IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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	No. 38837-5-II UNPUBLISHED OPINION

Penoyar, J. — Karyn Carbaugh obtained a $150,000 default judgment against an uninsured motorist who rear-ended the vehicle in which she was a passenger. Carbaugh's uninsured motorist insurance carrier, Progressive Northwestern Insurance Company, moved to vacate the default judgment and intervene in the lawsuit as a defendant. The trial court granted Progressive's motions, and Carbaugh now appeals. We affirm.

FACTS

On or about April 17, 2005, John N. Joslin rear-ended a pick-up truck stopped at a red light while driving his mother Norma's car. Carbaugh, a passenger in the pick-up truck, suffered back and neck injuries. The Joslins[1] did not have automobile liability insurance. Carbaugh's insurance policy with Progressive included $25,000 in underinsured motorist (UIM)[2] coverage.

[1] We designate John and Norma Joslin and their respective spouses as "the Joslins."

[2] We refer to Carbaugh's coverage as UIM insurance. UIM is an acronym for either uninsured or underinsured motorist coverage. *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 306 n.1, 88 P.3d 395 (2004). An "underinsured motor vehicle" includes a motor vehicle that is uninsured at the time of the accident. RCW 48.22.030(1).

The policy also included personal injury protection (PIP) coverage to reimburse Carbaugh for medical expenses and lost wages.[3]

On April 19, Carbaugh's primary care physician diagnosed Carbaugh with "cervical strain, thoracic strain, lumbar strain and coccygeal strain." Clerk's Papers (CP) at 23-24. Over the next 20 months, Carbaugh received chiropractic treatment, massage therapy, and physical therapy, incurring about $7,131.70[4] in medical bills. More than one year later, Carbaugh still experienced pain, and her physician diagnosed her with "[c]ervical spine strain . . . . [possibly] a ruptured disc." CP at 24. Apparently, Carbaugh has received no treatment for accident-related injuries since January 2007.

On February 21, 2006, Carbaugh's attorney informed Progressive that Carbaugh planned to file a UIM claim against Progressive, and he requested PIP benefit applications. In the same letter, Carbaugh's attorney stated: "**Demand is hereby made that two separate claim representatives be assigned to handle my client's respective PIP and UIM claims**. There is to be no sharing of information or ex parte contact between these two representatives regarding this claim." CP at 104. Progressive assigned Dawn Ibanez as the PIP claim representative and Nancy Wicks as the UIM claim representative.

Ibanez, the PIP representative, paid Carbaugh over $7,000 in PIP benefits. Wicks twice informed Ibanez in letters that "we will only consider medical bills which can be supported as

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[3] The record contains only a single page from Carbaugh's insurance policy. Although Carbaugh quotes the policy's notice provision in her brief, we do not consider this language because it is not properly before us.

[4] This dollar figure is based on the special provider report that Carbaugh submitted to the trial court with her motion for default judgment. Earlier, her attorney stated in a letter to Progressive that she had special damages in the amount of $7,396.70.

reasonable, necessary and accident-related." CP at 70-71. Wicks also once forwarded a letter to Ibanez so that Ibanez could address a PIP issue that Carbaugh's attorney had raised. Ibanez did not respond to these letters, and the two representatives had no other contact with each other. In February 2007, Ibanez deactivated Carbaugh's PIP file because Carbaugh had stopped receiving treatment. A year later, Progressive sent Carbaugh's PIP file to its subrogation department in Ohio.

Wicks, the UIM representative, asked Carbaugh's attorney for updates throughout 2006. In July 2007, Carbaugh's attorney asked Wicks to settle Carbaugh's UIM claim for the $25,000 policy limits. Wicks made separate counteroffers of $2,500 and $3,655. On March 24, 2008, Carbaugh's attorney wrote to Wicks and demanded arbitration. Wicks declined to arbitrate,[5] and she informed Carbaugh's attorney that Progressive preferred to resolve the dispute in court.

On March 24, 2008, the same day that Carbaugh's attorney demanded arbitration in a letter to Wicks, Carbaugh sued the Joslins in Pierce County Superior Court. At the time, Carbaugh's attorney did not inform Wicks of the lawsuit. Also, on the same day, Carbaugh's attorney wrote a letter to Ibanez, stating, "At your earliest convenience, please provide my office with an updated PIP ledger regarding the above-referenced claim. In the meantime, please be advised that we have filed a summons and complaint against the tortfeasor in Pierce County

[5] The arbitration provision in Carbaugh's policy reads:

> If **we** and an **insured person** cannot agree on . . . 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 in the state in which the **accident** occurred.

CP at 148.

Superior Court." CP at 60. Ibanez did not forward this letter to Wicks. In April 2008, Progressive filed a separate lawsuit against the Joslins to recoup the PIP benefits that it had paid to Carbaugh.

The Joslins did not answer Carbaugh's complaint. On July 22, 2008, Carbaugh obtained a $150,000 default judgment against them. On September 19, Progressive informed Carbaugh's attorney that it had "recently discovered" the existence of Carbaugh's default judgment, and it asked him to acknowledge that the default judgment did not bind Progressive. CP at 56. Carbaugh's attorney responded that the default judgment bound Progressive because he had notified Ibanez of the lawsuit on March 24.

On October 28, Progressive moved to vacate the default judgment against the Joslins and to intervene as a party defendant. In an attached declaration, Ibanez emphasized that her job as a PIP representative was to pay Carbaugh's reasonably necessary medical expenses:

> I have not been trained in, and am not familiar with . . . UM/UIM insurance requirements . . . . 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. This is **not** an issue that has ever arisen before in my 15 years as a PIP claims representative. This is not information which is necessary or pertinent in handling PIP claims.

CP at 64. Ibanez stated that she did not inform Wicks of the March 24 letter because Carbaugh's attorney had asked her not to communicate with Wicks.

Wicks's declaration stated that Carbaugh's attorney did not inform her of Carbaugh's lawsuit before entry of the default judgment. In June 2008, one month before entry of the default judgment, Wicks wrote to Carbaugh's attorney:

> In your last correspondence with us, you had advised Ms. Carbaugh would be filing a lawsuit on this matter as you had not agreed with our position on value. To date we have not received any further correspondence, nor have we received

> process of service on this matter.
>
> If Ms. Carbaugh will be pursuing her claim through litigation, we ask that you forward us a copy of any summons and complaint she has filed on this matter, so that we can handle it accordingly.

CP at 127. After detailing Carbaugh's post-accident medical treatment in her declaration, Wicks also opined that Carbaugh's claim was "[worth] much less than the $25,000 [UIM limits]." CP at 101.

After oral argument, the trial court vacated the default judgment against the Joslins. In a letter ruling, the trial court stated, "The correspondence from Progressive's UIM adjuster clearly asked for copies of any Summons and Complaint and expressed a probable intent to defend. The correspondence to the PIP adjuster was insufficient notice." CP at 200.

On January 5, 2009, the Joslins filed a notice of appearance.[6] Three days later, the trial court denied Carbaugh's motion for revision. Carbaugh now appeals.

ANALYSIS

I. Default Judgment

Carbaugh argues that her notice to Ibanez of the lawsuit against the Joslins binds Progressive to the default judgment. Alternatively, Carbaugh argues that, even if her notice to Progressive was deficient, the trial court erred in vacating the default judgment because Progressive failed to establish a prima facie defense and excusable neglect.[7] We disagree.

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[6] The Joslins apparently have taken no other action in this lawsuit apart from filing a notice of appearance.

[7] We reject Carbaugh's argument that Progressive lacked standing to move to vacate the default judgment because it was not a party to Carbaugh's lawsuit against the Joslins. As explained in Part II, Progressive had the right to intervene in the lawsuit and thus had standing to bring the motion. *See* CR 24(a).

A. Standard of Review

We will reverse a trial court's decision on a motion to set aside a default judgment if the trial court's decision is based on untenable grounds. *Little v. King,* 160 Wn.2d 696, 702-703, 161 P.3d 345 (2007). Default judgments are disfavored in Washington because "[i]t is the policy of the law that controversies be determined on the merits rather than by default." *Little*, 160 Wn.2d at 703 (quoting *Griggs v. Averbeck Realty, Inc.,* 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)) (alternation in original) (internal quotation marks omitted). At the same time, we value "an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." *Little*, 160 Wn.2d at 703. To balance these competing policies, we engage in a fact-specific inquiry to determine "whether or not justice is being done." *Little*, 160 Wn.2d at 703 (quoting *Griggs,* 92 Wn.2d at 582) (internal quotation marks omitted). Because we do not favor default judgments, we are less likely to find that the trial court based its decision on untenable grounds when the it vacated the default judgment than when it did not. *Griggs,* 92 Wn.2d at 582.

To vacate a default judgment, a moving party must demonstrate that (1) there is substantial evidence to support a prima facie defense; (2) the failure to timely appear and answer was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) the moving party acted with due diligence after notice of entry of the default judgment; and (4) the opposing party will not suffer a substantial hardship if the trial court vacates the default judgment. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The first two factors above are "primary," and the latter two are "secondary." *Little*, 160 Wn.2d at 704. We view the evidence in the light most favorable to the moving party when deciding whether there is substantial evidence of a prima facie

defense. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 835, 14 P.3d 837 (2000).

B. Notice to Insurer

A UIM insurer is "bound by the [insured's] 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." *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 269, 996 P.2d 603 (2000). Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

In *Lenzi*, the UIM insurer was bound where its insureds provided it with docket-stamped copies of the summons and complaint[8] two months before obtaining the default judgment. 140 Wn.2d at 269, 271-72; *accord Finney v. Farmers Ins. Co.*, 21 Wn. App. 601, 616, 618, 586 P.2d 519 (1978), *aff'd* 92 Wn.2d 748, 754, 600 P.2d 1272 (1979) (UIM insurer bound by default judgment where insured provided copies of the summons, complaint, amended complaint, answers, police reports and other documentation). By contrast, we have held that a UIM insurer was not bound by a default judgment where the insured communicated basic facts about the accident and his or her injuries but did not provide "any notice that [the tortfeasor] had been sued, of where the suit was filed, of who the parties were, of what the claims were, or of how [the UIM insurer] could make an appearance." *Beck v. Farmers Ins. Co.*, 113 Wn. App. 217, 224, 53 P.3d 74 (2002).

We hold that the trial court did not base its decision on untenable grounds when it found

[8] The *Lenzi* court determined that the insureds did not need to serve the summons and complaint on the tortfeasor before providing copies to the UIM insurer in order to bind the UIM insurer to the default judgment. 140 Wn.2d at 275-76.

that Carbaugh's attorney's passing reference to the lawsuit against the Joslins in his letter to Ibanez, the PIP representative, was deficient notice. Carbaugh's attorney presented Wicks with a formal demand for settlement of Carbaugh's UIM claim in July 2007, and he negotiated the UIM claim exclusively with Wicks for eight months before filing the lawsuit against the Joslins in March 2008. Yet Carbaugh's attorney elected to notify Ibanez of the lawsuit rather than Wicks, the agent who he knew had express authority to bind Progressive to settlement on Carbaugh's UIM claim. Additionally, earlier, Carbaugh's attorney had asked Ibanez and Wicks to refrain from ex parte contact.

Even after Wicks promptly rejected Carbaugh's arbitration demand on March 24 and informed Carbaugh's attorney that Progressive preferred to resolve the UIM claim in court, Carbaugh's attorney did not notify Wicks of the recently-filed lawsuit. Nor did Carbaugh's attorney notify Wicks of the lawsuit or Carbaugh's upcoming motion for default judgment when Wicks asked in June 2008—a full month before entry of the default judgment—for a "copy of any summons and complaint [Carbaugh] has filed on this matter." CP at 127. Based on these unique and unusual circumstances, we conclude that the trial court did not err by ruling that Carbaugh's notice to Progressive was deficient.

C. Prima Facie Defense and Excusable Neglect

Applying the *White* factors, we also hold that the trial court properly exercised its discretion by granting Progressive's motion to vacate the default judgment. First, viewed in a light most favorable to Progressive, Progressive established a prima facie defense to damages based on Wick's statement that Carbaugh's UIM claim was "[worth] much less than . . . $25,000" and evidence that Carbaugh's economic damages were limited to about $7,131.70.[9] CP at 101.

Second, Progressive's failure to timely appear is excusable neglect due to Carbaugh's deficient notice.[10] Third, Progressive acted with reasonable diligence by filing a motion to vacate the default judgment approximately one to two months after it learned of the default judgment. Finally, Carbaugh will not suffer a substantial hardship. She does not contend that any evidence or witnesses are now unavailable. Although she will have to prove her claim on the merits, this is

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[9] Carbaugh relies on *Little* to argue that Progressive failed to establish a prima facie defense. In *Little*, the UIM insurer moved to vacate a $2.2 million default judgment that the insured obtained after being rear-ended. 160 Wn.2d at 699, 702. The UIM insurer did not dispute the tortfeasor's liability but, instead, asserted that the damage award was unreasonable and that the insured's preexisting conditions aggravated the insured's injuries. *Little,* 160 Wn.2d at 704.

The *Little* court held that the UIM insurer did not present substantial evidence to support a prima facie defense because "[t]he only thing offered was a declaration from an insurance adjuster stating that the adjuster had reviewed [the insured's] medical records and found reports of headaches, hip pain, and depression before the collisions." 160 Wn.2d at 704. Thus, *Little* prevents insurers from merely speculating about the existence of preexisting conditions in order to establish a prima facie defense:

> [T]he mere existence of a preexisting condition is an insufficient basis to infer a causal relationship between the injury complained of and the preexisting condition . . . It is a rare person who does not from time to time experience headaches or other pains, and mere speculation of a connection does not amount to substantial evidence of a defense.

Little, 160 Wn.2d at 705. Here, Wicks, an experienced UIM adjuster, did not speculate about Carbaugh's pre-existing conditions. Instead, she based her opinion on the amount and type of medical treatment that Carbaugh received after the accident.

[10] Carbaugh relies on a recent decision of this court to argue that Progressive's failure to appear was inexcusable neglect that resulted from a "break-down of internal office procedure." Appellant's Br. at 25 (quoting *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 407, 196 P.3d 711 (2008)). In *Rosander*, we rejected an insurer's attempt to vacate a default judgment based on its excuse that the relevant claim handler was out of the office on medical leave. 147 Wn. App. at 407. In *Rosander*, we specifically noted that the insurer received proper notice. 147 Wn. App. at 407. That is not the case here. As we explained earlier, the trial court reasonably concluded that Carbaugh's notice was deficient. Therefore, because deficient notice prevented Progressive's appearance—rather than a break-down in Progressive's internal office procedure—*Rosander* does not apply.

the preferred method for resolving controversies in Washington. *See Little*, 160 Wn.2d at 703. Additionally, Carbaugh filed her lawsuit before the applicable three-year statute of limitations[11] ran so her action is not time-barred.

II. Motion to Intervene

Carbaugh argues that the trial court erred in granting Progressive's motion to intervene. We disagree.

We review a trial court's decision to grant a motion to intervene for abuse of discretion. *In re Recall Charges Against Seattle Sch. Dist. No. 1 Dirs.*, 162 Wn.2d 501, 507, 173 P.3d 265 (2007). The pertinent rule states:

> **Intervention of Right.** 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.

CR 24(a). Postjudgment intervention requires a strong showing that intervention is necessary considering all of the circumstances, including prior notice, prejudice to the other parties, and reasons for the delay. *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

As we discussed above, Carbaugh's defective notice prevented Progressive's timely intervention. The outcome of Carbaugh's lawsuit against the Joslins directly affects Progressive's potential financial obligation under the policy's UIM provision; therefore, Progressive's financial interest justifies CR 24(a)(2) intervention. The Joslins, who only appeared after entry of the default judgment, have not adequately represented Progressive's interests. Finally, adjudication

[11] RCW 4.16.080(2).

on the merits will not prejudice any party.[12] Accordingly, the trial court did not err by granting Progressive's motion to intervene based on its strong showing that intervention was necessary to protect its interests.[13]

Carbaugh requests attorney fees and costs on appeal and from the trial court proceedings because she has "engage[d] in litigation to obtain her insurance policy benefits." Appellant's Br. at 40 (citing *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 811 P.2d 673 (1991). Because Progressive prevails, we deny Carbaugh's request.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Van Deren, J.

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[12] Carbaugh is mistaken when she argues that vacation of her $150,000 default judgment automatically prevents her from obtaining a new judgment in the same amount. At trial, she may attempt to prove any amount of damages supported by the evidence.

[13] Carbaugh assigns error to the trial court's denial of her motion for revision, but she does not address this alleged error in her brief. Therefore, we decline to address it. *See* RAP 10.3(a)(6).