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## **A. ASSIGNMENTS OF ERROR**

1. The Superior Court Commissioner erred in entering a December 15, 2008, order granting Progressive Insurance Company's motion to intervene and vacate Karyn Carbaugh's April 30, 2008, Order of Default, and her July 22, 2008, default judgment against John Joslin and "Jane Doe" Joslin" and Norma Joslin and "John Doe" Joslin.

2. The trial court erred in entering its January 8, 2009, order denying Karyn Carbaugh's motion for revision.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred in vacating the April 30, 2008, Order of Default, and a July 22, 2008, default judgment against John Joslin and "Jane Doe" Joslin and Norma Joslin and "John Doe" Joslin when (1) Progressive Insurance Company concedes it had timely notice of the filing of Ms. Carbaugh's lawsuit against defendants Joslin, (2) when controlling precedent holds that an insurer that has been given notice that a lawsuit has been filed against the uninsured tortfeasors must act promptly to intervene or the UIM insurer will be bound by a default judgment taken against the uninsured tortfeasors, and (3) when Progressive's failure to timely intervene was caused by the inexcusable neglect of its adjuster?

2. On March 24, 2008, Karyn Carbaugh filed her complaint for personal injuries against John Joslin and “Jane Doe” Joslin and Norma Joslin and “John Doe” Joslin arising out of a motor vehicle collision. That same day, a letter was sent to Ms. Carbaugh’s automobile insurer, Progressive Insurance Company, notifying it of the filing of the complaint. Defendants John Joslin and “Jane Doe” Joslin and defendants Norma Joslin and “John Doe” Joslin were properly served with process on April 3, 2008. When none of the defendants answered or appeared, an order of default was entered on April 30, 2008. On July 22, 2008, the trial court entered Findings of Fact, Conclusions of Law, and a judgment against defendants Joslin.

On October 28, 2008, Progressive Insurance Company filed a motion to intervene and vacate the order of default and default judgment. Did the trial court err in vacating the order of default and default judgment as to defendants Joslin when neither John Joslin and “Jane Doe” Joslin nor Norma Joslin and “John Doe” Joslin have ever requested said relief, established any defenses, or proffered any reason for their failure to respond to the properly served summons and complaint, and when Progressive Insurance Company had no standing to vacate the judgment on

the defendant's behalf?

3. Whether the trial court erred in granting Progressive's motion to intervene and vacate the default judgment when the vacation of a judgment requires a showing of excusable neglect, and when the insurer's failure to appear or even acknowledge the existence of Ms. Carbaugh's lawsuit against the uninsured tortfeasors was caused by its representative's inexcusable neglect?

## **B. STATEMENT OF THE CASE**

### Ms. Carbaugh is injured in a car crash.

This case arose from injuries Ms. Carbaugh received on April 17, 2005, as she was traveling as a passenger in a car being driven by Kevin Watkins. CP 167. While stopped at a stop light on SR 410 in Bonney Lake, the car was struck from the rear by a car driven by defendant John Joslin. Id. The tortfeasor's car, which was owned by defendant Norma Joslin, was uninsured. Id.

Ms. Carbaugh later presented a claim for her injuries to her own automobile insurer, Progressive Northwest Insurance Company (hereinafter "Progressive"). CP 168. Ms. Carbaugh's automobile policy provided Personal Injury Protection (PIP) coverage for the payment of her

medical bills, as well as uninsured motorist (UIM) coverage. Id. Her UIM coverage allows her to recover from her insurer in much the same fashion as she would have been able to recover from the defendants if the defendants had been insured, up to her policy limits of \$25,000. CP 168, CP 131, CP 139.

If Progressive pays any of Ms. Carbaugh's damages under her PIP or her UIM coverage, then it has the right to seek reimbursement of those payments from the uninsured tortfeasors. CP 167-168. Of course, Ms. Carbaugh is obligated by her insurance policy to help protect Progressive's rights to seek reimbursement from the uninsured tortfeasors. CP 168. For example, Ms. Carbaugh may be obligated to sue the tortfeasors within the three year statute of limitations so that Progressive's ability to recover any PIP payments it made can be protected. Id.

Progressive eventually paid over \$7,000.00 in PIP benefits to cover many of Ms. Carbaugh's medical bills arising from her injuries suffered in the underlying car crash. Id. Ms. Carbaugh then submitted a settlement proposal to Progressive relative to her UIM claim. Id. Despite having paid over \$7,000.00 in reasonable, necessary and causally related medical bills, Progressive grossly undervalued Ms. Carbaugh's UIM claim and

offered only \$2,500.00 in UIM benefits. Id. In other words, despite Progressive admitting that over \$7,000.00 in medical bills was reasonable in light of Ms. Carbaugh's injuries, it believed her general damages warranted only \$2,500.00 in UIM benefits. Id.

Ms. Carbaugh seeks to arbitrate her UIM claim, to protect Progressive's reimbursement rights, and to recover damages against the tortfeasors that exceed her UIM limits.

Progressive's woefully inadequate UIM offer of only \$2,500.00 made it clear that Progressive was not interested in amicably resolving this case. Id. Although Ms. Carbaugh sent letters asking Progressive to reevaluate this claim and to settle it fairly, Progressive refused. Id. Because the statute of limitations for resolving her claim was set to expire on April 17, 2008, Ms. Carbaugh's legal counsel wrote to Progressive's UIM adjuster on March 24, 2008, asking Progressive to arbitrate Ms. Carbaugh's UIM claim as allowed by the following provision in her UIM policy:

If we and the **insured person** cannot agree on:

1. The legal liability of the operator or **owner** of an **underinsured motor vehicle**; or
2. The amount of the damages sustained by the **insured person**;

this will be determined by arbitration if **we** and the **insured person** agree to arbitration prior to the expiration of the bodily injury statute of limitations. . . .

CP 168-169, CP 148.

In order to protect Progressive's rights to seek reimbursement of any PIP or UIM money that Progressive might pay for this claim, and to preserve her own right to seek damages from the uninsured tortfeasors that exceeded the policy limits of her UIM policy, Ms. Carbaugh commenced a lawsuit on March 24, 2008, against John Joslin and "Jane Doe" Joslin, as the tortfeasor who was driving the vehicle that struck her, and against Norma Joslin and "John Doe" Joslin as the owners of the vehicle. CP 169; CP 3-6.

On March 24, 2008, which was the same day that Ms. Carbaugh filed her lawsuit, she demanded arbitration under the UIM portion of her policy with Progressive. CP 169; CP 124. She also sent a letter to Progressive on the same day informing it that this lawsuit had been commenced against the uninsured tortfeasors in Pierce County Superior Court, thereby protecting Progressive's right of subrogation against the tortfeasors for the \$7,000 plus dollars it has already paid towards Ms. Carbaugh's medical treatment. CP 169; CP 73.

Progressive fails to acknowledge that Ms. Carbaugh had filed a lawsuit to protect its subrogated interest, and instead files its own lawsuit against the tortfeasors.

Despite the fact that Ms. Carbaugh notified Progressive on March 24, 2008, that she had commenced a lawsuit against the tortfeasors that same day, thereby protecting Progressive's right of subrogation for the \$7000 plus dollars it had paid in PIP benefits, on April 3, 2008, Progressive inexplicably filed its own lawsuit against the uninsured tortfeasors under Pierce County cause number 08-2-06850-7. CP 170. That lawsuit specifically sought to recover on Progressive's "subrogation rights and contractual rights arising from said policy of insurance and payments made pursuant thereto for the benefit of Karyn Carbaugh." (Progressive's amended complaint, p. 3, li. 1-2). Id. Indeed, Progressive's lawsuit against the uninsured tortfeasors seeks recovery of \$7,230.28 in PIP benefits it paid, plus any UIM money that might be paid if and when Ms. Carbaugh's UIM claim is resolved.<sup>1</sup> Id.

As evidenced by the filing of Progressive's separate lawsuit against the tortfeasors, Progressive failed to acknowledge the existence of Ms. Carbaugh's lawsuit against the tortfeasors or to request to intervene in that lawsuit. CP 170. The reason that Progressive failed to take any action

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Neither the PIP adjuster, Ms. Ibanez, who had overseen the payout of over \$7000 in benefits, nor the UIM adjuster, Ms. Wicks, who was overseeing the UIM claim, were informed that Progressive was filing its own lawsuit against the tortfeasors to recover PIP benefits previously paid and UIM benefits that might be paid. CP 161; CP 101.

with regard to the notice of Ms. Carbaugh's lawsuit became readily apparent when the PIP adjuster, Dawn Ibanez, filed declarations, stating as follows:

I have not been trained in, and I am not familiar with, the UM/UIM insurance requirements, or its interplay when an insured sues the uninsured or underinsured third-party tortfeasor for injuries arising from an accident. Specifically, I did not know that a UM/UIM insurer could be bound by a judgment entered against a third-party tortfeasor by its insured. CP 64.

. . . I do not have the training or experience in either UM or subrogation **and do not need to know the rules or procedures for those sections.** CP 160 (emphasis added).

Progressive denies Ms. Carbaugh the timely and inexpensive remedy of arbitrating her UIM claim and instead requires that she commence a lawsuit against it in order for her to recover the UIM benefits for which she had paid premiums.

After requesting arbitration of her UIM claim, and after notifying Progressive that Ms. Carbaugh had sued the uninsured tortfeasors and thereby protected Progressive's reimbursement rights for the PIP benefits it paid, on April 17, 2008, Progressive harshly responded that it would not agree to arbitration of Ms. Carbaugh's UIM claim. CP 179; CP 125. By so doing, Progressive ended any chance for Ms. Carbaugh to resolve her UIM claim under the more cost effective and timely arbitration mechanism allowed by her insurance policy with Progressive. Id. She was instead

asked to sue Progressive in a lawsuit separate from her lawsuit against the uninsured tortfeasors, thereby compelling her to engage in two lawsuits at the same time. Id.

An Order of Default is properly entered against the tortfeasors after they failed to appear or answer and after Progressive fails to take any action to intervene.

Progressive continued to refuse to seek intervention in Ms.

Carbaugh's lawsuit against the uninsured tortfeasors and instead plowed ahead with its own lawsuit against the very same defendants Ms. Carbaugh had rightfully sued on her own. CP 170. In the meantime, the uninsured tortfeasors/defendants in the case at bar failed to appear or answer Ms. Carbaugh's complaint. Id. Thus, on April 30, 2008, an Order of Default was entered against defendants John Joslin and "Jane Doe" Joslin and Norma Joslin and "John Doe" Joslin. Id., CP 15. Progressive has never argued that the entry of the Order of Default against defendants Joslin was in any way improper. CP 74-96.

A default judgment is entered against defendants Joslin

On July 22, 2008, which was four months after this lawsuit had been filed with no response from either the defendants or Progressive, Ms. Carbaugh sought a default judgment against defendants Joslin. CP 170.

The default judgment was supported by declarations from two of Ms. Carbaugh's doctors, CP 23-26; CP 27-30, a declaration from Ms. Carbaugh, CP 43-44, jury verdicts from similar cases, CP 31-38, and two legal memoranda regarding the entry of the default judgment. CP 16-17, CP 20-22. Upon review of the materials submitted, the court commissioner then entered Findings of Fact, Conclusions of Law, an order directing entry of judgment, and a Judgment against defendants Joslin. CP 45-49. Progressive has never argued that Ms. Carbaugh was not entitled to the entry of the default judgment against defendants Joslin. CP 74-96.

Progressive initially claims it is not bound by the default judgment against defendants Joslin.

On September 19, 2008, counsel for Progressive wrote to Ms. Carbaugh's counsel. CP 56-57. In that letter, Progressive's counsel claimed that Progressive had never been notified of the filing of Ms. Carbaugh's lawsuit against the defendants. Id. Thus, Progressive's counsel argued that Progressive was not bound by the default judgment against the defendants under the holding of the Division Two case of Beck v. Farmers Ins. Co., 113 Wn. App. 217, 53 P.3d 74 (2002), review denied, 149 Wn.2d 1005 (2003) because it had no notice of the lawsuit. Id.

On September 26, 2008, Ms. Carbaugh's attorney responded by

letter, informing Progressive's counsel that Progressive was timely notified of the filing of Ms. Carbaughs' complaint on March 24, 2008, and providing Progressive's counsel with proof of mailing. CP 59-61.

Rather than seeking a declaration that it was not bound by the default judgment, Progressive moves to intervene and set aside the default judgment against defendants Joslin.

Ninety-eight days after the default judgment was entered, on October 28, 2008, Progressive filed a motion to intervene and to set aside the default judgment obtained against defendants Joslin, the same defendants that Progressive itself was suing in its own lawsuit filed in April 2008. CP170, CP 74-96. Importantly, defendants Joslin, the actual defendants in this case, who are the uninsured tortfeasors who injured Ms. Carbaugh, did not appear, join in Progressive's motion, or otherwise move to set aside the default judgment against them. CP 170-171. Progressive instead filed its motion to intervene on its own accord and in no way represented the uninsured tortfeasors. In fact, Progressive was actually suing the uninsured tortfeasors for the precise injury claim at issue in Ms. Carbaugh's own lawsuit against the same tortfeasors. CP 171.

Progressive's motion to intervene did not request any type of

declaratory relief that it was not bound by the default judgment.<sup>2</sup> CP 74-92  
Instead, it requested that it be allowed to intervene, to set aside the default  
judgment that had properly been entered against the tortfeasors, and to  
answer Ms. Carbaugh's complaint. Id.

At oral argument on its motion, Progressive's counsel also urged  
the court commissioner to apply a new rule of law regarding notification to  
the insurer as follows:

We would ask, you know, the Court to just apply a simple  
rule saying if you're going to do something that affects the  
UM coverage, then counsel needs to notify the UM insurer,  
Ms. Wicks, or the representative about what's going to be  
happening. We don't notify somebody else in the  
company.

November 17, 2008, Verbatim Report, RP 9; See also December 12, 2008  
Verbatim Report, RP 11.

On December 15, 2008, the court commissioner granted  
Progressive's motion, and vacated the default judgment against defendants  
Joslin. CP 220-221.

By moving to set aside the default judgment, Progressive denied

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After being reminded that it had timely notice of the lawsuit, Progressive essentially  
dropped the argument that it was not bound under the Beck v. Farmers case based on a  
lack of notice, and began attacking Ms. Carbaugh's counsel. CP 90-92.

Ms. Carbaugh the opportunity to seek recovery on her judgment directly from the defaulted defendants, especially when her judgment was worth six times the UIM limits on her policy with Progressive. CP 171. In other words, even if Progressive pays the UIM limits of \$25,000.00 to Ms. Carbaugh, she has been deprived of the ability to collect the balance of her damages, as reflected in the judgment against the defendants. Id.

The following is a brief time line of the pertinent facts and events in this case:

- |                       |  |
|-----------------------|--|
| <b>April 17, 2005</b> | Rear end motor vehicle collision between a car in which Ms. Carbaugh was riding and a car driven by defendant John Joslin, and owned by defendants Norma Joslin and "John Doe" Joslin Defendant John Joslin is uninsured.  |
| <b>March 24, 2008</b> | Karyn Carbaugh files a summons and complaint against John Joslin and "Jane Doe" Joslin, and Norma Joslin and "John Doe" Joslin. Ms. Carbaugh notifies Progressive that she has filed a lawsuit in the Pierce County Superior Court against the tortfeasor. Ms. Carbaugh demands UIM arbitration. |
| <b>April 3, 2008</b>  | Defendant John Joslin, and defendants Norma Joslin and "John Doe" Joslin are served with Karyn Carbaugh's summons and complaint at a residence where John Joslin also resides.   |
| <b>April 3, 2008</b>  | Progressive files a separate lawsuit as subrogee for Karyn Carbaugh against defendant John Joslin and  |

“Jane Doe” Joslin under Pierce County Cause No. 08-2-06850-7.

- April 30, 2008** An Order of Default in Ms. Carbaugh’s lawsuit was entered against John Joslin and “Jane Doe” Joslin, and Norma Joslin and “John Doe” Joslin.
- June 11, 2008** Progressive writes to Ms. Carbaugh’s counsel, asking if Ms. Carbaugh intends to file a lawsuit against it for UIM benefits or if she wishes to settle.
- July 22, 2008** An Order directing entry of judgment, Findings of Fact and Conclusions of Law, and a Judgment are entered against defendants Joslin.
- September 19, 2008** Counsel for Progressive writes to Ms. Carbaugh’s counsel, claiming that because Progressive had never been notified of the filing of Ms. Carbaugh’s lawsuit against the defendants, it was not bound by the default judgment.
- September 26, 2008** Ms. Carbaugh’s counsel provides Progressive’s counsel with the March 24, 2008, letter to Progressive notifying it that Ms. Carbaugh had filed a lawsuit.
- October 28, 2008** Relying on dicta in the Lenzi v. Redland case, Progressive moves to intervene and vacate the default judgment.
- December 15, 2008** A court commissioner grants Progressive’s motion to intervene and vacate the default judgment.
- January 5, 2009** A Notice of Appearance is filed on behalf of John Joslin and “Jane Doe” Joslin, and Norma Joslin and “John Doe” Joslin. Defendants Joslin do not participate or join in any of the court proceedings.

**January 8, 2009**      The trial court denies Ms. Carbaugh's Motion for Revision.

## **C. ARGUMENT**

### **1. Standard of Review**

Default judgments are normally viewed as proper when the adversary process has been halted because of an unresponsive party. Colacurcio v. Burger, 110 Wn. App. 488, 495, 41 P.3d 506 (2002), review denied, 148 Wn.2d 1003 (2002). An appellate court reviews a trial court's decision to set aside a default judgment under an abuse of discretion standard. Prest v. American Bankers Life Assur. Co., 79 Wn. App. 93, 97, 900 P.2d 595 (Div. 2, 1995) review denied, 129 Wash.2d 1007 (1996)( reversing a trial court's vacation of a default judgment).

Similarly, a trial court's ruling on a motion to intervene is reviewed under an abuse of discretion standard. Spokane County v. State, 136 Wn.2d 644, 650, 966 P.2d 305 (1998).

A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. Professional Marine Co. v. Underwriters at Lloyd's, 118 Wn. App. 694, 708, 77 P.3d 694 (2003).

2. **Progressive is bound by the default judgment entered against defendants Joslin when it had received timely notice of the lawsuit.**
  - a. **Washington law is clear that an insurer, with notice of a third-party lawsuit against an uninsured tortfeasor, is bound by any judgment rendered in that action.**

A UIM insurer that has been given notice that a lawsuit has been filed against the uninsured tortfeasors must act promptly to intervene or the UIM insurer will be bound by a default judgment taken against the uninsured tortfeasors. Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 276, 996 P.2d 603 (2000).

In Lenzi, a case with facts almost identical to the case at bar, a UIM insured was injured in a car crash caused by an uninsured tortfeasor. The UIM insured tried to amicably resolve his UIM claims by sending a settlement proposal to his insurer. However, the insurer offered "only \$5,500.00" in UIM benefits despite the UIM insured having incurred medical bills of \$2,535.79, most of which had been paid by PIP. Id. at 270-71.

The UIM insured in Lenzi immediately rejected the insurer's offer. The UIM insured then sued the uninsured tortfeasor in August 1998. In September 1998, the UIM insured sent a letter to his insurer notifying it

that a lawsuit against the uninsured tortfeasor had been filed. In October 1998, the UIM insured served the uninsured tortfeasor but did not inform his UIM insurer of service of process. In November 1998, without providing any notice to the UIM insurer, the UIM insured obtained a default judgment against the uninsured tortfeasor for \$212,000.00. The UIM insured then sued the UIM insurer for payment of the default judgment against the uninsured tortfeasor. Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 996 P.2d 603 (2000).

The Supreme Court ruled that the UIM insurer in Lenzi was bound by the default judgment. The court went on to state that “[n]either the Finney-Fisher rule nor ordinary notions of fair play and substantial justice dictate the Lenzis had any duty to Redland other than timely notifying Redland of the filing of the summons and complaint [against the uninsured tortfeasor].” Id. at 276. Once the UIM insurer received notice that a lawsuit had been filed, it was obligated to timely appear in that lawsuit or seek to intervene to protect its interest. Failure to take those actions obviated any further notice of any further actions taken in the lawsuit by the insured against the uninsured tortfeasors. Id. at 276.

**b. Progressive had timely and sufficient notice of the filing of Ms. Carbaugh's lawsuit against the tortfeasors.**

In the case at bar, Progressive was informed of Ms. Carbaugh's lawsuit against the uninsured tortfeasors on March 24, 2008. Instead of trying to intervene upon receiving notice of that lawsuit, Progressive chose to file its own lawsuit against the same uninsured tortfeasors for the same motor vehicle crash that is the subject of Ms. Carbaugh's own lawsuit.

Progressive does not argue that the notice of the filing of the lawsuit against the Joslins was insufficient or otherwise inadequate to notify the recipient that a lawsuit had been filed against the third party tortfeasors. In the case at bar, Progressive's adjuster candidly admits that she received the March 24, 2008, letter from Ms. Carbaugh's counsel informing Progressive of the lawsuit and its venue. Nonetheless, Progressive argues that she "did not know and should not have known of the significance to the UM insurance of the plaintiff filing the third-party action." CP 79, lines 19-21.

Instead, Progressive complains that the notice should have been sent to someone else within the insurance company. Progressive does not argue that Ms. Carbaugh failed to comply with any particular notice

provisions of its insurance policy or that its insurance policy required notice of third party lawsuits be given to a particular person or adjuster.<sup>3</sup> Instead, at oral argument, Progressive requested that the court adopt a new rule, requiring notice be given to the particular UM adjuster (if any) assigned to the claim. See November 17, 2008, Verbatim Report, RP 9; See also December 12, 2008 Verbatim Report, RP 11.

In Lenzi, supra, when faced with similar arguments from Redland Insurance Company that it received insufficient notice of its insured's lawsuit against the tortfeasor, our Supreme Court noted that the insurance company could have done a number of things to avoid this situation, including writing a clear policy requirement of regarding notice of lawsuits by its insureds. Lenzi, 140 Wn.2d at 278.

In Lenzi, supra, our Supreme Court rejected the UIM insurer's arguments that it did not have sufficient notice beyond the fact that a lawsuit had been filed. Specifically, the insurer in Lenzi admitted that it knew that a lawsuit had been filed, but that the UIM insured's counsel did not inform the insurer that the lawsuit had been served or that the insured

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Although only a portion of Ms. Carbaugh's insurance policy is in the trial court record, CP 185, the notice provisions of that policy simply state at page 46 "**PROOF OF NOTICE** Proof of mailing of any notice will be sufficient proof of notice."

was seeking a default judgment against the uninsured tortfeasor. Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 275, 996 P.2d 603 (2000). In other words, the UIM insurer sought from the Supreme Court “a new rule that would require an insured to keep its UIM carrier apprised of specific steps the insured takes in litigation against a tortfeasor beyond just the filing of a summons and complaint.” Id. at 275. The Supreme Court rejected the UIM insurer’s request for this new rule and instead ruled that a UIM insured need only inform her UIM insurer of a lawsuit against the uninsured tortfeasors, after which time the UIM insured must appear in that lawsuit or be bound by a default judgment entered in that lawsuit.<sup>4</sup> Progressive’s argument in the case at bar that Ms. Carbaugh and her counsel somehow owed a greater duty than sending written notice of the lawsuit to Progressive’s assigned adjuster ignores the Supreme Court’s edict in Lenzi.

Moreover, Progressive’s argument that because the PIP adjuster assigned to this case was ignorant of the importance of being notified of a

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On a related note, the court in Lenzi ruled that a UIM insured who gives her insurer written notice of filing a lawsuit against the uninsured tortfeasor, and then waited fifty-five (55) days before obtaining a default judgment, has fulfilled the insured’s obligation to the insurer. Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 276, n. 3, 996 P.2d 603 (2000). In the case at bar, Ms. Carbaugh waited fifty-nine (59) days after notifying Progressive of her lawsuit before taking the default judgment against defendants Joslin

lawsuit between Progressive's insured and the uninsured tortfeasors, the notice of the filing of the lawsuit was insufficient, must fail for numerous reasons.

First, the PIP adjuster paid over \$7,000.00 of Ms. Carbaugh's medical bills and knew that Progressive had a claim for reimbursement of those bills from the uninsured tortfeasor. Indeed, Progressive filed its own lawsuit against the uninsured tortfeasor only nine days after Ms. Carbaugh had filed her lawsuit. The PIP adjuster's claim payments of over \$7,000.00 were included in the lawsuit by Progressive as an item of recovery being sought. If the PIP adjuster knew to refer the PIP file to the subrogation department at Progressive so that a lawsuit could be filed against the tortfeasors to protect Progressive's reimbursement potential, she knew or should have known that the outcome of Ms. Carbaugh's own lawsuit against those same tortfeasors would likewise effect Progressive's claim. For example, if Ms. Carbaugh had not obtained a ruling in her lawsuit that her medical bills were reasonable and necessary, then Progressive would have been unable to collect any reimbursement of those same bills. The uninsured tortfeasor, like any other tortfeasor, is liable only for treatment bills that are reasonable, necessary and causally related

to the underlying tort. If Ms. Carbaugh had not prevailed on her proof relative to her medical bills, then she would not have recovered the same against the uninsured tortfeasors and would have jeopardized Progressive's potential reimbursement or subrogation claim.

Second, the PIP adjuster knew that Ms. Carbaugh had a UIM claim by virtue of the letter of representation sent to Progressive by Ms. Carbaugh's counsel on February 21, 2006. Later, the UIM adjuster sent two separate letters to the PIP adjuster informing the latter that the UIM adjuster would only agree to reimburse the PIP adjuster for bills that were reasonable and necessary as a result of the underlying car crash. CP 77, lines 4-6, CP 65. Then, shortly before Ms. Carbaugh filed her lawsuit against the tortfeasors, the UIM adjuster sent the PIP adjuster a copy of a letter regarding the status of UIM negotiations. CP 122. The UIM adjuster's January 24, 2008, letter, which predated the filing of Ms. Carbaugh's complaint by only two months, states "[i]f you believe there is any further amounts owed by PIP, you need to bring that up with the PIP adjuster, Dawn Ibanez. **A copy of this letter has been forwarded to her for any response needed on the PIP handling of this claim.**" CP 122 (emphasis added).

For the PIP adjuster to feign ignorance about the importance of Ms. Carbaugh's lawsuit against the uninsured tortfeasors is ludicrous. The PIP adjuster knew that a lawsuit against the uninsured tortfeasors was necessary to protect Progressive's potential subrogation claim. The PIP adjuster should have known that Progressive would be bound by the results of Ms. Carbaugh's lawsuit not only with respect to the UIM coverage, but with respect to Progressive's quest to seek reimbursement from the uninsured tortfeasors for Progressive's over \$7,000.00 of PIP payments.

**c. Progressive's inadvertence in failing to recognize the importance of the fact that a lawsuit had been filed against the tortfeasors is inexcusable.**

Insurance companies are routinely involved in litigation and are charged with knowing the effects a lawsuit may have on it. In an analogous case, an insurance company was served a lawsuit through the insurance commissioner. Prest v. American Bankers Life Assur. Co., 79 Wn. App. 93, 900 P.2d 595 (Div. 2, 1995), rev. denied, 129 Wn.2d 1007, 917 P.2d 129 (1996). The commissioner sent the complaint to the insurer's designated agent, but that agent had been reassigned to another department. Thus, the lawsuit was "misplaced" such that the insurer failed to

timely respond. A default was later entered, which the insurer sought to set aside.

The trial court's decision to set aside the default in Prest was reversed on appeal. As stated by Division Two of the Court of Appeals, “[i]t is an important part of the business of an insurance company to respond to legal process. . .” and the failure to take action in the face of a lawsuit that later results in a default judgment that binds the insurance company “is inexcusable.” Prest v. American Bankers Life Assur. Co., 79 Wn. App. 93, 100, 900 P.2d 595 (1995), rev. denied, 129 Wn.2d 1007, 917 P.2d 129 (1996). Because the insurer's neglect in failing to take action when notified of a lawsuit was inexcusable, the default was reinstated.

In a more recent case, the Court of Appeals, Division Two, affirmed a trial court's decision to deny the motion to set aside a default judgment. Rosander v. Nightrunners Transport, Ltd., 147 Wn. App. 392, 196 P.3d 711(2008). In response to the insurer's argument that its claims adjuster's medical condition caused the insurer's failure to appear at a default hearing, thereby excusing its conduct, the Court of Appeals stated as follows:

Further, '[j]udicial decisions have repeatedly held that, if a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable.' TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 212, 165 P.3d 1271 (2007). **This rule applies with equal force to a company's receipt of properly sent notice.**

Rosander v. Nightrunners Transport, Ltd., 147 Wn. App at 407.(emphasis added).

In the case at bar, Progressive was sent a letter telling it that Ms. Carbaugh had sued the uninsured tortfeasors in Pierce County Superior Court. Progressive took absolutely no action to intervene or appear in that lawsuit and instead filed a separate action against the same uninsured tortfeasors. By making the choice to pursue its own later filed lawsuit and ignoring Ms. Carbaugh's lawsuit, Progressive cannot now complain about the result of Ms. Carbaugh's lawsuit, i.e., a \$150,000.00 default judgment. Case law is clear. An insurer that is notified of a lawsuit against an uninsured tortfeasor is bound by the result of that lawsuit. The court should hold that the trial court erred in vacating the default judgment.

**3. Progressive has no standing to set aside the default judgment.**

CR 60 only allows a “party or his legal representative” to obtain relief from a final judgment. CR 60(b). Progressive was not a party to Ms. Carbaugh’s lawsuit when she filed it or when she concluded it by obtaining a default judgment against the uninsured tortfeasors. Indeed, Progressive was not a party to the judgment itself. Progressive is not the uninsured tortfeasor’s legal representative and has actually sued the uninsured tortfeasors in a separate lawsuit seeking many of the same damages at issue in Ms. Carbaugh’s lawsuit against the same tortfeasors.

Ms. Carbaugh had every right to obtain a default judgment against the uninsured tortfeasors, all of whom failed to appear in this lawsuit or otherwise defend the same. Ms. Carbaugh now has every right to attempt to collect her judgment against the uninsured tortfeasors to recover her damages that exceed Progressive’s \$25,000 UIM policy limits. It is only if Progressive pays some or all of Ms. Carbaugh’s \$25,000.00 UIM limits, that it can potentially seek reimbursement from the uninsured tortfeasor subject to Washington law.

Given that Ms. Carbaugh had the right to collect on her judgment, Progressive should not have been permitted to impair that right, to the prejudice of its own insured, by seeking an order to set aside her properly

obtained default judgment against the defendants. Instead, if Progressive truly believed that it had insufficient notice of the filing of Ms. Carbaugh's lawsuit against the tortfeasors, it should have sought a declaration at the trial court level that it was not bound by the default judgment under the holding of Division Two's decision in Beck v. Farmers Ins. Co., 113 Wn. App. 217, 53 P.3d 74 (2002), review denied, 149 Wn.2d 1005 (2003)(holding that a UIM insurer which had not received actual notice that a lawsuit had been filed was not bound by a later arbitration award). In that way, Ms. Carbaugh could still pursue recovery on her judgment independent of her prosecution of her UIM claim with Progressive.

However, for what appear to be tactical reasons, Progressive did not seek a declaratory order in the trial court that it was not bound by the judgment under the holding of Beck. Instead, once it received the correspondence from Ms. Carbaugh's counsel, which included the March 24, 2008, letter notifying it of Ms. Carbaugh's lawsuit and proof of mailing of the same, CP 59-61, it realized that it did have timely notice of the lawsuit. At that time, Progressive made the strategic decision to make a belated attempt to intervene in the third-party lawsuit and vacate the default judgment, based on a procedure that was clearly dicta from a

footnote in the Lenzi v. Redland Ins. Co. case.

In Lenzi, 140 Wn.2d 267, 996 P.2d 603 (2000), after ruling that only timely notice of a lawsuit against a third party and an opportunity to intervene was required under the Finney-Fisher rule in order to bind the UIM insurer to a judgment against the third party, the Supreme Court went on to state, in a footnote, as follows:

Had [the insurer] filed a motion to intervene and a motion to vacate the default judgment after learning of it, it seems possible if not likely the trial court might have granted both motions under the unusual circumstances of the case.

Lenzi, 140 Wn.2d 267, 278, n.8, 996 P.2d 603 (2000). There can be little doubt that this statement was dicta.

Moreover, the dicta procedure set forth in the Lenzi footnote, suggesting the filing of a motion to intervene and a motion to set aside a default judgment, are not necessary if the insurer did not have notice that a third party lawsuit had been filed. Under the Beck v. Farmers Ins. Co., 113 Wn. App. 217, 53 P.3d 74 (2002), review denied, 149 Wn.2d 1005 (2003) case, the insurer simply is not bound by its insured's judgment against a tortfeasor if the insurer did not have notice of the filing of the lawsuit. There is no need for the insurer to vacate the third-party judgment, to the prejudice of the insured, if the insurer is not bound by that

judgment. However, if the insurer did have notice of the filing of the lawsuit, the insurer is bound under the Finney-Fisher rule as announced and followed in Lenzi.

At the trial court level, Progressive could not point to one case where a non-party insurer was allowed to obtain an order setting aside a default judgment obtained by an injured party against an uninsured motorist. Without such authority, and in light of the plain language of CR 60, the court should rule that Progressive had no standing to vacate Ms. Carbaugh's properly obtained default judgment.

Neither John Joslin and "Jane Doe" Joslin, nor Norma Joslin and "John Doe" Joslin have ever requested a vacation of the judgment against them. Defendants Joslin have never proffered any reason for their failure to respond to the properly served summons and complaint. Defendants Joslin have never established any prima facie defense to the liability and damages set forth in the Findings of Fact, Conclusions of Law and Judgment entered against them. Defendants Joslin did not participate in any way in Progressive's motion to set aside the default judgment against them. In fact, it was not until January 5, 2009, just before entry of the order on Ms. Carbaugh's motion for revision on January 6, 2009, CP

2225-227, that defendants Joslin filed a notice of appearance. CP 222-224. No explanation has ever been given regarding this nine (9) month delay in acknowledging Ms. Carbaugh's properly served lawsuit.

Thus, under the facts of this case, the court should hold that Progressive lacked standing to intervene and to set aside Ms. Carbaugh's judgment against defendants Joslin. The record is clear that Progressive had timely notice of Ms. Carbaugh's lawsuit against defendants Joslin. Thus, under Lenzi, the insurer is simply bound when it failed to timely seek intervention and instead allowed the third-party lawsuit to proceed to judgment. Accordingly, the court should reverse the trial court and reinstate the July 22, 2008, judgment against defendants Joslin.

**4. The trial court erred in granting Progressive's motion to intervene when a timely motion and a strong showing are necessary to intervene if a judgment has already been entered.**

CR 24(a), the civil rule dealing with intervention, provides as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Timeliness is a critical requirement of CR 24(a). Kreidler v. Eikenberry, 111 Wn.2d 828, 832, 766 P.2d 438 (1989); Martin v. Pickering, 85 Wn.2d 241, 243, 533 P.2d 380 (1975). Where a person seeks to intervene after judgment, a trial court should allow intervention “only upon a strong showing after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay.” Kreidler, 111 Wn.2d at 832-833.

Progressive first attempted to intervene in Ms. Carbaugh’s lawsuit seven (7) months after Ms. Carbaugh sued the uninsured tortfeasors, seven (7) months after it received written notice of that lawsuit, and more than three (3) months after Ms. Carbaugh obtained a default judgment against the tortfeasors. Progressive’s application for intervention is not timely.

Progressive’s only excuse for failing to seek intervention sooner is that Ms. Carbaugh’s notice of the lawsuit was sent to the PIP adjuster instead of the UIM adjuster. But Progressive has no authority to support its argument that it lacked notice of this lawsuit, especially when one of Progressive’s adjusters assigned to this very case was sent notice of the filing of the lawsuit, the venue of the lawsuit, and against whom the lawsuit was filed. Indeed, Progressive candidly admits through its PIP

adjuster that it received notice and failed to take timely action because the assigned adjuster “did not know that a UM/UIM insurer could be bound by a judgment entered against a third-party tortfeasor by its insured,” CP 64, and “[did] not need to know the rules or procedures for those [UM and subrogation] sections.” CP 160.<sup>5</sup>

Given that the reason for the untimely intervention stemmed wholly from the Progressive adjuster’s lack of knowledge that a UM/UIM insurer could be bound by a judgment entered against a third-party tortfeasor by its insured, Progressive failed to make the “strong showing” necessary to intervene after a judgment had been rendered. The court should hold that the trial court erred in granting Progressive’s motion to intervene.

- 5. Even if Progressive did have standing to seek to vacate the default judgment, the default judgment should have been upheld where Progressive did not establish a prima facie defense and when its neglect was not excusable.**

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The level of internal dysfunction at Progressive regarding Ms. Carbaugh’s claim is also demonstrated by the fact that neither the PIP adjuster nor the UIM adjuster, both of whose coverages would be effected or impacted by a lawsuit against the third-party tortfeasors, were even informed that Progressive filed its own lawsuit against the tortfeasors. CP 161; CP 101.

It is the defaulting party's burden to prove each of the four elements necessary to set aside a default judgment. Prest v. American Bankers Life Assur. Co., 79 Wn. App. 93, 97, 900 P.2d 595 (Div. 2, 1995), rev. denied, 129 Wn.2d 1007, 917 P.2d 129 (1996). It is well settled that a motion to set aside a default judgment is left to the sound discretion of the trial court. In re Estate of Stevens, 94 Wn. App. 20, 30, 971 P.2d 58 (1999).

The Superior Court Civil Rules provide different standards for setting aside orders of default and default judgments. CR 55(c)(1), CR 60(b); Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc., 63 Wn. App. 266, 271, 818 P.2d 618 (1991). Generally, an order of default may be set aside upon a showing of good cause. CR 55(c)(1). To establish good cause under CR 55, a party may demonstrate excusable neglect and due diligence. Seek, 63 Wn. App. at 271. Whereas, the requirements for setting aside a default judgment are as follows:

(1) that there is **substantial evidence** supporting a prima facia [sic] defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

Little v. King, 160 Wn.2d 696, 703-704, 161 P.3d 345 (2007)(emphasis added); CR 60(b).

**a. Progressive failed to establish a prima facie defense as to damages.**

In the case of Little v. King, our Supreme Court was faced with the circumstances where both the uninsured driver and the plaintiff's UM insurance carrier jointly moved to vacate a default judgment against the uninsured driver. Little v. King, 160 Wn.2d at 699. Because it was acknowledged that the uninsured driver was liable for the rear end collision, the uninsured driver and the UM insurance carrier attempted to establish a prima facie defense as to damages, arguing that the plaintiff's damages were unreasonable and preexisting conditions may have contributed to the plaintiff's injuries. Id. at 704.

As the Supreme Court noted, a party who moves to set aside a judgment based upon damages must present substantial evidence of a prima facie defense to those damages. Id. However, it is not a prima facie defense to damages that a defendant is surprised by the amount of damages or that the damages might have been less in a contested hearing. Id.

In attempting to meet its burden of establishing substantial evidence of a prima facie defense to damages, the uninsured driver and the

UM insured relied solely on the declaration of an insurance adjuster. Id. In her declaration, the adjuster stated that she reviewed the plaintiff's medical records and found reports of preexisting headaches, hip pain, and depression before the collision. Id. The Supreme Court bluntly rejected the adjuster's declaration as "evidence" of a prima facie defense to damages, stating as follows:

The defendants provided no competent evidence of a prima facie defense to damages. . . . Even viewed in the light most favorable to the parties moving to set aside the default judgment, mere speculation is not substantial evidence of a defense.

Id. at 704-705.

In the present case, Progressive's whole defense as to damages is found in a few paragraphs in the declaration of its adjuster, Nancy Wicks. CP 100-101. There, adjuster Wicks states that she believes that a jury would award much less than \$25,000 for Ms. Carbaugh's claim. CP101. Moreover, after noting that Ms. Carbaugh had two gaps of two and six months during her treatment, adjuster Wicks opined that she believed that only the first four months of treatment were reasonable, necessary and accident related. CP 100-101.

Ms. Wick's declaration is not competent, substantial evidence of a prima facie defense under the holding of Little v. King. The fact that Ms. Wicks believes that a jury might award less in a contested hearing is insufficient to constitute a defense as to damages. Moreover, Ms. Wick's own personal opinion as an insurance adjuster, that only four months of treatment were reasonable and necessary, lacks any foundation and is simply her own speculation.

Thus, because Progressive failed to establish a prima facie defense as to damages, the trial court erred in vacating the default judgment against the tortfeasors.

**b. Progressive failed to establish excusable neglect.**

Although the requirements for setting aside an order of default are not entirely the same as those for setting aside a default judgment, two factors to be considered are the same, excusable neglect and due diligence. Seek, 63 Wn. App. at 271; Estate of Stevens, 94 Wn. App. at 30-31. The Court of Appeals went on to note that, without excusable neglect, "neither an order of default nor a default judgment can be vacated." Id. (citing Seek Systems, Inc. v. Lincoln Moving/ Global Van Lines, 63 Wn. App. 266, 271, 818 P.2d 618 (1991)).

“Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. It is thus an abuse of discretion.” Little v. King, 160 Wn.2d 696, 706, 161 P.3d 345 (2007).

If a party seeking to set aside a default fails to show excusable neglect, the court need not consider whether due diligence existed because failing to prove either one of the elements is fatal to a motion to set aside a default. In re Estate of Stevens, 94 Wn. App. 20, 35, 971 P.2d 58 (1999). Indeed, if there was no excusable neglect, then whether the defaulted party has a strong defense or not is irrelevant. See, e.g., In re Estate of Stevens, 94 Wn. App. at 31.

In the case at bar, the only excuse being offered for Progressive’s failing to appear or seek to intervene sooner is the claim that the PIP adjuster was not properly trained to know what to do when she was notified that Ms. Carbaugh had filed her lawsuit. That PIP adjuster claims that she did not need to know any rules or procedures relating to UIM or subrogation. CP 160. To affirm the trial court’s vacation of Ms. Carbaugh’s judgment under these facts would reward the selective

ignorance of the insurance adjuster, and allow an insurer to avoid judgments, following proper notice, by having adjusters state “it wasn’t my job” or “I didn’t know.”

The fact remains, however, that Ms. Carbaugh and her counsel sent notice of this lawsuit directly to an adjuster assigned to this case. Ms. Carbaugh cannot be faulted for sending notice to the PIP adjuster instead of the UIM adjuster when her lawsuit against the uninsured tortfeasors equally affects Progressive’s rights and duties on the PIP and UIM claims.

Moreover, Ms. Carbaugh had demanded UIM arbitration contemporaneous with filing this lawsuit. She believed that Progressive would agree to arbitrate her case. If Progressive had so agreed to arbitration, then UIM arbitration would likely have occurred before the completion of trial in her lawsuit against the uninsured tortfeasors. As it turned out, Progressive rejected arbitration and demanded that Ms. Carbaugh file a separate lawsuit against Progressive for UIM benefits. In the meantime, the two sets of uninsured tortfeasors, John Joslin and “Jane Doe” Joslin, and Norma Joslin and “John Doe” Joslin, failed to appear in Ms. Carbaugh’s lawsuit, so she obtained a default judgment several months after this lawsuit was started. Progressive cannot now rightfully

complain about the result in Ms. Carbaugh's lawsuit against the uninsured tortfeasors when it had every chance to avoid this result and failed to do so.

Progressive's neglect in failing to intervene or take any action in Ms. Carbaugh's lawsuit against the tortfeasors, following timely notice of that lawsuit, was inexcusable. Under the holding of In re Estate of Stevens, the trial court erred in vacating the default judgment.

**6. The default judgment should not be set aside when Progressive has failed to prove any misconduct by Ms. Carbaugh or her counsel.**

As quoted above, a UIM insured and her counsel have no duties to a UIM insurer in the context of this case other than to provide written notice to the UIM insurer of a lawsuit against the uninsured tortfeasors. Lenzi v. Redland Ins. Co., *supra*. If Ms. Carbaugh had not notified Progressive of her lawsuit, then she would not have been able to bind Progressive to the default judgment.

At the trial court level, Progressive claimed that Ms. Carbaugh's counsel violated a duty of good faith by sending notice of the filing of Ms. Carbaugh's lawsuit to the PIP adjuster. CP 90-92. That precise argument was soundly rejected by our Supreme Court when it stated that "[n]either

the Finney-Fisher rule nor ordinary notions of fair play and substantial justice dictate the [UIM insured] had any duty to [the UIM insurer] other than timely notifying [it] of the filing of the summons and complaint [against the uninsured tortfeasor].” Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 276, 996 P.2d 603 (2000). Any argument of “sharp practices” by Ms. Carbaugh’s counsel fails when Progressive admits that it received written notice of the lawsuit Ms. Carbaugh filed against the uninsured tortfeasors and failed to act on it. If Progressive’s PIP adjusters are so inexperienced not to know that they need to take some action when notified that its insureds have sued an uninsured tortfeasor, then Progressive should reevaluate its adjuster training and education procedures. But blaming Ms. Carbaugh and her attorney for Progressive’s shortcomings smacks of an insurer unwilling to assume responsibility for its own failures.

**7. In the event this Court finds that Progressive is bound by the default judgment, the Court should award Ms. Carbaugh her attorney fees and costs on appeal and at the trial court level.**

It is well settled that an insured who engages in litigation to obtain her insurance policy benefits is entitled to reasonable attorney fees and costs if that litigation is successful. Olympic Steamship Co. v. Centennial

Insurance Co., 117 Wash.2d 37, 54, 811 P.2d 673 (1991). An award of attorneys fees under the holding of Olympic Steamship is applicable where a UIM insured binds her insurance company to a judgment against a third party. See e.g. Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 281-282, 996 P.2d 603 (2000).

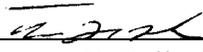
Here, at the trial court level, Progressive filed a motion to set aside a default judgment that would otherwise bind Progressive to paying its UIM policy limits to Ms. Carbaugh. Ms. Carbaugh was forced to respond to that motion in an effort to obtain her UIM benefits. Now, Ms. Carbaugh has been forced to file the present appeal in order to obtain her UIM benefits. In the event Ms. Carbaugh prevails on appeal, the Court should award Ms. Carbaugh her attorneys fees and costs expended at the trial court level and on appeal.

**D. CONCLUSION**

Based on the foregoing argument, Ms. Carbaugh requests that the court reverse the trial court, reinstate the default judgment against defendants Joslin, and find that Progressive is bound by that judgment.

DATED this 12<sup>th</sup> day of June, 2009.

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

  
\_\_\_\_\_  
Thomas F. Gallagher, #24199  
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Karyn Carbaugh

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

KARYN A. CARBAUGH, an  
individual, )  
Appellant, )  
v. )  
JOHN N. JOSLIN and "JANE DOE"  
JOSLIN, husband and wife and the marital  
community comprised thereof; NORMA O.  
JOSLIN and "JOHN DOE" JOSLIN, wife  
and husband and the marital community  
comprised thereof; )  
Respondents. )

NO. 38837-5-II  
**DECLARATION OF MAILING**

Marie Ekstrand hereby declares and states as follows:

On June 12, 2009, I deposited a copy of the Appellant's ~~Reply~~ Brief, in the United States  
Mail, postage prepaid, addressed to the following recipients:

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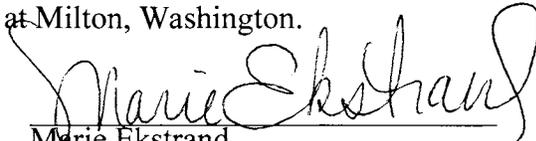
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 12<sup>th</sup> day of June, 2009, at Milton, Washington.

  
Marie Ekstrand