IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

Kim A. Hann, Respondent, v. Richard Squire and "Jane Doe" Squire, defendants, Metropolitan Property and Casualty Insurance Company, Appellant.	)	No. 66649-5-I DIVISION ONE UNPUBLISHED FILED: May 9, 2011

Cox, J. — Metropolitan Property and Casualty Insurance Co. appeals the trial court's order granting limited intervention and other related decisions in this personal injury action of its insured against an uninsured driver. The trial court did not abuse its discretion either in granting Metropolitan limited intervention or in any other respect. The unchallenged findings are verities on appeal and support the conclusions of law and the judgment against Richard Squire, the uninsured driver. Metropolitan is also bound by that judgment. We affirm.

The material facts are largely undisputed. Kim Hann was riding as a passenger in her 1998 Ford Expedition on September 9, 2005. John Combs was driving the vehicle. Richard Squire ran a red light in his 1986 Chevy pickup truck and t-boned Hann's vehicle. Hann suffered personal injuries resulting from the collision. It appears that Combs also suffered some injuries.

At the time of the accident, Hann was a named insured under a policy issued by Metropolitan. The policy included an uninsured motorist (UIM) provision.

Combs arbitrated his insurance claim against Metropolitan. The arbitrator made an award to him.

Hann commenced this action against Squire in August 2008. Squire failed to appear, and the trial court entered an order of default against him in October 2008. In November 2008, Hann provided Metropolitan with written notice of this action.

The record is unclear when settlement negotiations between Metropolitan and Hann started. But, they failed to reach agreement. Metropolitan first entered its notice of appearance and moved to intervene in this suit in February 2009. In its motion, Metropolitan stated:

> Hann filed this action against Squire on August 26, 2008. ***Hann has served Metropolitan with notice of the action.*** Hann then moved for, and was granted a default order against Squire on October 24, 2009. Metropolitan filed a notice of appearance with intent to intervene on February 3, 2009.[1]

[1] Clerk's Papers at 6 (emphasis added).

Significantly, Metropolitan then argued that it should be permitted to intervene because it would be "bound by the findings, conclusions, and judgment of any proceeding" under Fisher v. Allstate Insurance Co.[2]

The trial court granted Metropolitan limited intervention. The order states in part:

> [T]herefore it is hereby ORDERED, ADJUDGED AND DECREED that Metropolitan's Motion to Intervene in this matter shall be and is hereby GRANTED—allowing limited intervention. Metropolitan Insurance Company shall be allowed limited intervention herein, to include notice of a hearing for entry of judgment, along with copies of supporting evidence, and shall be given the opportunity to challenge the sufficiency of the evidence at the time of the hearing. Metropolitan shall have the opportunity to bring a motion to allow limited discovery as to damages as it finds such discovery necessary.[3]

Metropolitan's motion for reconsideration of this order claimed that the court should have granted "full" intervention because Metropolitan was not provided with notice of the lawsuit prior to Hann obtaining the order of default against Squire. Metropolitan claimed that Hann's policy language and Lenzi v. Redland Insurance Co.[4] required her to notify it of her action against Squire before moving for an order of default. The court denied this portion of the motion. But the court did grant Metropolitan's request for expanded discovery, ordering:

> Metropolitan shall be allowed to conduct reasonable discovery as follows:

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[2] Clerk's Papers at 7; 136 Wn.2d 240, 961 P.2d 350 (1998).

[3] Clerk's Papers at 387-88.

[4] 140 Wn.2d 267, 996 P.2d 603 (2000).

1). Interrogatories—limited to request for 10 yrs. from today's date re: medical records.

2). Ruling reserved re: CR 35 exam.

3). Live witnesses that plaintiff intends to call at reasonableness hearing can be deposed by Metropolitan.[5]

Thereafter, the trial court continued the reasonableness hearing and granted Metropolitan additional discovery, including a CR 35 examination of Hann.

Both Hann and Metropolitan presented evidence and argument at the reasonableness hearing on the nature and extent of her injuries. The trial court entered findings of fact and conclusions of law and a judgment in the amount of $733,483.71 against Squire. The court also granted Hann's motion to bind Metropolitan to the judgment against Squire. Accordingly, Metropolitan was liable to Hann, as of the date of entry of the order, in the amount of $252,483.03, the policy limit plus statutory attorney fees and costs.

Metropolitan appeals.

NOTICE AND INTERVENTION

Metropolitan argues that it did not receive proper notice of Hann's action because she did not provide the notice until after she obtained an order of default against Squire. This argument is not persuasive.

As a preliminary matter, we note that Metropolitan did not make this argument to the trial court in its initial Motion to Intervene. To the contrary,

[5] Clerk's Papers at 390.

Metropolitan indicated to the trial court that it ***did*** receive notice of the action prior to entry of the order of default. Metropolitan represented in its Motion to Intervene that "Hann has served Metropolitan with notice of the action. Hann then moved for, and was granted a default order against Squire on October 24, 2008."[6]

For the first time on reconsideration, Metropolitan indicated that it had not received a copy of the summons and complaint from Hann until some 25 days after entry of the order of default. Metropolitan argued, based on these newly presented facts, that the trial court should have granted full, rather than limited intervention under Lenzi.

"Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion."[7] A trial court abuses its discretion when its decision is based on untenable grounds or reasons.[8] Unchallenged findings of fact are verities on appeal.[9] Failure to raise an issue before the trial court precludes a party from raising it on appeal absent argument that any of the limited exceptions to RAP 2.5(a) apply.[10]

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[6] Clerk's Papers at 6.

[7] Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (citing Perry v. Hamilton, 51 Wn. App. 936, 938, 756 P.2d 150 (1988)), review denied, 157 Wn.2d 1022 (2006).

[8] Id. (citing Wagner Dev., Inc., v. Fidelity & Deposit Co. of Maryland, 95 Wn. App. 896, 906, 977 P.2d 639 (1999)).

[9] In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g).

Whether the trial court abused its discretion in denying the motion for reconsideration after being presented with a new argument is the issue. For the reasons we now discuss, the trial court did not abuse its discretion.

Metropolitan argues that our supreme court's decision in Lenzi requires an insured to provide notice of an action against an uninsured driver to its UIM insurer prior to obtaining an order of default against the driver. A close reading of that case does not support this argument.

The supreme court stated that the issue before it was:

> [I]f an insurance carrier that has notice of its insureds' lawsuit against an uninsured tortfeasor and declines to intervene in that lawsuit is bound by a default judgment obtained against the tortfeasor.[11]

The court answered the question as follows:

> ***Under the facts of this case****,* we hold the UIM insurer is bound by the default judgment where it had timely notice of the filing of the lawsuit by its insureds and ample opportunity to intervene in the lawsuit to protect its interests, but declined to do so.[12]

In Lenzi, the supreme court affirmed the rule of Finney v. Farmers Insurance Co.[13] and Fisher that an insurer having "notice of a lawsuit brought by its insured against [an] uninsured tortfeasor may be bound by the judgment obtained by the insured."[14]

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[10] Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5(a).

[11] Lenzi, 140 Wn.2d at 269.

[12] Id. (emphasis added).

[13] 21 Wn. App. 601, 586 P.2d 519 (1978), aff'd, 92 Wn.2d 748, 600 P.2d 1272 (1979).

The supreme court clearly articulated that an insured's duty to its insurer is to "***timely notify***" its insurer of the filing of the summons and complaint so that the insurer has an opportunity to intervene and protect its interest prior to the entry of a monetary judgment.[15] Under the facts of that case, the court concluded that notice was timely because the Lenzis provided their insurer with a copy of the summons and complaint before entry of the ***default judgment***.[16] The court did not hold that notice would be untimely if the summons and complaint were provided to the insurer after the filing and service of the summons and complaint but prior to the entry of a monetary judgment.

Here, Metropolitan knew of the accident on which this action is based well before commencement of this lawsuit. It was involved in a proceeding to arbitrate a claim by Combs, the other injured occupant of the insured vehicle. To argue that it neither knew nor had reason to know that this lawsuit was likely if settlement negotiations with Hann were unsuccessful is not credible.

More importantly, Hann provided Metropolitan with a copy of the summons and complaint in this action after obtaining an order of default against Squire but prior to entry of the default judgment against him. This notice provided Metropolitan both with ample opportunity to intervene (which it did) and to participate in the reasonableness hearing (which it also did) prior to entry of

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[14] Lenzi, 140 Wn.2d at 273 (citing Fisher, 136 Wn.2d 240).

[15] Id. at 276 (emphasis added).

[16] Id. at 276 n.3.

the monetary judgment. In short, Metropolitan had full opportunity to protect its interests prior to entry of the monetary judgment to which it is now bound to the extent the trial court determined. That is the underlying lesson of Lenzi. The policies and procedures discussed in that case were fully honored by the trial court in its rulings in this case.

Metropolitan suggests that Hann's failure to notify it of this lawsuit until after entry of the order of default is prejudicial. But Metropolitan fails to explain what prejudice comes from this failure. We see none.

Metropolitan also appears to argue that Hann was required to provide it with notice of her action prior to entry of the order of default under the policy language. We decline to reach this argument because Metropolitan failed to preserve it below and none of the narrow exceptions to preservation apply to this case.

In Metropolitan's Motion for Reconsideration re: Intervention, it argued that Hann was required to provide it with copies of the summons and complaint against Squire based on the following policy language:

> If a person seeking coverage files a suit against the owner or driver of the uninsured or underinsured motor vehicle, copies of suit papers must be forwarded to us and we have the right to defend on the issues of the legal liability of, and the damages owed by such owner or driver. However, we are not bound by any judgment against any person or organization obtained without our written consent.[17]

After Metropolitan filed its opening brief in this appeal, it filed a "Notice of

[17] Clerk's Papers at 32.

Clarification of Record" with the trial court stating that the above policy language is incorrect. The actual policy language states:

> If any legal action is begun before we make payment under any coverage, a copy of the summons and complaint or other process must be forwarded to us immediately.[18]

Metropolitan then filed an amended opening brief with this court with argument based on the "correct" policy language. There is no indication in this record that Metropolitan asked the trial court to make any ruling regarding this new policy language.

This court may refuse to review any claim of error which was not first raised in the trial court.[19] Here, because Metropolitan's arguments below were premised on language not included in Hann's policy and the trial court never ruled on this new language, we decline to review Metropolitan's new argument on appeal.

We conclude that under the facts of this case and the arguments properly presented to this court, Metropolitan received timely notice of Hann's action against Squire.

SCOPE OF INTERVENTION

Metropolitan argues that the trial court erred in granting it limited intervention. We disagree.

Pursuant to Civil Rule (CR) 24, the trial court shall permit a nonparty to

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[18] Clerk's Papers at 1652.

[19] RAP 2.5(a); Boes v. Bisiar, 122 Wn. App. 569, 575, 94 P.3d 975 (2004), review denied, 153 Wn.2d 1025 (2005).

intervene "(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."

Here, there is no dispute that the trial court properly allowed Metropolitan to intervene on the basis of this rule. The issue is whether the trial court abused its discretion by limiting the extent to which Metropolitan participated in this action. Metropolitan also claims that its ability to protect its interests was impaired and impeded because it was not able to request a jury trial and it was unable to conduct full discovery as permitted by the civil rules. These arguments are also unpersuasive.

With respect to the issue of a jury trial, Metropolitan never moved to set aside the order of default and never requested a jury trial. Before a party can contend that it has been denied the constitutional right to a jury trial, it must first show that it actually demanded a jury.[20] Metropolitan argues that this rule should not apply under the facts of this case because it was not granted "party" status and therefore could not request a jury under CR 38. While Metropolitan is correct that CR 38(b) refers to the right of a "party" to demand a jury trial, there is nothing to suggest that Metropolitan is not a party, notwithstanding its limited

[20] Ford Motor Co. v. Barrett, 115 Wn.2d 556, 563, 800 P.2d 367 (1990).

status as an intervenor. To hold otherwise would elevate form over substance.

The trial court granted Metropolitan's motion to intervene. Metropolitan certainly could have moved to set aside the default judgment or made a jury demand if it felt that either was in its best interests. It did not do so. It cannot now claim error on the basis of either a nonexistent ruling or demand.

Finally, Metropolitan claims that its rights were impaired by the limitations on intervention because it was unable to conduct full discovery as permitted by the civil rules. A trial court has broad discretion under CR 26 to manage the discovery process and, if necessary, to limit the scope of discovery.[21] This court reviews a trial court's order limiting discovery for an abuse of discretion.[22] A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds.[23]

Here, the trial court carefully considered each of Metropolitan's requests for discovery, granting Metropolitan the right to propound interrogatories on Hann, obtain access to the past 10 years of Hann's medical records, and conduct a CR 35 examination of Hann. Metropolitan used this information to contest the amount of damages sought by Hann at the reasonableness hearing.

Metropolitan argues that the permitted discovery was inadequate because

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[21] CR 26(b), (c); Nakata v. Blue Bird, Inc., 146 Wn. App. 267, 277, 191 P.3d 900 (2008), review denied, 165 Wn.2d 1033 (2009).

[22] Lang v. Dental Quality Assurance Comm'n, 138 Wn. App. 235, 254, 156 P.3d 919 (2007), review denied, 162 Wn.2d 1021 (2008).

[23] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

it was unable to depose and cross-examine Hann's witnesses. But the limited scope of discovery in this case was consistent with the underlying principles of the reasonableness hearing and sufficient to protect Metropolitan's interests in this case. As the court explained in Lenzi, the policy concerns at play in a UIM case such as this are "concern about collusion between [the] insured and the tortfeasor, who may be judgment proof and have no real interest in the outcome of an arbitration or trial, leading to an artificially high award for the insured the carrier must pay. Another possibility is the tortfeasor might have minimal insurance coverage, thus lessening the incentive for the tortfeasor's insurance company to defend the action vigorously, again possibly leading to an artificially high award."[24] From the point of view of the insured, he or she should not have to relitigate a case or become involved in protracted discovery at the whim of the UIM carrier.[25]

Here, the discovery permitted by the trial court was enough for Metropolitan to vigorously contest the amount of damages. The concerns and policies articulated by the Lenzi court were adequately addressed by the trial court in this case.

Further, Metropolitan does not argue that the trial court abused its discretion in limiting discovery under the facts of this case. Hann did not call any live witnesses. And Metropolitan was allowed to present the declaration testimony of its own medical expert witnesses to counter the declarations

[24] Lenzi, 140 Wn.2d at 274.

[25] Id. at 275.

submitted by Hann's experts. Metropolitan has not demonstrated that the trial court abused its discretion in managing the scope of permitted discovery.

In addition, we note that Metropolitan does not contest any specific discovery order of the trial court, or point to what additional discovery it sought and did not receive. This further supports the conclusion that the trial court did not abuse its discretion in managing the discovery process.

BINDING EFFECT OF JUDGMENT

Metropolitan argues that the trial court erred in granting Hann's motion for an ancillary order binding it to the judgment she obtained against Squire. We disagree.

As discussed above, the Fisher/Finney rule provides that an insurer having "notice of a lawsuit brought by its insured against [an] uninsured tortfeasor may be bound by the judgment obtained by the insured."[26] Here, Hann provided Metropolitan with notice of her action against Squire, and Metropolitan intervened in the lawsuit in sufficient time to contest the damages award at the reasonableness hearing. This is all that is required by the Fisher/Finney rule and by Lenzi in order for a trial court to bind the insurer to the resulting judgment against the tortfeasor.

The trial court properly determined that Metropolitan was bound by the judgment against Squire up to the limits of Hann's UIM policy.

[26] Id. at 273 (citing Fisher, 136 Wn.2d 240).

ATTORNEY FEES

Hann requests an award of attorney fees under RAP 18.9 on the grounds that Metropolitan's appeal is frivolous. We decline to award fees on this basis.

RAP 18.9(a) provides:

> Sanctions. The appellate court on its own initiative or on motion of a party ***may order a party*** or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, ***files a frivolous appeal***, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.[27]

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of success.[28]

Hann argues that Metropolitan's appeal is frivolous because it is devoid of any merit and was filed for the purpose of delay. We cannot say that this appeal is so totally devoid of merit that there was no reasonable possibility of success on appeal. While we conclude that application of the Fisher/Finney rule and Lenzi to the facts of this case entitles Hann to prevail, we cannot conclude that an award of fees is merited.

We affirm the trial court's ordering granting limited intervention and its other related decisions.

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[27] (Emphasis added.)

[28] In re Recall of Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

Cox, J.

WE CONCUR:

Spearman, J.

Leach, A.C.J.