

72106-2

72106-2

NO. 72106-2

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS,

Appellant,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Respondent.

REPLY BRIEF OF APPELLANT

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DIVISION ONE
SEATTLE, WA

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I. SUMMARY OF THE REPLY

Trinity honored the terms of the policy it issued, construed it exceedingly broadly to protect its additional insured, and when Ohio Casualty violated *its* obligations to do the same, Trinity refused to let Ohio's intransigence prejudice the insured. Ohio now accuses Trinity of "overreaching" for seeking the application of the correct interest rate on money Ohio owed, but refused to pay. Despite its repetition of this colorfully pejorative term, Ohio's actual *legal* argument is weak, and the Court should reject it.

Ohio presents three arguments, each of which is addressed below. First, Ohio posits that the trial court lacked authority to modify any aspect of the Judgment other than to strip it of the IFCA, CPA and attorney fees awards. This argument fails because the trial court had authority to modify the Judgment to *conform* to this Court's ruling, and was not obligated blindly misapply Washington's interest statutes simply because this Court did not address that issue.

Second, Ohio argues that the legally proper rate of interest on this Judgment is the tort-interest rate in RCW 4.56.110. This is Ohio's only substantive argument, but it fails as well. Regardless of how Ohio attempts to re-frame the issue, the fact is that equitable subrogation allows the

paying insurer to “*step into the shoes*” of the insured, and assert rights, be they contractual or tort-based, that the insured has against others. In this case, the right being asserted by Trinity was a *contractual* right against Ohio – the Ohio policy’s provisions to provide Millennium a defense and indemnification. While Trinity certainly asserted tort rights against Ohio for bad faith claims handling, this Court excised entirely all of those claimed damages, and remanded for the trial court to correct the judgment to reflect *only* the claims for amounts due *under Ohio’s policy*. The judgment this Court directed the trial court to enter was not “founded on tortious conduct” under RCW 4.56.110.

Finally, Ohio argues that Trinity chose the tort judgment interest rate when it reduced the default to Judgment, and that it would be an unconstitutional violation of Ohio’s due process rights to apply the correct judgment interest rate to conform to this Court’s ruling on remand. Ohio is incorrect. *Of course* Trinity proposed a tort judgment interest rate in the original judgment, because more than two thirds of the original Judgment was “founded on tortious conduct” (the IFCA and CPA multipliers). However, there is no requirement that a plaintiff even plead that it is entitled to post-judgment statutory interest in order to receive it, so statutory interest on a default judgment cannot be a deprivation of due process. And Ohio’s inchoate argument that Trinity is “stuck” with the

tort-based interest rate as a kind of estoppel for failing to correctly prognosticate that only non-tort remedies would remain after appeal is not supported by a single citation is nothing more than rhetoric. The Court should reject this argument as well.

II. ARGUMENT

1. The trial court had both the right and the duty to apply to correct judgment interest rate on remand, in accordance with the basis for the Judgment, as articulated by this Court's Opinion.

Ohio argues that the trial court's only authority on remand was to correct the Judgment by removing those portions of it based on the IFCA, the CPA and the award of attorney fees. Anything more than that, Ohio argues, would be outside the power of the trial court on remand. Of course, even Ohio cannot take this argument seriously because Ohio had no objection at all to the trial court removing the portion of the interest award that was based on the part of the Judgment this Court reversed. If the trial court had no authority to "tamper" with the interest component of the Judgment, then the interest on remand should have remained entirely intact, on the principal amount of \$764,270.96. As Ohio argues, this Court did not address the issue of interest.

Of course that is not what Trinity requested, which indeed would have been overreaching, given this Court's Opinion. Ohio wants this Court to rule that the trial court had authority to alter the *amount* of

interest in its favor (even though this Court said nothing about it), but that the trial court lacked the authority to consider whether the *basis* for the Judgment shifted from tort to non-tort for purposes of computing interest. Ohio cites no authority to support this proposition, and misconstrues the authority cited by Trinity.

In support of its position, Trinity cited both *Yarno v. Hedlund Box & Lumber Co.*, 135 Wash. 406, 407, 237 P. 1002, 1003 (1925) and *White Pass Co. v. St. John*, 78 Wn.2d 188, 190, 470 P.2d 548, 550 (1970). In both of those cases, the appellate court remanded with instructions to correct the judgments that had been entered based on the appellate court's holdings. In neither of those cases did the appellate court address the impact that its rulings would have on the calculation of interest. In both of those cases, the defendant argued that the trial court had no authority to even award interest because the remand language did not "authorize" it. For example, in *Yarno* the defendant argued: "[T]he words 'and enter judgment for the reduced amount' must be taken literally as an expression of this court that no interest was recoverable." 135 Wash. at 407. And in *White Pass*, "In particular, respondent claims that since neither our opinion nor the remittitur made any mention of interest, there should be no interest awarded." 78 Wn.2d at 192.

Here, Ohio clings to the echoes of these depleted arguments, citing *Bank of America NA v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013), *rev. den.*, 179 Wn.2d 1027 (2014) for the proposition that “[T]he trial court cannot ignore the appellate court’s specific holdings and directions on remand.” This is precisely the argument that was raised and flatly rejected in both *Yarno* and *White Pass*. Trinity did not, of course, ask the trial court to “ignore” this Court’s specific holdings or directions. Instead, Trinity asked the trial court to apply this Court’s Opinion requiring that it “correct” the Judgment to correct *all aspects* of the Judgment, not just those that benefited Ohio. And as the courts held in *Yarno* and *White Pass*, the only thing that could be said about the fact that appellate courts did not mention interest was that it was an open question. “Indeed it would hardly seem necessary that the opinion of this court should make any reference thereto, inasmuch as interest is provided for in the statute. . .” *Yarno v. Hedlund Box & Lumber Co.*, 135 Wash. at 407.

The fact that neither *Yarno* nor *White Pass* address the specific issue of the rate at which interest should accrue is of no moment. These cases stand for the proposition that the trial court should apply interest, pursuant to statute, to the judgment that the appellate court orders it to enter, and that appellate silence on the issue of interest is not surprising nor controlling.

2. *The Judgment, as ordered to be corrected by this Court's Opinion, is not founded on tortious conduct.*

Ohio argues strenuously that the portion of the Judgment affirmed by this Court is based on its tortious conduct, and should carry only tort-based interest under RCW 4.56.110. Ohio is opportunistically mistaken about the nature of the rights that resulted in the portion of the Judgment affirmed by this Court. It must not be forgotten that the corrected Judgment represents the amount Ohio was obligated to pay *under the insurance contract* it issued to Millennium. Ohio also will have no explanation as to why it spent multiple pages briefing, to this Court in the last appeal, the basis of its claimed “meritorious defense” to Trinity’s claims by expounding on the meaning of the “other insurance” *contractual* provisions in its policy. But the answer is not a mystery; it was a contractual defense to a contractual claim.

There is nothing about the transfer of rights under the principle of equitable subrogation that changes those rights from “contractual” to “tortious.” In fact, the explicit holding of this Court was that the tort-based claims did *not* transfer by equitable subrogation; only the right to recover the cost of defense and indemnification (policy rights) did. As this Court ruled, “While both Trinity and Ohio may have had a duty to Millennium to defend and seek a reasonable settlement, *they did not owe one another that duty.*” *Trinity Universal Ins. Co. of Kansas v. Ohio*

Cas. Ins. Co., 176 Wn. App. 185, 204, 312 P.3d 976, 987 (2013) *review denied*, 179 Wn. 2d 1010, 316 P.3d 494 (2014) (emphasis added). Because Ohio owed Trinity no duty, the fount of liability was derivative: “[B]y virtue of completely defending and indemnifying Millennium, Trinity was equitably subrogated to Millennium with respect to losses it actually paid.” *Id.* at 205.

Thus the issue is what it means to be equitably subrogated to Millennium with respect to losses it actually paid. Washington law is clear that an insurer that is equitably subrogated to its insured steps “into the shoes” of its insured. “The insurer, the “subrogee”, has rights equal to, but not greater than, those of the injured party.” *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc.*, 119 Wn. 2d 334, 341, 831 P.2d 724, 728 (1992). “Equitable subrogation allows one party to step into the shoes of a second party who is owed a debt or obligation and to receive the benefit of that debt or obligation, in the absence of any contractual agreement or assignment of rights between those two parties or the debtor.” *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn. 2d 566, 573-74, 304 P.3d 472, 475 (2013).

No case in Washington has ever held that equitable estoppel, in and of itself, is either a tortious or a contractual “basis” for recovery. That is because this formulation of the issue is nonsense. It is the same as

asking if a judgment obtained by an assignee on an assigned right is based on a tort or contract. The assignment *itself* might be contractual, but that has no impact on basis for the judgment. For example, if someone negligently burns his neighbor's house down, and the homeowner makes a *contractual* assignment of her cause of action against the negligent neighbor to someone else, and the assignee obtains a judgment pursuant to those rights, that does not make the judgment "founded on contract."

The fact that contractual causes of action and tortious causes of action can both be transferred via equitable subrogation is well-recognized in Washington. "That insurance company recoveries, under their right of subrogation, most often flow from tort actions is quite natural, but without significance. Subrogation is an equitable principle *and applies to contract rights as fully as it does to tort actions.*" *Consol. Freightways v. Moore*, 38 Wn. 2d 427, 430-31, 229 P.2d 882, 884-85 (1951) (emphasis added). "The insurer is subrogated to respondent's contract right of indemnity. This *sustains the cause of action* against appellant for the identical reason that subrogation sustains a tort action where the plaintiff has been paid for his loss." *U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn. App. 823, 834, 16 P.3d 1278, 1284 (2001).

Here, Trinity might have asserted that it was equitably subrogated to recover tort damages against someone who actually caused Mr. Riley's

physical injury. A judgment on that basis would be “founded on tortious conduct.” This case, however, is based on Trinity’s equitable subrogation to contract rights. As this Court noted, Trinity and Ohio owed each other no duty – this is not an equitable *contribution* claim. ***Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.***, 176 Wn. App. at 204. Thus the only source of liability was Ohio’s contractual obligation to Millennium – a liability to which Trinity was equitably subrogated as to the amounts Trinity actually paid. The Judgment, as corrected, was not based on tortious conduct.

Ohio argues that this Court determined that Trinity’s rights against Ohio arose from Trinity’s own equitable subrogation rights as the paying insurer, not the rights of the insured. *Id. at 209*. That is true so far as it goes, but it is irrelevant. That comment was made with respect to Trinity’s entitlement to an award of attorney fees under *Olympic Steamship*, and the Court was distinguishing the rights of the insured *under Olympic Steamship* when asserted for the benefit of the insured or by another party through a written assignment versus the right of an insurer under “its own” rights as equitable subrogee. This Court applied the public policy enunciated in *Olympic Steamship*, and determined that that policy did not to apply where coverage is sought through equitable subrogation. This has nothing to do with whether the equitably subrogated rights, themselves,

were based on the contractual rights in the policy issued by Ohio Casualty. Indeed, this Court recognized that Trinity's Motion for Default "explained that these expenses should have been borne by Ohio alone, ***based on Ohio's policy with Millennium.***" *Id.* at 207 (emphasis added). The Judgment, as corrected, is not based on any tort.

Ohio also contends that if Trinity "stepped into the shoes" of Millennium, it had no damages because Millennium was entirely protected by Trinity and suffered no harm. This argument has been rejected in Washington. "It is a well settled rule in tort actions that a party has a cause of action notwithstanding the payment of his loss by an insurance company. The purpose of this rule is to implement the insurance company's right of subrogation, and not to afford the respondent a double recovery." *Consol. Freightways v. Moore*, 38 Wn. 2d 427, 430-31, 229 P.2d 882, 884-85 (1951). That case went on to apply this principal to equitable subrogation to contractual indemnity rights: "This cause of action is not defeated by the insurance company's payment of the judgment. The insurer is subrogated to appellant's contract right of indemnity." *Id.* at 431. The fact that Trinity protected Millennium from Ohio's wrongful refusal to defend and indemnify does not defeat a claim for equitable subrogation to Millennium's contract rights under the Ohio policy. The Court should reject this argument as well.

Finally on this subject, Ohio contends that the case of *Woo v. Fireman's Fund Ins. Co.*, 150 Wash. App. 158, 172, 208 P.3d 557, 564 (2009) controls, and mandates the application of the tort-based rate of interest where an insurer fails to defend and indemnify. That is a gross misreading of *Woo*. There, this Court ruled that all of the policy-based damages were *not* based on tortious conduct: damages for the breach of the duty to defend and indemnify were contract-based. *Id.* However, there was also a large award for tortious bad faith conduct, which dwarfed the contract-based remedies. Because the predominant share of the award was based on tort, the court applied the statutory rate of interest for judgments founded on tortious conduct. In reaching this conclusion, the Court described the components of the judgment in that case:

Here, the jury found by special verdict that Fireman's Fund acted in bad faith and awarded damages of \$750,000.00 to Dr. Woo. ***This sounds in tort.***

The court determined that the proportionate share of total defense expenses in the underlying action by Alberts against Dr. Woo that Fireman's Fund declined to defend against totaled \$71,554.95 in damages. ***This award sounds in contract.***

The court also awarded Dr. Woo \$250,000.00 based on the jury's finding of bad faith of Fireman's Fund and application of the remedy of insurance coverage by estoppel. ***This too sounds in tort.***

Id. at 172. (emphasis added)

Ohio cites *Woo* as a “decision [that] concluded that when the conduct of an insurer is at issue, such as the refusal to defend, the claim

sounds in tort and is subject to the tort interest rate in the statute.” *Brief of Res. at 15*. That is exactly the opposite of the actual holding of *Woo*, which held that the failure to pay defense fees required by the policy resulted in an “award [that] sounds in contract.” In the case at bar, the Court removed all of the bad-faith tort-like damages that led this Court in *Woo* to conclude that the tort damages were the predominant components of the award. The result is the same in *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wash. App. 912, 927, 250 P.3d 121, 130 (2011), where this Court held, “Nevertheless, the judgment against Mutual of Enumclaw was based primarily on tortious bad faith conduct.” The Judgment in this case, as corrected, is not based on tortious bad faith conduct *at all*.

Because the Judgment, as correct, is not based on tortious conduct, the Court should remand this case for the trial court to award interest at the rate of twelve percent, *nunc pro tunc*, to the original date of the Judgment, in accordance with its previous Opinion as to the principal amount.

3. Awarding interest at the correct statutory rate is not a deprivation of Ohio Casualty's Due Process rights.

Ohio’s last argument is that awarding interest at twelve percent would violate its Due Process rights. Ohio argues that a “defendant has a due process right to assume that a default judgment will not exceed or substantially differ from the demand stated in the complaint,” citing

Conner v. Universal Utils. 105 Wn.2d 168, 173, 712 P.2d 849 (1986). Ohio argues that correcting the post-judgment interest rate would be “add[ing] new damages” to that judgment. *Brief of Res. at 19*. This argument is predicated on the mistaken belief that a party must plead entitlement to post-judgment statutory interest in the first place.

There is no authority that requires a plaintiff to plead entitlement to post-judgment interest; it is a statutory requirement where a court enters judgment. RCW 4.56.110. “In any event, regardless of who prepared the form of judgment, it is the responsibility of the court to enter a judgment which complies with the statute.” *Safeco Ins. Co. of Am. v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 23, 680 P.2d 409, 422 (1984). Applying the substantially identical federal interest statute,¹ the court in *Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1104 (7th Cir. 1990), held that the award of statutory interest was mandatory, and was appropriate regardless of whether prayed for the in complaint. This approach is consonant with Washington law, and Ohio cites no case to the contrary. Never on appeal did Ohio object to an award of statutory interest – only (now) to the rate of interest, which has nothing to do with the right to

¹ (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. 28 U.S.C.A. § 1961

statutory interest itself. And it is the “Court’s responsibility to enter a judgment which complies with the statute.” *Id.* Because there is no requirement to plead entitlement to statutory post-judgment interest, Ohio had no right to rely Complaint to presume it would not be ultimately liable for such interest. There is no due process violation, and the Court should reject this argument as well.

III. CONCLUSION

For the reasons provided above, Trinity respectfully requests that the Court reverse the trial court’s order correcting and satisfying the Judgment, and remand with instructions to apply the statutory interest rate of twelve percent from the date the Judgment was originally entered.

Respectfully submitted this 17th day of December 2014.

HACKETT, BEECHER & HART



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CERTIFICATE OF SERVICE

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Signed in Seattle, Washington this 17th day of December 2014.



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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TRINITY UNIVERSAL INSURANCE
COMPANY OF KANSAS,

NO. 72106-2

Appellant,

AMENDED CERTIFICATE
OF SERVICE

v.

THE OHIO CASUALTY INSURANCE
COMPANY,

Respondent.

Linda Voss declares, under penalty of perjury, that on December 17, 2014 she sent a copy of the Reply Brief of Appellant to Alfred Donohue of Wilson Smith Cochran Dickerson, 901 Fifth Avenue, Suite 1700, Seattle, WA, via ABC Legal Services and on December 18, 2014 to Philip A. Talmadge, 2775 Harbor Avenue SW, 3rd Floor, Suite C, Seattle, WA, via Washington Legal Messenger and facsimile 206 575 1397.

Signed in Seattle, Washington this 18th day of December 2014.

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Linda Voss, Legal Assistant
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