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STATE OF WASHINGTON
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Supreme Court No. 95827-1
Court of Appeals, Division III No. 346714

SUPREME COURT OF THE STATE OF WASHINGTON

MONICA DIAZ BARRIGA FIGUEROA, AS PARENT AND
NATURAL GUARDIAN OF BRAYAN MARTINEZ, A MINOR,

Respondent,

vs.

CONSUELO PRIETO MARISCAL,

Petitioner.

RESPONDENT'S ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION

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Co-Attorneys for Respondent

Plaintiff-Respondent Monica Diaz Barriga Figueroa, as parent and guardian of Brayán Martínez (“Figueroa”), submits the following answer to the Brief of Amicus Curiae filed on behalf of the Washington State Association for Justice Foundation (“WSAJF”):

Figueroa agrees with and endorses the arguments of WSAJF with two qualifications:

1. WSAJF’s analysis of the remedies available in this action appears to be too limited. *See* WSAJF Am. Br., at 15. WSAJF correctly notes that information from Figueroa’s PIP file should not be admitted in this action, and that admission of such evidence is presumptively prejudicial and warrants a new trial. *See id.* As far as it goes, this is consistent with Figueroa’s argument. *See* Figueroa 2nd Supp. Br., at 5-8. However, Figueroa also believes that the insurer should forfeit the right to claim any offset or reduction for PIP benefits paid. *See* CP 9, 210 & 217 (defense counsel, requesting offset); Figueroa 2nd Supp. Br., at 9 & n.5 (argument regarding forfeiture of offset). In addition, Figueroa believes that defense counsel accessing information from the PIP file should potentially be

subject to disqualification depending on the degree of knowledge and fault. *See* *Figueroa* 2nd Supp. Br., at 10.¹

2. WSAJF seems to imply, but does not clearly state, that a finding of bad faith in this action should be given preclusive effect in a separate bad faith action. *See* WSAJF Am. Br., at 15. *Figueroa* agrees because insurers are bound to the results of litigation involving their insureds even when the technical requirements of collateral estoppel are not satisfied. *See* *Figueroa* 2nd Supp. Br., at 8; *See also* *Fisher v. Allstate Ins. Co.*, 136 Wn. 2d 240, 248, 961 P.2d 350 (1998) (holding UIM insurer bound by judgment obtained by insured in private arbitration ancillary to tort action against tortfeasor, even though “technical privity is absent”); *Lenzi v. Redland Ins. Co.*, 140 Wn. 2d 267, 279, 996 P.2d 603 (2000) (holding UIM insurer bound by default judgment obtained by insured against tortfeasor, relying on *Fisher* and stating the insurer’s “reliance on a collateral estoppel analysis is misplaced”); *Mulcahy v. Farmers Ins. Co. of Washington*, 152 Wn. 2d 92, 105 n.9, 95 P.3d 313 (2004) (noting “the general rule that, in the interests of fairness and to avoid redundant litigation, insurers, who have received notice of

¹ This does not exclude the possibility of any remedies that the tortfeasor-defendant has against the insurer for having to go through a second trial.

litigation by their insureds against tortfeasors and an opportunity to intervene, are bound by settlements between their insureds and tortfeasors,” citing *Fisher*); *Mutual of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wn. 2d 255, 266–67, 199 P.3d 376, 382 (2008) (holding good faith settlement establishes insured’s liability and the amount of the settlement establishes the insured’s presumptive damages purposes of insurance coverage, relying on *Fisher*). The insurer should not be permitted to relitigate its bad faith conduct in a separate action, which should instead focus on the injury and damage proximately caused by its bad faith conduct and the remedies available for the tort of insurance bad faith and violation of the Consumer Protection Act.

Respectfully submitted this 26th day of February, 2019.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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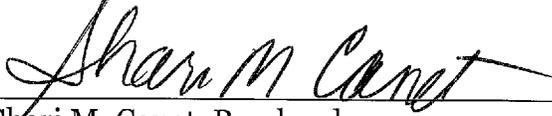
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and via email to co-counsel for Respondent pursuant to prior agreement to:

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Signed on February 26, 2019 at Moses Lake, Washington.



Shari M. Canet, Paralegal

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