No. 89331-4

SUPREME COURT
FOR THE STATE OF WASHINGTON

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS,

Petitioner,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Respondent.

OHIO CASUALTY'S ANSWER TO TRINITY'S PETITION FOR REVIEW

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A. INTRODUCTION

The petition for review of Trinity Universal Insurance Company of Kansas ("Trinity") is audacious for its effort to convert a dispute between insurers into an opportunity for an insurer to claim the benefits of two statutes designed to protect *insureds* -- the Consumer Protection Act, RCW 19.86 ("CPA") and the Insurance Fair Conduct Act, RCW 48.30.015 ("IFCA"). Similarly, the equitable exception to the American Rule on attorney fees for an insured seeking coverage from an insurer is unavailable to an insurer in a dispute with another insurer.

After claiming below that it had a full assignment of rights by its insured, Millenium Building Co., Inc. ("MBC"), when, at most, it had a limited subrogation right, Trinity, nevertheless, hopes to persuade this Court that all of MBC's valuable extracontractual rights were transferred to it without consideration simply because it complied with its duty to defend its insured. Trinity's policy language on subrogation does not support such a self-interested outcome. Moreover, as further evidence of its elevation of its own interests over that of its insured, *nowhere* does Trinity indicate that it ever would have shared the additional half million dollars it obtained by default judgment on MBC's extracontractual claims with MBC, over and above its subrogation claim. This Court, like the

Court of Appeals, should firmly reject Trinity's overreaching and deny review.

B. STATEMENT OF THE CASE

Unlike the Statement of the Case in Trinity's petition, the recitation of the facts in the Court of Appeals opinion is an accurate and fair description of the facts and procedure in this case. Op. at 1-5.

Three factual points or omissions in Trinity's petition bear attention. First, Trinity now argues that Ohio Casualty Insurance Company ("Ohio") was *solely* responsible for defending the underlying claim at issue here. Pet. at 2-3. Trinity's actual contention below was that Ohio and Trinity were *co-primary insurers*. CP 107; Br. of Resp't at 41. By virtue of the default judgment, Trinity was able to parlay what was *joint* responsibility for the claim against MBC with Ohio into Ohio bearing *sole* responsibility for the claim.

Second, Trinity asserts it never argued that it received a "stealth" assignment from its insured. Pet. at 9. That is simply false. Trinity *repeatedly* claimed it had an *assignment* from MBC when all it had from MBC was a traditional subrogation right. CP 194; Br. of Appellant at 33-35; Reply Br. at 5-6, 19-20. Trinity waited until its motion for reconsideration in the Court of Appeals to supply the actual policy

language of its subrogation interest, language it deemed to be important only after it lost in the Court of Appeals.

Finally, Trinity does not even provide the actual language of its subrogation provision anywhere in the text of its petition. It does not want to emphasize the language of the Court of Appeals found to be significant. Op. at 13-15. That language made clear that Trinity's insured *nowhere* assigned any extracontractual rights to Trinity, as the Court of Appeals correctly noted. Op. at 14 ("The language does not expressly assign any IFCA and CPA claims of the insured to the insurer."). That Trinity policy language only gave Trinity the right to recoup sums it actually paid on MBC's behalf:

> If the insured has rights to recover *all or part of any payment we have made under this Coverage Form*, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

Op. at 14 (emphasis added). By virtue of the Court of Appeals' decision, Trinity recovered what it was entitled to recover -- what it allegedly paid on MBC's behalf under its policy.[1]

C. REASONS WHY REVIEW SHOULD BE DENIED

[1] As noted *supra*, Trinity actually recovered *more* than what it was entitled to recover if both it and Ohio were co-primary insureds, as it alleged below.

This case is essentially a dispute between insurers. Trinity made that point absolutely clear when it sued Ohio on its *own behalf*. It never bothered to "stand in the shoes" of MBC in bringing any extracontractual claims on MBC's behalf, but rather sought to recover IFCA and CPA damages for itself.[2] This Court should not warp the contours of the CPA, IFCA, or *Olympic Steamship*[3] fees to allow an insurer to invoke such claims or principles that were designed to protect insureds.

(1) The Court of Appeals Correctly Addressed the Scope of a Default Judgment

Trinity wants this Court to adopt the principle that a default judgment may be entered even when the plaintiff lacked the ability to state the cause of action for which it sought relief. Pet. at 15-20. In effect, Trinity argues that even if it is utterly clear that the plaintiff could not state the claim under Washington law, or the judgment exceeded the claim pleaded in the complaint, courts are powerless under CR 60(b) to reform a default judgment because any error "inheres" in the default judgment. Pet.

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[2] This was because Trinity never intended to share any of the proceeds of the extracontractual claims with MBC. Appropriating such valuable rights, without consideration, plainly raises a question of bad faith as to Trinity's conduct. RCW 48.01.030 applies principles of good faith to dealings between insurers and their insureds. This is a quasi-fiduciary duty that is not specific to the insurance contract; it requires an insurer to act under a broad obligation of fair dealing, giving equal consideration to the insured's interests. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664 (2008). Plainly, the appropriation of extracontractual rights of MBC by Trinity was the height of self-interest.

[3] *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991).

at 15. Such an argument is simply wrong under Washington law and would be inequitable. Far from a "dramatic departure from the law of final judgments," (pet. at 19), the Court of Appeals' decision is well within the principles of Washington law in addressing default judgments.

First, Trinity loses sight of a core value -- default judgments are *disfavored* under Washington law. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). Default judgments should, for this reason, be strictly construed as to their propriety.

Second, there are limits in Washington law upon the ability of a party to apply to a trial court for default relief. In *In re Marriage of Lesley*, 112 Wn.2d 612, 772 P.2d 1013 (1989), this Court held that a court could not grant relief in a default judgment beyond that which the party sought in its complaint. The Court applied CR 60(b)(5) to find that such a judgment was void to the extent the relief awarded in the judgment exceeded the relief sought in a dissolution petition. *Id.* at 620. This result is rooted in due process considerations. *State ex rel. Adams v. Superior Court*, 36 Wn.2d 868, 872, 220 P.2d 1081 (1950); *Ware v. Phillips*, 77 Wn.2d 879, 468 P.2d 444 (1970). Similar due process considerations apply to an effort by a plaintiff to obtain relief that no law affords that plaintiff.

Washington courts have routinely set aside default judgments that purported to award relief different in nature than that prayed for in a complaint. *See* CR 54(c) ("A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.").[4]

Finally, it has long been Washington law that a default judgment is *void* if the complaint states facts affirmatively showing the plaintiff has no right of recovery or the complaint lacks averments necessary to sustain a right to recover. *Adams*, 36 Wn.2d at 872-73. Contrary to Trinity's argument, Washington courts are not powerless to examine whether a default judgment is valid. A court may certainly determine that a default judgment is invalid because the plaintiff failed to state a claim in its complaint. In *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 242 P.3d 27 (2010), the trial court properly refused to enter a default judgment where alleged facts, even if deemed to be true, failed to state a claim upon which

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[4] *See, e.g., Sceva Steel Buildings, Inc. v. Weitz*, 66 Wn.2d 260, 262-63, 401 P.2d 980 (1965) (plaintiff erected a steel building on land purchased by defendants under an executory contract of conditional sale; plaintiff brought action to foreclose labor and material liens, alleging defendants to be the owners of the land; default judgment and decree of foreclosure on the building only, directing the sheriff to sell the building, were void since the trial court granted a remedy different from that sought in the complaint); *Mueller v. Garske*, 1 Wn. App. 406, 409, 461 P.2d 886 (1969) (creditor commenced action for accounting of partnership assets and did not allege either fraud or wrongful withholding of funds; default judgment against defendant for funds and assets wrongfully and fraudulently withheld was void and subject to attack at any time); *Davis v. Bafus*, 3 Wn. App. 164, 166, 473 P.2d 192 (1970) (relief prayed for was rescission of contract and damages; default judgment granting damages but no rescission was void).

relief could be granted. The *Kaye* court properly noted that a default merely admits the facts in a complaint, not the legal conclusions there and the court has discretion to determine if the cause of action is "legitimate." *Id.* at 326. A court in entering a default judgment must assess both its jurisdiction and the sufficiency of the complaint and should not enter a judgment that would inevitably be vacated if challenged. *Id.* at 330. Thus, to the extent that a party seeks in a default judgment to obtain relief not authorized by Washington law, the judgment is void and relief under CR 60(b)(5) is appropriate because the court lacked the authority to award the relief requested. For example, a court would have the authority under CR 60(b)(5) to set aside a default judgment to the extent it purported to award punitive damages not authorized by Washington law, or it awarded damages to a party under a statute when the statute did not allow that party to recover such damages.[5]

In sum, the Court of Appeals correctly discerned that Ohio could challenge under CR 60(b)(5) a default judgment that purported to allow

[5] The Court of Appeals based its decision on Trinity's lack of standing to assert the claims of MBC for damages under the CPA and IFCA, and to seek attorney fees. Op. at 11-17. It is undisputed that the lack of standing to assert claim renders a judgment void for purposes of CR 60(b)(5). *Kaye*, 158 Wn. App. at 330; *Int'l Ass'n of Firefighters Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212, 45 P.3d 186 (2002) ("standing is a jurisdictional issue ...).

Trinity to seek relief to which it was not entitled by statute or common law. Review of this issue is not merited. RAP 13.4(b).

(2) Trinity Lacked Standing to Assert MBC's Extracontractual Claims under the CPA and/or IFCA

Trinity contends that it has standing by virtue of its policy's subrogation clause to assert MBC's extracontractual rights against Ohio. Pet. at 6-15. In so doing, Trinity misrepresents the terms of its policy, attempting to seize MBC's valuable rights without consideration, and attempts to transform a dispute between insurers into grounds for allowing insurers to state claims under the CPA and IFCA, statutes designed to protect insureds. The Court of Appeals was entirely correct in rejecting Trinity's self-serving efforts. Op. at 11-17.

In two decisions, *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998) and *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 191 P.3d 866 (2008), this Court has explored the parameters of conventional and equitable subrogation and equitable contribution when there are disputes between insurers over the insurers' respective obligations as to a loss. The Court of Appeals' opinion is consistent with this Court's decisions. That court concluded that under conventional subrogation principles, MBC did not assign its extracontractual claims to

Trinity. Op. at 13-15. Moreover, under equitable subrogation principles, no assignment occurred. Op. at 15-17.

First, Trinity had no claim under the CPA or IFCA against Ohio, independent of MBC.[6] The dispute merely involved a disagreement between two insurers over their respective coverage obligations to MBC. Trinity *nowhere* denied that, by their express terms, both the CPA and IFCA recognize that an insurer may not make a claim under those statutes, as the Court of Appeals correctly determined. Op. at 12-14. Thus, where,

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[6] Trinity's complaint alleged two very different types of causes of action: (1) subrogation and equitable contribution claims directly asserted against Ohio; and (2) extracontractual statutory claims asserted indirectly against Ohio as MBC's insurer. Trinity did not seek default judgment based on its own equitable claims, but rather conceded that the default judgment, in its entirety, was based on MBC's alleged IFCA and CPA claims. Br. of Resp't at 20. Whether or not Trinity *could have* asserted its own claims against an alleged co-insurer is irrelevant; the judgment is based solely on Trinity's claim that it could assert MBC's IFCA and CPA claims. Therefore, if MBC did not assign its claims to Trinity, or if those claims were not transferred to Trinity by operation of law, the default judgment should not have been entered.

As the Court of Appeals recognized, op. at 12, Trinity has no direct CPA or IFCA claims against Ohio. Washington law generally precludes a third party from suing an insurer directly for bad faith. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 391, 715 P.2d 1133 (1986); *Planet Ins. Co. v. Wong*, 74 Wn. App. 905, 909-10, 877 P.2d 198, *review denied*, 125 Wn.2d 1008 (1994). Moreover, Trinity alleged a violation by Ohio of WAC 284-30-360(3) for failing to timely respond to a communication, but that regulation is limited to "pertinent communications from a *claimant*," not from another insurance carrier. The definition of "claimant" is specifically limited to first-party claimants (a person covered by an insurance policy) and third-party claimants (a person asserting a claim against a person covered by an insurance policy). *See* WAC 284-30-320(2), (6), (14). Trinity is neither. Likewise, the IFCA provides a private civil cause of action to a "*first party claimant to a policy of insurance* who is unreasonably denied a claim for coverage or payment of benefits by an insurer." RCW 48.30.015(1). IFCA does not provide a cause of action to an insurer trying to force another insurer to share expenses.

as here, there is no valid assignment of the insured's CPA or IFCA claims, Trinity had no basis for presenting such claims in its own right.

Trinity also had no claim under the CPA or IFCA against Ohio under conventional subrogation principles. Conventional subrogation is based on the actual language of the insurance contract. *Mahler*, 135 Wn.2d at 412; *Mutual of Enumclaw*, 164 Wn.2d at 423. The Trinity policy language did not provide that it received MBC's CPA or IFCA rights.

Trinity ignores the language of its subrogation clause. The policy language does not assign all claims MBC might have against an insurer or third party,[7] let alone CPA and IFCA claims. Rather, the policy language is *expressly* limited to assisting Trinity to recover "all or part of *any payment we have made* under this Coverage Part." This provision simply confirms Trinity's right to recover the actual expenses it paid on MBC's behalf, by a conventional subrogation claim against Ohio up to the amount it paid to defend and settle the case, if Ohio was, in fact, MBC's primary insurer. But Trinity's policy language *nowhere* mentions any general

[7] In truth, Trinity's insured, MBC had no claim against Ohio under the CPA or IFCA either, given the principles of *Ledor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 11, 206 P.3d 1255, *review denied*, 167 Wn.2d 1007 (2009), as Trinity itself acknowledged, pet. at 9 n.4, and the Court of Appeals noted. Op. at 15. Demonstrating the jumbling of doctrines in Trinity's argument, if Trinity was asserting MBC's rights under the CPA and IFCA, Trinity had no right to claim damages against Ohio under the CPA and IFCA because *MBC had no CPA or IFCA claim against* Ohio, having experienced no harm.

assignment or the transfer of any of MBC's extracontractual rights, such as a right to sue another insurer under the CPA or IFCA, as the Court of Appeals properly noted. Op. at 14.[8]

Trinity attempts to fuzz the distinction between an assignment and subrogation by referring to its subrogation clause as "an assignment by subrogation." Pet. at 8, 12. That is inaccurate.

Subrogation allows a party that has paid damages legally owed by another "to recoup those payments from the party responsible for the loss." *Mahler*, 135 Wn.2d at 413. This Court has defined subrogation in the insurance context generally as

> the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party *with respect to any loss covered by the policy.*

Mut. of Enumclaw Ins. Co., 164 Wn.2d at 423 (*quoting Black's Law Dictionary* 1467 (8th ed. 2004)) (emphasis added). A subrogation claim arises when, and to the extent, an insurer has paid a claim on behalf of an insured that another party also has a legal obligation to pay. *Id.* Similarly, a claim for "equitable contribution" may arise when one party has paid a claim in full, or a larger portion of that claim than it equitably owes, when

[8] Trinity does not address the obvious lack of consideration for its seizure of MBC's valuable rights and it certainly does not indicate that it would give any recovery beyond what it paid on MBC's behalf to MBC.

another party is also liable. *See, e.g., Safeco Ins. Co. of Illinois v. Country Mutual Ins. Co.*, 165 Wn. App. 1, 267 P.3d 540 (2011). The amount of an equitable contribution claim is determined by the amount the party has paid out, and is apportioned between the parties, each being responsible for a portion of the total. *Id.* at 8.

Assignments, like conventional subrogation, are entirely different matters that are subject to contract law principles. An assignment is a contract. *Boley v. Greenough*, 22 P.3d 854, 858 (Wyo. 2001). Thus, the traditional principles of contract including mutual assent and consideration apply. While parties may assign causes of action, *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 832, 1881 P.2d 986 (1994), some assignments of causes of action are precluded by public policy considerations. *Id.*; *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003) (barring assignment of legal malpractice claim to adversary).[9] The terms of the assignment contract control.

Here, the alleged "assignment," by its terms, did not assign MBC's extracontractual claims to Trinity. The word "assignment" *nowhere* appears in that clause. No assignment of MBC's CPA or IFCA rights

[9] In the context of the relationship between an insurer and an insured, given the quasi-fiduciary good faith duty owed by a insurer to its insured, and given the fact that insurance policies are contracts of adhesion, "assignments" of rights by insureds to insurers should, at a minimum, be strictly construed in favor of protecting the insured's interests. *St. Paul Fire & Marine*, 165 Wn.2d at 129.

occurred by virtue of Trinity's policy language here. Moreover, Trinity's policy, a contract of adhesion, gave MBC no consideration for MBC's loss of what were valuable rights. Indeed, according to Trinity, MBC assigned and gave away statutory claims worth a half million dollars for absolutely nothing. This reading of the policy makes no sense.

Contrary to Trinity's contention, pet. at 8-12, the Court of Appeals correctly applied this Court's teaching on subrogation from *Mutual of Enumclaw*. Subrogation does not equal an assignment of an insured's extracontractual claims to the insurer. The *Mutual of Enumclaw* court did discuss "equitable contribution" and "subrogation," but not in a way that supports Trinity's argument.

The Court in *Mutual of Enumclaw* did not hold, or even suggest, that subrogation is synonymous with assignment of extracontractual statutory claims. In fact, this Court specifically articulated the limits of a claim of equitable subrogation, Trinity's present ostensible basis for asking for review by this Court, when it reaffirmed that under subrogation an insurer must pay the insured's loss under the policy and then only obtains the insured's rights "against a third party *with respect to any loss covered by the policy*." *Mut. of Enumclaw Ins. Co.*, 164 Wn.2d at 423. Equitable subrogation, which the Court noted "arises by operation of law," is similarly limited to *losses covered by the policy. Id.* The Court

distinguished equitable subrogation from conventional subrogation, which "can arise only by agreement;" it noted that conventional subrogation "is substantially the same" as an assignment, but the Court nowhere suggested that *equitable* subrogation was the same as assignment, let alone that it automatically conveyed an insured's non-contractual statutory claims. *Id.* at 424.

Equitable subrogation did not arise in *Mutual of Enumclaw* because the insurer received an *express* assignment from its insured and, unlike Trinity, was not relying on equitable subrogation as the basis for its lawsuit. The Court noted the limited scope of its decision, cautioning that it applied only to "conventional [contractual] subrogation and not to the more common doctrine of equitable subrogation." *Id.* at 417.

In fact, *Mutual of Enumclaw* did not even concern subrogation or assignment under an insurance policy, but rather under an express assignment of claims as part of a settlement agreement:

> None of the parties dispute that Dally's settlement agreement with MOE and CUIC dictates whether Dally assigned its rights to its USF policy.

Id. at fn.9. Finally, the Court cautioned that a full assignment of rights would differ from a partial assignment, or no assignment:

> While we need not decide whether conventional [contractual] subrogation and assignment are equivalent in all respects, this court recognizes that an insurer *who*

> *receives full contractual assignment of an insured's rights* may bring a conventional subrogation claim to enforce those rights.

Id. at 424 (emphasis added).

Therefore, nothing in *Mutual of Enumclaw* suggests that Trinity has the right to assert MBC's statutory and extracontractual claims based on equitable subrogation principles, given the absence of a written assignment. Equitable assignment is a more limited doctrine.

Contrary to Trinity's suggestion, Washington law does not recognize an assignment "by operation of law" when an insurer simply fulfills its duty to an insured under a liability policy. For instance, in *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008), *review denied*, 165 Wn.2d 1035 (2009), the Court of Appeals rejected an insurer's attempt to claim "subrogation" rights that exceeded the amount of money it had actually paid on a claim. The insurer there relied on an express subrogation clause in its policy that only assigned the insured's rights to recover payments the insurer had actually made, and nothing more. *Id.* at 698. Because "[n]othing in the American Safety contract gives it the right to subrogation for sums that it did not pay," the

court declined "to give it rights it did not clearly provide for in its policy." *Id.*[10]

Moreover, the assignment-by-operation-of-law rule Trinity urges this Court to adopt would transfer an insured's potentially valuable statutory rights and claims to its insurer *for no consideration whatsoever*, as the Court of Appeals noted. Op. at 17. An insured's statutory claims may include remedies different and broader than simply reimbursing the cost of defense and settlement, such as attorney fees, other types of damages, and the statutory trebling Trinity so eagerly took advantage of in this case. Trinity was *already* legally obliged to defend and indemnify MBC under its insurance policy – why would Washington law transfer valuable CPA and IFCA claims to Trinity for free, simply because Trinity complied with its existing contractual duties?

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[10] In one unique instance, Washington law has recognized what amounts to an assignment by operation of law – where an excess insurer pursues claims against a primary insurer. That rare instance does not apply here, as the Court of Appeals observed. Op. at 15-16. A primary insurer's refusal to defend exposes the insured (and thus the excess insurer) to liability it would not otherwise face. "[T]he duty a primary insurer owes to an excess carrier is identical to that owed the insured," and so public policy justifies permitting an excess carrier to bring a CPA claim against a primary that badly mishandles litigation. Op. at 16 (citing *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 971 P.2d 953 (1999)). Those public policy concerns, however, are not at play in this case. Trinity provided MBC a defense – as Trinity admitted it was required to do – and so MBC never faced exposure from Ohio's contention that its coverage was excess to Trinity's coverage under the "other insurance" provision in the Ohio policy. *See* Op. at 15. In fact, Ohio's contention that its coverage was excess to Trinity's coverage was more favorable to MBC than Trinity's position that both carriers were co-primary insurers, because both policies' limits then applied to the claim against MBC.

The Court of Appeals correctly addressed conventional and equitable subrogation and equitable contribution principles already articulated by this Court in *Mahler* and *Mutual of Enumclaw*. Review is not merited on this issue.

(3) Trinity Lacked Standing to Assert a Claim for Fees under the CPA/IFCA or the Equitable Rule in *Olympic Steamship*

The Court of Appeals also correctly determined that Trinity was not entitled to an award of attorney fees. Op. at 20-22. Trinity's argument on fees is, in any event, largely an afterthought, pet. at 14-15, and not an independent basis for review under RAP 13.4(b). The trial court awarded attorney fees in the default judgment to Trinity in the amount of $32,400 (reflecting a 1.5 contingent fee multiplier). CP 588-90. The Court of Appeals properly discerned that the award was erroneous because Trinity had no legal grounds to receive a fee award. Op. at 20-22. Trinity has no standing to bring CPA or IFCA claims against Ohio, and therefore it had no basis for receiving an award of fees under those statutes. Likewise, because MBC did not assign its extracontractual rights to Trinity, and Trinity did not establish any right to recover more than it had paid out in settlement costs, it was not entitled to an award of fees under the *Olympic Steamship* doctrine.[11] Specifically, this equitable exception applies to

[11] While parties customarily refer to *Olympic Steamship* fees, the more precise statement is that this Court in *Olympic Steamship* recognized an equitable exception to

situations where an insurer denies coverage, 117 Wn.2d at 52, and not to disputes over the amount of coverage, for example. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Here, *Ohio never denied coverage to MBC.* Under its argument, Ohio agreed to cover MBC's loss, but its obligation was excess to the limits of Trinity's coverage.

In any event, as the Court of Appeals noted in its opinion at 21, its decision is consistent with *Safeco Ins. Co. of Illinois v. Country Mutual Ins. Co.*, *supra*, where the court rejected a bid by an insurance carrier in an equitable contribution action to receive attorney fees under *Olympic Steamship* because the carrier had failed to show that it had received an express assignment of rights from the insured. It was only seeking to recoup moneys it overpaid and that should have been paid by another insurer. *Id.* at 8-9. The exception of *Olympic Steamship* was inapplicable to such an inter-insurer dispute, just as here.

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the American Rule on fees as costs of litigation where an insured is compelled to bring suit against an insurer to secure coverage under the applicable policy. *McGreevy v. Or. Mutual Ins. Co.*, 128 Wn.2d 26, 37, 904 P.2d 731 (1995). This equitable exception is not a principle that allows fees to be recovered in inter-insurer disputes.

As with all equitable principles, a party seeking equity must do equity. The party must not have unclean hands. Here, Trinity's conduct was patently "unclean" in nature. This Court should not reward Trinity for its gamesmanship in *deliberately* waiting to seek entry of a default judgment for more than a year in order to make Ohio's effort to overturn the default judgment more difficult, br. of resp't at 5, 8-9, and its repeated misrepresentation to the lower courts that it had an actual assignment of rights from MBC, *supra*. Trinity failed to introduce the subrogation language from its policy until it belatedly filed a motion to expand the appellate court record under RAP 9.11 at the same time it filed its motion for reconsideration in the Court of Appeals.

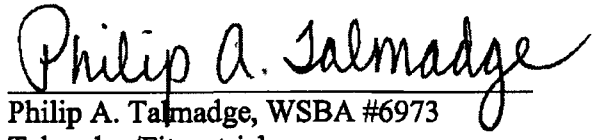
Review is not appropriate under RAP 13.4(b).

D. CONCLUSION

The Court of Appeals correctly determined that Trinity could not transform a dispute between insurers into an opportunity to allow it to seize MBC's valuable rights under the CPA, IFCA, and *Olympic Steamship*. In making its arguments, Trinity misleads the Court on the language of its subrogation clause and seeks to distort Washington law that protects insureds. The Court of Appeals decision is correct and this Court should deny review.

DATED this 14th day of October, 2013.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail a true and accurate copy of the Ohio Casualty's Answer to Trinity's Petition for Review in Supreme Court Cause No. 89331-4 to the following parties:

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Washington Supreme Court
Clerk's Office
415 12th Street West
Olympia, WA 98504

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

DATED: October 11, 2013, at Tukwila, Washington.

Irelis Colon, Paralegal
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Irelis Colon
Subject: RE: Trinity Universal Insurance Company of Kansas v. The Ohio Casualty Insurance Company - 89331-4

Rec'd 10-11-13

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Sent: Friday, October 11, 2013 2:14 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Trinity Universal Insurance Company of Kansas v. The Ohio Casualty Insurance Company - 89331-4

Dear Clerk:

Attached please find the Ohio Casualty's Answer to Trinity's Petition for Review for the following case:

Case Name: Trinity Universal Insurance Company of Kansas v. The Ohio Casualty Insurance Company

Supreme Court Cause No.: 89331-4

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Sincerely,

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