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Supreme Court No. 78667-4

Court of Appeals Div. If No. 32946-8

BY C. I. HERRITT

CLERK

FILED  
JUN - 1 2006

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

SUPREME COURT OF THE  
STATE OF WASHINGTON

FINANCIAL INDEMNITY COMPANY

Petitioner,

v.

KEVIN SHERRY

Respondent.

REPLY TO PETITION FOR DISCRETIONARY REVIEW BY THE  
SUPREME COURT

ANSWER

David H. Middleton  
WSBA#22485  
DAVID H. MIDDLETON & ASSOCIATES  
Attorneys for Respondent

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Federal Way, WA 98003  
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### I. Identity of Respondent.

Respondent is the claimant, Kevin Sherry.

### II. Decision Below

Respondents respectfully request the Court to deny Petitioner's Motion for Discretionary Review in part, because the Petitioners failed to satisfy the criteria set forth under RAP 13.4(b) that would allow for discretionary review.

### III. Issues Presented for Review

While the respondent disagrees with the petitioner's contention that the Court of Appeals, Division II decided this case incorrectly, the respondent does not disagree that the issues framed in the petition are appropriate for review by the Supreme Court.

### IV. Statement of the Case

Kevin Sherry's mother purchased UIM and PIP coverage from Financial Indemnity Company. CP 5-23. A UIM arbitration award was issued in favor of Kevin Sherry as a result of his accident with an uninsured motorist, Gretchen Winkleman. CP 26-28. The facts of the accident were determined by the arbitrator. CP 27. Although the insurer's position through the course of this litigation has been that Kevin Sherry was performing a "Jackass"-style stunt at the time of the accident, that was not the factual holding of the arbitrator. CP 26-28

The arbitrator found total damages of \$143,127.92, including special damages. CP 26-28. After reduction for 70% comparative fault, the net damages, including special damages, were \$42,938.38. CP 26-28. Financial Indemnity had previously paid \$14,600.00 to or on behalf of Kevin Sherry under his PIP coverage. CP 35-36.

Respondent Kevin Sherry moved the Pierce County Superior Court for entry of judgment on the arbitration award. CP 1. Respondent's arguments were, primarily, (1) that there should be no offset for the PIP payments because Kevin Sherry was not fully compensated for his injuries, and (2) that if there were an offset, that the offset should be reduced by Kevin Sherry's proportionate share of fault, because that represented the amount that he recovered in arbitration, and (3) that in either event, a proportionate share of attorney's fees and costs should be paid by the insurer. See RP, CP 60-68. Ruling on the motion, the trial court entered judgment and awarded the entire PIP offset entirely, reduced by a proportionate share of attorneys fees and costs. RP at 20.

The case was reviewed by the Court of Appeals, Division II, which held that because Kevin Sherry was not fully compensated, no offset should occur. See Published Opinion, Case No. 32946-8-II. The Court also held that, as a result, there would be no proportionate sharing of attorneys fees and costs by the insurer. Id.

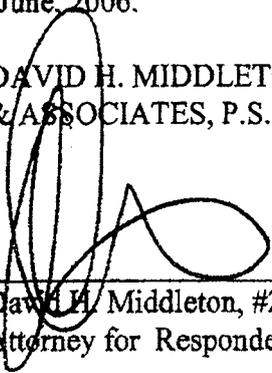
#### V. Argument

Although respondent Kevin Sherry does not agree entirely with the factual assertions or arguments of the petitioner, and does not agree that

the decision of the Court of Appeals, Division II was incorrect, respondent does not object to the Supreme Court's review of this case.

DATED this 1<sup>st</sup> day of June, 2006.

DAVID H. MIDDLETON  
& ASSOCIATES, P.S.



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David H. Middleton, #22485  
Attorney for Respondent Kevin Sherry

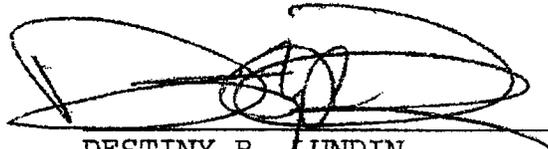
DECLARATION OF SERVICE

I, Destiny R. Lundin, state:

On this 18 day June, 2006, I caused to be mailed by first class postage to Debora A. Dunlap, 2135 112<sup>th</sup> Ave NE Ste 100, Bellevue, WA 98004, attorney for Petitioner, and by facsimile, a copy of the following documents: Reply to Petition for Discretionary Review by the Supreme Court.

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18 day of June, 2006, at Federal Way, Washington.

  
DESTINY R. LUNDIN

**DAVID H. MIDDLETON  
& ASSOCIATES,**

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Please see attached Reply to Petition for Review