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No. 33379-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES and DEBORAH SHARBONO,
individually and the marital community
thereof; CASSANDRA SHARBONO,

Respondents/Cross-Appellants,

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
a foreign insurer;

Appellant/Cross-Respondent,

and

LEN VAN DE WEGE and "JANE DOE" VAN
DE WEGE, husband and wife and the marital
community composed thereof,

Cross-Respondents.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT
UNIVERSAL UNDERWRITERS INSURANCE CO

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A. INTRODUCTION

The Sharbonos' brief of respondent/cross-appellant, despite its often harsh and unfounded rhetoric, unsupported by citations to the record, offers nothing that should dissuade this Court, for the reasons outlined in the opening brief of Universal Underwriters Insurance Company (Universal), that the trial court's summary judgment decisions should be reversed and the judgment on the verdict of the jury should be vacated.

The trial court made a series of legal rulings on coverage under the Sharbonos' Universal policy that simply cannot be justified under the language of that policy. At its most basic, after writing a 100-page brief, the Sharbonos still misstate the basic language of Universal's commercial umbrella coverage and torture its language to argue such commercial coverage was applicable to Cassandra Sharbono's negligent conduct in operating a personal vehicle for an entirely personal purpose. Similarly, despite a clear intent in the Universal policy to *forbid* stacking of coverage limits, the Sharbonos argue the trial court was correct in ignoring anti-stacking language in the policy and condoning stacking of coverage limits.

The trial court also found Universal guilty of bad faith as a matter of law for violating WAC 284-30-330(7) when there was a question as to whether that regulation even applied here and there were genuine issues of material fact to be resolved as to whether Universal acted in bad faith by

not producing its entire proprietary underwriting file. The trial court then compounded these errors by conducting a trial on causation and damages in a bad faith case under the Consumer Protection Act, RCW 19.86 (CPA) that deprived Universal of a fair trial, resulting in an enormous, and unjustified, verdict in favor of the Sharbonos.

Again, after writing a 100-page brief, the Sharbonos cannot identify any authority for their contention Universal was obligated to turn its entire proprietary underwriting file over to them, nor do they indicate a single piece of information that file contained that affected their settlement negotiations with the Tomyns. Throughout such negotiations, they knew they had a disagreement with Universal over the extent of their coverage limits. The underwriting file's contents did not alter that fact. Ironically, the Sharbonos now contend the entire contents of that file, which did not give them the "smoking gun" documents on coverage they wanted, are irrelevant.

The trial court's coverage, bad faith, and damages decisions should not stand.

B. RESPONSE TO SHARBONOS' COUNTER-STATEMENT OF THE CASE

Notwithstanding their lengthy and often improper Counter-Statement of the Case, Br. of Resp'ts at 4-22,¹ the parties largely agree on the facts and procedure below as set forth in Universal's opening brief, with some significant exceptions. For example, the Sharbonos assert Len Van de Wege somehow conceded the Sharbonos asked for \$3 million in personal umbrella coverage. *Id.* at 8-9. This is not contrary to Van de

¹ Beginning with the Introduction to their brief, Br. of Resp'ts at 1-3, and extending into their Counter-Statement of the Case, Br. of Resp'ts at 4-22, the Sharbonos engage in ad hominem attacks on Universal and offer argumentative claims unsupported by the record. When a litigant resorts to such descriptions as "Universal struggles mightily . . ." (Br. of Resp'ts at 5); "curry this Court's favor by shading facts to help redefine the issues . . ." (*Id.* at 6); "Universal uses misstatements and half-truths . . ." (*Id.* at 8); ". . . but Universal does not tell all . . ." (*Id.* at 13); "again misrepresents . . ." (*Id.* at 14); "greatest inaccuracy . . ." (*Id.*); "It [Universal's brief] is one-sided, and permeated with overstatements, innuendos, misrepresentations, argument, and misstatements." (*Id.* at 22), it is clear that litigant has moved from a fair factual recitation into argument forbidden by RAP 10.3(a)(4). This Court should reject such tactics and disregard the "facts" claimed by the Sharbonos that are not grounded in the record.

RAP 10.3(a)(4) requires that a statement of the case be a fair statement of the facts and procedure relevant to the issues presented on appeal, without argument. There is a certain irony in the Sharbonos' citation to that provision of the Rules of Appellate Procedure in their brief at 21-22 when their brief so frequently violates that very rule. Their counter-statement of the case contains repeated argumentative statements and commentary.

Additionally, there must be a reference to the record for each factual statement of the case. RAP 10.3(a)(4); RAP 10.4(f). Long passages in the Sharbonos' brief lack any references whatsoever to the record. This failure to cite to the record makes it difficult for Universal, or the Court, to appropriately analyze the brief, and to respond to the factual assertions.

Where a brief contains factual material not supported by the record, such facts should be disregarded. RAP 10.7; *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995). The need for appropriate citations to the record was made clear in *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992), where the Court sanctioned counsel for failing to provide the necessary citations to the record to enable the Court of Appeals to properly consider the case. *See also Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999).

Wege's trial testimony in which he specifically denied the Sharbonos sought \$3 million in personal umbrella coverage. RP 1437-38, 1626; Ex. 31.

The Sharbonos also assert Deborah Sharbono did not sign a \$2 million personal umbrella application, implying that this application was somehow "forged." *Id.* at 9-14. The Sharbonos neglect to cite to the record for extensive passages in that portion of their brief. The record indicates Mrs. Sharbono signed that application, contradicting her trial testimony that she always insisted on \$3 million in personal umbrella coverage. Notwithstanding her later protests to the contrary, Mrs. Sharbono's February 7, 1997 application for \$2 million in personal umbrella coverage with Universal, Ex. 1, continued the exact coverage limits the Sharbonos had with State Farm (the Sharbonos do not dispute the fact they carried \$2 million in personal umbrella limits with State Farm until 1997). RP 1135, 1437. The Sharbonos initially wanted \$2 million in personal umbrella coverage and later decreased those limits to \$1 million. *See generally* Br. of Appellant at 8-11.²

Finally, the Sharbonos recount at length the conflict they had with Universal, the settlement negotiations they had with the Tomyns, and the

² The focus of the case below was not so much the Sharbonos' personal umbrella coverage in Part 970, but the commercial umbrella coverage in Part 980 of the Universal policy which had coverage limits of \$3 million. *See* Br. of Appellant at 31-32.

“meditation” [sic] proceedings. Br. of Resp’ts at 14-21.³ Missing from this recitation is any reference to the fact Universal promptly offered to pay the \$1 million limits of its personal umbrella coverage to the Sharbonos for the mediations to settle the case, Ex. 10, and made extensive portions of its files that were not proprietary available to the Sharbonos and their counsel. RP 1295-97; Exs. 10, 16, 19, 27. The Sharbonos’ counsel never reviewed those documents. RP 1295.

In their discussion of the negotiations with the Tomyns and the settlement they ultimately achieved with the Tomyns, the Sharbonos omit reference to the fact that they tentatively settled with the Tomyns in October 2000, culminating in a formal settlement on March 30, 2001, Br. of Appellant at 17-18; their negotiations with the Tomyns focused as much on their desire to get money from Universal as on their liability exposure, *id.* at 17 n.9, 70-71; and the settlement exonerated them from any personal liability whatsoever. *Id.* at 71.

C. ARGUMENT

The Sharbonos provide a description of the standard of review for orders on summary judgment that is largely correct. Br. of Resp’ts at 24. A court grants summary judgment if there is no genuine issue as to any

³ Again, extensive passages in this portion of the Sharbonos’ brief have no citation to the record.

material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and inferences from these facts are construed in a light most favorable to Universal, as the nonmoving party; a court should grant summary judgment if from the evidence before the court, “reasonable persons could reach but one conclusion.” *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).⁴ This Court reviews such a decision de novo. *Id.*

(1) Principles for Insurance Policy Interpretation

The Sharbonos articulate a number of principles for insurance coverage in their brief. Br. of Resp’ts at 25-27, 50. However, they omit crucial interpretive principles in the case law and contend that insurance policies should be interpreted in accordance with the understanding of the “average man [sic].” *Id.* at 25. For example, the Sharbonos omit any reference to a critical aspect of Washington insurance law that requires this Court to reasonably interpret a policy to avoid “a strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective.” *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.’ Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988) (principles of construction look to the commercial context of the coverage). Moreover,

⁴ The Sharbonos omit any reference to the “single conclusion” standard in *Wilson* in their brief.

the Court must consider the entire policy giving force to each clause. *Id.* at 457.

The Sharbonos also criticize Universal's contention, Br. of Appellant at 37 n.23, that the policy should be interpreted in a commercially reasonable fashion. Br. of Resp'ts at 41-42 n.5. They cite *Boeing Co. v. Aetna Cas. & Surety Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990) in support of their position. That case, however, stands for the unremarkable proposition that the average person standard for interpreting insurance policies applies even to corporate enterprises. *Id.* at 883.

Washington contract law provides that where two business entities enter into an agreement, that agreement will be given "a commercially reasonable construction." *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998).

In the insurance context, treatise author Thomas Harris states that the context of the parties' negotiations for insurance coverage leading to the issuance of an insurance policy is important for the courts' interpretation of that policy. Thomas V. Harris, *Washington Insurance Law* (2d ed.) (hereinafter "Harris") § 6.1-6.2 at 6-1 to 6-7. This Court's focus in interpreting an insurance policy is to determine what the parties intended at the time of contracting. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 78-79, 882 P.2d 703 (1994); *Eurick v.*

Pemco Ins. Co., 108 Wn.2d 338, 340, 738 P.2d 251 (1987). As Harris notes, the context of the parties' negotiations leading to the policy, including their conduct, and the structure of the policy, should be viewed as sources of the parties' intent. Harris, *id.* at 6-3.

By contrast, the Sharbonos invocation of the reasonable person purchasing insurance standard as their mantra in their brief confuses that interpretive guide with the reasonable expectations of the insured test rejected by our Supreme Court. The reasonable person standard merely means policy language will be given the interpretation an average person would give to the language, rather than the technical interpretation of the judge or legal scholar. *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966 (1974).

However, Washington courts have adopted a non-technical interpretative principle for policy language (reasonable person purchasing insurance). However, those same courts have not adopted the presumption in favor of coverage based on the reasonable expectations of the insured. The Sharbonos appear to argue because they intended certain coverage to apply, this Court should honor that subjective intent as if it were part of the policy. This approach has been consistently *rejected* by our Supreme Court. *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 123 Wn.2d 678,

684, 871 P.2d 146 (1994); *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 485, 687 P.2d 1139 (1984).

These interpretative principles are not merely an academic exercise. They prevent a party like the Sharbonos from arguing, for example, that the Universal policy had two umbrella coverages for personal vehicles, rather than one for commercial coverage and one for personal, or that despite multiple *anti-stacking* provisions, the Sharbonos could *stack* coverages.

(2) The Sharbonos Had No Coverage for Their Daughter's Personal Use of a Family Vehicle under Universal's Commercial Umbrella

The Sharbonos ask this Court to allow coverage for their daughter Cassandra's liability arising out of her use of a personal, noncommercial vehicle, for a personal, noncommercial purpose under the commercial umbrella coverage in the Universal policy. Br. of Resp'ts at 22-43. They appear to argue, without citation to any authority for this proposition, that the commercial umbrella coverage in the Universal policy should afford them coverage, as owners of Cassandra's noncommercial vehicle, for any liability they experience vicariously for Cassandra's fault. *Id.* at 31. To interpret the Universal policy in the fashion argued for by the Sharbonos, and adopted by the trial court, requires this Court to ignore the structure and commercial context of the Universal policy.

First, the Universal policy provided *two distinct umbrella coverages*. In Part 970, Universal provided \$1 million of coverage in excess to the family's underlying State Farm automobile liability insurance policy for any liability arising out of the use of the Sharbonos' personal vehicles; in that part, the *personal* umbrella coverage, Universal insured individuals, and these individuals did not necessarily have a connection to any business. RP 1445, 1580, 1582, 1584. Part 970 specifically referenced the Sharbonos' underlying auto liability, homeowners, and motorhome coverages with State Farm. CP 41; Part 980 references underlying commercial coverages to which it is excess. CP 42, 179.

A careful reading of the Sharbonos' brief indicates that *at no point* in any of its argument on coverage under the commercial umbrella coverage, Part 980, does that brief even reference Part 970. Br. of Resp'ts at 22-43. These two umbrella provisions were plainly intended to provide *distinct* coverages.

As noted in Universal's opening brief, Part 980, by contrast, provided *commercial* umbrella coverage for the Sharbonos' commercial operations. Br. of Appellant at 29-34. The Sharbonos offer an elaborate construction of Part 980 that flatly *ignores* Part 980's definition of an insured. The Sharbonos claim Part 980 is not a *commercial* umbrella

coverage. Br. of Resp'ts at 26-27. But they can only arrive at this self-serving conclusion by cherry picking the definition of "insured" from the general conditions of the policy, *id.* at 28-29, and entirely ignoring the specific definition of insured in Part 980:

- (a) YOU (and YOUR spouse if YOU are a sole proprietor); if YOU are a sole proprietor, coverage applies only to YOUR business activities as covered by the UNDERLYING INSURANCE;
- (b) any of YOUR partners and their spouses, paid employees, directors, executive officers, or stockholders, while acting within the scope of their duties as such;
- (c) any other person or organization named in the UNDERLYING INSURANCE (provided to the Named Insured of this Coverage Part) but not for broader coverage than provided to those persons or organizations in the UNDERLYING INSURANCE.

CP 258. This definition makes unambiguous the *commercial* purpose of Part 980. Cassandra Sharbono was not an insured for this commercial umbrella coverage either in the All Transmission & Automotive policy (CP 31, 42) or the Trans-Plant policy (CP 171, 179).

To adopt the Sharbonos' interpretation of the Universal policy would mean this Court must conflate the two umbrella coverage parts. Under the Sharbonos' theory, Universal would offer *both* personal and commercial umbrella coverage under Part 980 *and* personal umbrella coverage under Part 970. Such a duplication of coverages makes no sense

in the real world; the coverages are distinct. It would be a commercially unreasonable, absurd reading of the policy to believe Universal offered such overlapping provisions.⁵

Washington law has long recognized that so-called garage policies like Universal's do not provide coverage for a business owner's personal vehicles. *See also* Br. of Appellant at 36 (cases holding insured may not be covered under commercial policy for personal activities). In *American States Ins. Co. v. Breesnee*, 49 Wn. App. 642, 745 P.2d 518 (1987), the Court of Appeals upheld a judgment for the insurer where Breesnee, the owner of a car lot, sought coverage for an accident involving his 17-year-old son using a personal vehicle. The vehicle in question, a TransAm, was not listed in Breesnee's name nor in the car lot's name. The Court found that under a reasonable construction of the garage policy there was no intent to cover the son's personal use of the vehicle under the garage policy. *Id.* at 646-47.

Similarly, in this case, there was no coverage under a commercial umbrella coverage in Universal's All Transmission & Automotive policy

⁵ The very fact that the Sharbonos purchased a personal umbrella coverage evidences the fact they knew their commercial coverage did not extend to occurrences like Cassandra's collision. *Atlantic Mut. Ins. Co. v. Hillside Bottling Co.*, ___ A.2d ___, *10, 2006 WL 2265032 (N.J. App. Div. 2006); *Zito v. Firemen's Ins. Co.*, 36 Cal. App. 3d 277, 285, 111 Cal. Rptr. 392 (1973).

for Cassandra Sharbono’s personal use of a personal vehicle never used in the Sharbonos’ business enterprises.

A second reason to reject the Sharbonos’ interpretation of Part 980 is that their interpretation reads out of the policy the preamble and declarations page. A court is obliged to honor the language of the whole policy, omitting no parts as superfluous, and giving force and effect to every clause in it. *Tyrrell v. Farmers Ins. Co.*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000); *Pub. Util. Dist. No. 1 of Klickitat County v. Int’l Ins. Co.*, 124 Wn.2d 789, 797, 881 P.2d 1020 (1994). Those portions of the policy make clear that the commercial umbrella coverage of Part 980 was unavailable to Cassandra Sharbono.

The Sharbonos assert that an unpublished Ohio appellate court decision,⁶ *United Ohio Ins. Co. v. Metzger*, 1999 WL 84201 (Ohio App. 1999), allegedly stands for the proposition that Universal “conceded that individuals who are designated insureds are covered under [Part 980].” Br. of Resp’ts at 42. The Sharbonos blatantly misrepresent the holding in

⁶ RAP 10.4(h) provides that a party may not cite as authority any unpublished opinion of the Washington Court of Appeals. This rule, however, has been extended by case law to include unpublished opinions from other jurisdictions. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 471, 45 P.3d 594 (2002). This Court has made explicit its view that unpublished opinions have no precedential value and should not be cited by a party in its brief. *Skamania County v. Woodall*, 104 Wn. App. 525, 536 n.11, 16 P.3d 701, review denied, 144 Wn.2d 1021 (2001). Division I of the Court of Appeals imposed a \$500 sanction against an attorney who cited and discussed at length an unpublished opinion of that Court. *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000), review denied, 143 Wn.2d 1024 (2001).

that case. Both spouses were sued in the case for the negligent maintenance of a fuel storage tank at the family home which was used for personal and business purposes; the central issue in the case was whether the fuel tank had a commercial use.⁷ The husband was listed as an insured under item 2 in the policy's declarations page for Part 980. Universal stipulated in the trial court *the wife* was also an insured. This is hardly a revolutionary stipulation as to a marital community. It is a far cry from a general concession that persons not named in the declarations page are covered under Universal's Part 980, as the Sharbonos contend.

The Sharbonos complain about the preamble to the policy which indicates the various coverage parts apply only to persons designated in the declarations and each coverage part is a separate contract of insurance. Br. of Resp'ts at 34-35. Far from being unusual, this is a separability clause, long recognized in Washington insurance law. *Pac. Indem. Co. v. Thompson*, 56 Wn.2d 715, 716, 355 P.2d 12 (1960). Moreover, Washington law is also clear that an insurance policy is not rendered ambiguous because the relevant coverage language is not contained within a single clause or page or because coverage is determined by examining several provisions in the policy. *Safeco Corp. v. Kuhlman*, 47 Wn. App.

⁷ The case is also distinguishable because it deals with premises liability for which Part 980 offered excess coverage. It has nothing to do with vehicle use.

662, 665, 737 P.2d 274, *review denied*, 108 Wn.2d 1037 (1987); *Doyle v. State Farm Ins. Co.*, 61 Wn. App. 640, 644, 811 P.2d 968, *review denied*, 118 Wn.2d 1005 (1991). Each coverage part of the Universal Unicover policy is a separate contract made up of its specific provisions and that portion of the declarations page pertaining to the coverage part, as the Florida appellate court has held. *Dick Courteau's GMC Truck Co. v. Comancho-Colon*, 498 So.2d 1023, 1026 (Fla. App. 1986) (“each coverage part is a separate contract made up of its provisions and that portion of the declarations sheet pertaining to it.”).

Cassandra Sharbono was covered under the personal umbrella coverage of the Universal policy for All Transmission & Automotive (Part 970), CP 31, 41, 113, as Universal has readily acknowledged throughout this case, but she was not covered under the commercial umbrella coverage (Part 980), CP 31, 42, 119, as the declaration page and the definition of insured clearly delineate. (She was never covered under the Trans-Plant policy, CP 171, 179.) The Sharbonos appear to contend that they are covered under Part 980, the commercial umbrella coverage, for their vicarious liability arising from Cassandra's use of a personal vehicle

for her personal purposes.⁸ They misread the language of the insuring agreement to arrive at this very strained interpretation of the policy. The policy was to be excess of any underlying employer's liability and wrongful termination coverages, not the family's personal insurance policies. CP 41, 179. Part 980's insuring agreement so stated. CP 119, 255.

Part 980 clearly focused coverage on business-related activities. CP 122, 179, 258. The definition of an insured included the named person for that person's business activities, business associates and spouses while acting within the scope of their business duties, or other persons or organizations named in the underlying wrongful termination and employer liability coverages. *Id.* Neither Cassandra, nor the Sharbonos met these requirements.

Similarly, for auto use, the named insureds (All Transmission & Automotive or Trans-Plant) are covered, as well as any other designated persons, CP 31, 42, 171, 179-80 (for Part 980, Casey Ray, Jr., Claudia Ray, and James Sharbono) for business use of an auto or personal use of a leased auto. Part 980 says nothing about insuring children while on personal business.

⁸ The Sharbonos never made this argument below on summary judgment. CP 315-31, 448-45. They may not make it here for the first time. RAP 2.5(a).

Simply put, where there was no coverage under Part 980 for Cassandra's use of a personal vehicle for a personal purpose, there was similarly no coverage under that part of the Universal policy for the Sharbonos' alleged vicarious liability arising from Cassandra's conduct.

(3) The Sharbonos Were Not Entitled to Stack the Umbrella Insurance Coverages in Universal's Policy

The Sharbonos also ask this Court to adopt the apparent analysis of the trial court that because the multiple *anti-stacking* provisions in Parts 970 and 980 of the Universal policy were "ambiguous," the *stacking* of coverages in that policy should be allowed. Br. of Resp'ts at 43-51. The Sharbonos go so far as to argue "the average person purchasing insurance" interpretive guide requires this result. *Id.* at 50. To the contrary, it is highly doubtful an average person would so torture the language of this policy to find two *anti-stacking* clauses could be somehow artfully construed to affirmly justify stacking of coverage limits.⁹

The Sharbonos' citation to cases that predate the 1980 legislative authorization of anti-stacking clauses in UIM policies as authority for stacking here is misleading. The Sharbonos neither cite nor discuss RCW 48.22.030(5-6). Similarly, they neglect to discuss any of the authorities

⁹ If the anti-stacking provisions were ambiguous (which they are not), the trial court should have applied the anti-stacking provision most favorable to the insureds rather than allowing stacking.

cited in Universal's brief regarding internal or external anti-stacking clauses. Br. of Appellant at 37-41.

The Sharbonos' argument on the stacking issue betrays a plain misunderstanding of the nature of excess or umbrella coverage, and anti-stacking clauses. For example, the Sharbonos assert: "The umbrella limits cannot be both excess of underlying limits and reduced by the underlying insurance." Br. of Resp'ts at 47. However, it is the essence of umbrella or excess insurance that it applies *only after the underlying limits are exhausted*. See Br. of Appellant at 35.

Absent an anti-stacking clause, because each coverage part of the Universal policy is a separate contract of insurance, an insured could stack the limits of liability for each internal coverage part to the extent it applied to the insured, and stack the liability limits of each external, non-Universal insurance policy to the extent it provided coverage. See generally *Britton v. Safeco Ins. Co. of America*, 104 Wn.2d 518, 532, 707 P.2d 125 (1985) (differentiating between internal/external stacking); Harris, *supra* at § 39.1. RCW 48.22.030(5-6) articulated the public policy in Washington on stacking UIM coverages. A similar public policy applies in other forms of liability insurance where "other insurance" clauses are present. Harris at § 51.1. An insurer like Universal may prohibit *both* the stacking of limits

internal to the policy (such as the various coverage parts of the Universal policy) and those limits applicable from other insurers' policies.

In this case, Universal was entirely unambiguous in its intent to *forbid* stacking of limits. Universal had an anti-stacking provision in its general conditions applicable throughout the two policies. CP 57, 193. Parts 970 and 980 each had its own anti-stacking provision in those two parts of the Unicover policy. CP 118, 127, 254, 263.

The Sharbonos claim the latter anti-stacking policies are ambiguous by their terms and therefore, they are entitled to the reasonable interpretation most favorable to them. *State Farm Mut. Auto. Ins. Co. v. Johnson*, 72 Wn. App. 580, 871 P.2d 1066, *review denied*, 124 Wn.2d 1018 (1994). Their argument is that the anti-stacking provision in Parts 970-980 are so ambiguous there can be no interpretation enforcing an anti-stacking directive.

That argument flies in the face of the clear intent of the policy. The anti-stacking clauses in Parts 970-980 must be read in *pari materia* with the general conditions in the policy. It would be entirely unreasonable to believe Universal intended to allow stacked coverages when the language of the policy repeatedly *prohibited* stacking. In any event, they must also read in conjunction with RCW 48.22.030(5-6) and the anti-stacking directive found there.

Finally, even if the Sharbonos were somehow correct that the anti-stacking provisions of Parts 970 and 980 in the Universal policy are inapplicable here, the anti-stacking provision in the general conditions of the Universal policy applies. The policy states: “The General Conditions apply except as amended or replaced in this Coverage Part.” CP 57, 118, 193, 254. Thus, to the extent the anti-stacking provisions in Parts 970 and 980 are inapplicable, for whatever reason, the anti-stacking provision in the general conditions of the Universal policy applies. This carries out the clear intent in the Universal policy to forbid stacking of coverages.

The policy interpretation offered by the Sharbonos, and adopted by the trial court, is strained and absurd. Universal expressed the clear intent in the Sharbonos’ Unicover policy to ban stacking; a policy interpretation that affirmatively allows such stacking is erroneous.

(4) The Tomy-Sharbono Settlement Was Not Reasonable

The Sharbonos do not even address the argument set forth in the Brief of Appellant at 41-48 that the Tomy-Sharbono settlement was not reasonable under RCW 4.22.060, *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 658 P.2d 1230 (1983), and *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339, *review denied*, 117 Wn.2d 1018 (1991). The determination that a settlement between the insured and a tortfeasor is reasonable is a necessary predicate to a bad faith claim against an insurer

like Universal. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 49 P.3d 887 (2002); *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22, review denied, 155 Wn.2d 1025 (2005).

The Sharbonos' silence in their brief on this point is a concession Universal's point of error is well-taken, *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (failure to respond to issue in brief concedes error); *State v. Mora*, 110 Wn. App. 850, 858, 43 P.3d 38, review denied, 147 Wn.2d 1021 (2002) (assignment of error unsupported by citations of authority deemed abandoned); this fact alone defeats the Sharbonos' claim of bad faith.

(5) The Trial Court Erred in Finding Universal Was Liable for Bad Faith as a Matter of Law

The Sharbonos *concede* that bad faith is ordinarily a question of fact under Washington law, but argue the trial court did not err in ruling here that Universal was guilty of bad faith as a matter of law under WAC 284-30-330(7). Br. of Resp'ts at 51-70. Bad faith as a matter of law is unavailable if reasonable minds can differ on the reasonableness of Universal's conduct. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 486, 78 P.3d 1274 (2003). Here, the Sharbonos *ignore* Commissioner Skerlec's ruling that the trial court committed obvious or probable error in directing Universal to provide its proprietary underwriting file to counsel for the

Tomyns. They contend without authority that ruling does not bear on Universal's duty to give them, rather than the Tomyns' counsel, the file. Br. of Resp'ts at 59. The Sharbonos also largely ignore the fact Universal provided them significant nonproprietary documents from its files, and identify no specific documents Universal withheld that they now deem were material. Br. of Appellant at 52.

First, as noted in Universal's opening brief, WAC 284-30-330(7) does not apply in this case. Br. of Appellant at 48-52. The Sharbonos give little, if any, attention to the actual language of WAC 284-30-330(7), which deals explicitly with *unreasonable settlement offers*. The Sharbonos distort the language of the rule, a rule whose purpose they *concede* is to assure that insurance companies do not use their financial power to browbeat insureds into disadvantageous settlements, Br. of Resp'ts at 67, to conclude that the rule somehow extends to the disclosure of documents. *Id.* The rule simply does not so state.

Second, an insurer's duty to an insured is to act in a fashion giving equal consideration to the insurer's interest as to the insured's. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000), *review denied*, 142 Wn.2d 1017 (2001); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002).

This standard, however, does not require an insurer to relinquish all of its proprietary rights in the face of an insured's demands.

The Sharbonos fail to cite *a single case* in support of the proposition that an insurer must provide proprietary underwriting information to the lawyers for the party making a claim against their insured. Thus, the Sharbonos' reference to Mr. Barcus' desire for the Universal underwriting file is not relevant. Br. of Resp'ts at 65-66. In fact, Commissioner Skerlec's ruling is powerful evidence of the fact that Universal had no obligation to provide such information to Ben Barcus, counsel for the Tomyns.

Third, in order for an insurer like Universal to be liable for bad faith under Washington law, the insurer's conduct need not be intentional bad faith or fraud but conduct overemphasizing its own interests. But a good faith mistake is not bad faith. At its most basic, the insurer's conduct must be unreasonable in light of all the facts and circumstances of the case before the insurer is guilty of bad faith. *Anderson*, 101 Wn. App. at 329; Br. of Appellants at 49-50. It is plainly because courts must assess the reasonableness of the insurer's conduct in light of the facts and circumstances of the case that bad faith is a question of fact. *Smith*, 150 Wn.2d at 485.

Washington cases finding an insurer acted in bad faith involve egregious situations where the insurer acted in derogation of the insured's interests. In *Anderson*, for example, the Court of Appeals found bad faith as a matter of law where the insurer failed to disclose the existence of UIM coverage to an unrepresented insured, found no bad faith in the insurer's conduct of the investigation of the claim or in its delay in paying the claim, and found a fact issue for trial as to the amounts the insurer offered in settlement. In *Truck Insurance Exchange*, the insurer denied coverage and failed to defend the insurer without explanation and then offered a tardy, after-the-fact explanation with "a laundry list of exclusions without any analysis or correlation to the particular claims." 147 Wn.2d at 764. The insurer also lied about conducting a thorough investigation of the claim and did not respond to requests for meetings from the insured. In *Ellwein v. Hartford Accidental & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), *overruled by Smith v. Safeco Ins. Co.*, *supra*, the Supreme Court found there was no bad faith as a matter of law where an insurer made a low settlement offer in a UIM case based on its belief comparative fault applied to reduce the insured's recovery. However, the *Ellwein* court found bad faith as a matter of law where the insurer appropriated an expert witness it had secured for the insured in defense of the case against the insured for the UIM case. Recently, this

Court in *Holly Mountain Resources, Ltd. v. Westport Insurance Corp.*, 130 Wn. App. 635, 104 P.3d 725 (2005) declined to find bad faith where the insurer delineated its rationale for denying coverage and offered to reconsider its decision if additional information was provided to it by the insured. Nothing akin to the clear-cut misconduct outlined in the cases above is present here.

Here, there were fact issues precluding a determination Universal was guilty of bad faith as a matter of law. Universal was an excess insurer. Universal advised the Sharbonos the \$1 million in personal umbrella coverage was available to them. Exs. 10, 19, 24.¹⁰ It explained in detail to the Sharbonos why it believed this was the coverage to which they were due. *Id.* Despite settlement discussions and potential litigation between the Sharbonos and the Tomyns, it participated in mediation efforts and, upon the demand of the Sharbonos, as well as the lawyer for the Tomyns, it provided extensive nonproprietary documents about the extent of the Sharbonos' insurance coverage with Universal including their coverage applications and any other documents the Sharbonos signed or generated. Exs. 10, 19. Universal offered to provide additional proprietary materials if the Sharbonos could cite authority obligating the

¹⁰ The Tomyns' attorney demanded that Universal place the \$1 million "in escrow," Ex. 25, a demand Universal rightfully rejected. Ex. 27.

company to do so. *Id.* The Sharbonos' counsel provided no such authority. Ex. 22.

The Sharbonos did not articulate what they wanted from the Universal underwriting file. The letters exchanged between Maureen Falecki and Universal indicate quite clearly Falecki wanted "the complete underwriting files for the Sharbonos' three businesses," Ex. 56; she could provide no specific legal authority requiring their disclosure, Ex. 22; and she threatened to file suit and subpoena the files, *id.*, Ex. 23. But none of Falecki's communications with Universal identified what the Sharbonos believed that file contained that was essential for them. Exs. 22, 23, 56. They apparently wanted to undertake a fishing expedition to find documents to bolster their contention that there was more than \$1 million in personal umbrella coverage under the Universal policy; they colluded with the Tomyns' counsel to make this argument.¹¹

Underwriting files can often contain information reflecting an insurer's procedures used to evaluate risks, a vital internal business practice. Disclosure of such information would put the insurer at a

¹¹ There is a certain irony in the Sharbonos' argument that Universal's underwriting file was inadmissible because the file was "not relevant." Br. of Resp'ts at 71 n.9. It was only "irrelevant" after the Sharbonos learned it did not support their contention that Universal failed to provide additional coverage beyond the \$1 million in the personal umbrella coverage to them. The trial court erred in prohibiting its admission throughout most of the trial. Br. of Appellant at 57 n.31.

commercial disadvantage. Universal's reluctance to turn over its proprietary file, particularly to a party potentially in litigation with its insured, or even to its insured, was a legitimate position.

Finally, and most critically, the issue of what portions, if any, of an insurer's proprietary underwriting file must be produced to an insured negotiating with a claimant is an issue that is at least debatable. Commissioner Skerlec's ruling again is powerful support for the proposition that Universal legitimately asserted a proprietary interest in its underwriting file; the Commissioner discussed CR 26(b)(2) and stated:

The intent of the rule is to protect the insurer's privileged material and work product. Accordingly, discovery is limited to the existence and contents of insurance agreements and any other document pertinent to coverage that the insurer provided to the insured. Orland and Tegland, *Washington Practice*, Vol. 4, Author's Comments, 2000 pocket part, p. 6. The documents sought by Tomy do not fit within the clear language of the exception. Neither the parties, nor the superior court provided any authority for departure from the rule, and this court has found none.

CP 1427.

Where legal issues are unsettled, it is not bad faith as a matter of law for an insurer to take a legal position adverse to the insured. *See, e.g., Mencil v. Farmers Ins. Co.*, 86 Wn. App. 480, 487, 937 P.2d 627 (1997). *See also CalFarm Ins. Co. v. Krusiewicz*, 131 Cal. App. 4th 273, 31 Cal. Rptr. 3d 619, 633 (Cal. App. 2005) (no bad faith if there was genuine

issue, even if later found to be mistaken, of insurer's liability under existing law); *Morris v. Paul Revere Life Ins. Co.*, 109 Cal. App. 4th 966, 135 Cal. Rptr. 2d 718 (Cal. App. 2003) (insurer acts in good faith by asserting position that is not clearly contrary to established law); *Clemco Indus. v. Comm. Union Ins. Co.*, 665 F. Supp. 816, 830 (N.D. Cal. 1987) (trigger of coverage issue was "unsettled," hence insurer could argue noncoverage in good faith); *Safeco Ins. Co. of America v. Guyton*, 692 F.2d 551, 557 (9th Cir. 1982) (no bad faith where there is a genuine issue as to insurer's liability). There is no bad faith where there is a genuine issue in dispute. Where there is no legal authority on point, a genuine issue is by definition present. Indeed, if that were not the case, an insurer could never develop new case law, because it would be bad faith not to pay every claim for which a coverage defense had not been conclusively upheld by the appellate courts.

The Sharbonos cite no specific case that holds an insurer is obligated to turn over to an insured its proprietary underwriting file to an insured. Br. of Resp'ts at 53-64. They offer a pastiche of cases that allegedly support their argument. They assert the Civil Rules are not a

limiting principle for disclosure of an insurer's proprietary files. Br. of Resp'ts at 60-62. The cases they cite do not support their contention.¹²

Washington courts have on *rare* occasions determined that an insured's need for information may overcome a well-recognized privilege. The Sharbonos did not cite these cases to the trial court, and should be foreclosed from raising them at this late date. RAP 2.5(a).

In *Escalante v. Sentry Insurance*, 49 Wn. App. 375, 743 P.2d 832 (1987), *review denied*, 109 Wn.2d 1025 (1988), the Court of Appeals determined that a UIM insurer had a heightened duty of good faith. *Id.* at 385 n.7. Based on such a heightened duty, the Court of Appeals concluded an insured could discover privileged communications by an attorney with the insurer if the communications pertained to ongoing or future fraudulent conduct by the insurer or the insurer could show bad faith that was tantamount to civil fraud. *Id.* at 393-95. Work product material could be discovered only if the insured demonstrated "substantial need." *See also Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985). In *Escalante*, the insureds filed a motion to compel discovery.

¹² The Sharbonos' citation to the dissent in *Tran v. State Farm Fire & Casualty Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998), a case involving suspected insurance fraud in which the insurer asked for material financial information bearing on the possible fraud, is quite bizarre. Br. of Resp'ts at 62-64. They cite no authority for their apparent contention that the information they sought in this case was no different than what insurers "routinely" require of insureds. *Id.* at 62. Fraud hopefully is not a "routine" matter prompting an insurer to demand cooperation under a policy's cooperation clause in its investigation.

Escalante was overruled as to the duty owed by an insurer in *Ellwein*, 142 Wn.2d at 781 n.10.

The Court of Appeals in *Barry v. USAA*, 98 Wn. App. 199, 989 P.2d 1172 (1999) also recognized the right of an insured in a bad faith action involving improper claims handling to obtain work product materials. The trial court initially ordered an in camera inspection of the insurer's claim file, but the trial court reversed itself on reconsideration. The Court of Appeals concluded the insurer's claims files were not necessarily even work product and ordered in camera review of the claims files by the trial court on remand.

In this case, there is no definitive authority requiring Universal's underwriting file to be produced. The Tomyns filed a motion to compel its production in their litigation with the Sharbonos. This Court concluded it was obvious or probable error for the trial court to order its production to the Tomyns. The Sharbonos have offered no authorities permitting them access to Universal's proprietary underwriting file. The trial court erred in ruling as a matter of law that Universal was guilty of bad faith where the disclosure of the underwriting file was an issue upon which reasonable minds could differ and nothing in that file affected the Tomyn-Sharbono settlement.

(6) The Trial Court Deprived Universal of a Fair Trial in the Bad Faith Case

As recounted in Universal's opening brief, the trial court committed a number of prejudicial errors requiring this Court to reverse the judgment on the verdict of the jury. Br. of Appellant at 57-71. The Sharbonos' attempt to trivialize the significant evidentiary and instructional errors committed by the trial court is unpersuasive. Br. of Resp'ts at 70-90.

(a) Evidentiary Rulings

As noted in Universal's opening brief, Br. of Appellant at 57-62, the trial court abused its discretion in three respects: the court refused to advise the jury of this Court's Commissioner's ruling, the trial court allowed disclosure of the content of mediation proceedings, and the court permitted nondisclosed experts to render opinions.

(i) Commissioner's Ruling

The Sharbonos raise a number of arguments why the trial court did not abuse its discretion in preventing the jury from knowing of this Court's Commissioner's ruling. Br. of Resp'ts at 72-75. None of the arguments is persuasive.

First, the Sharbonos *acknowledge* they sought the admission of Judge Armijo's ruling, claiming it was apparently relevant to the issues of

causation and damages in the bad faith action. *Id.* at 74. Despite contending the trial court's decision was relevant on those trial issues, the Sharbonos make the entirely illogical argument that this Court's Commissioner's ruling disapproving of that decision as obvious or probable error under RAP 2.3(b) was not relevant. The jury was entitled to the whole picture; the trial court's decision excluding that evidence allowed the Sharbonos to paint Universal in the worst possible light.

Second, the Sharbonos claim that Universal was allowed to introduce "evidence that the Court of Appeals accepted Universal's appeal for review." *Id.* at 74. Their argument is disingenuous. The Armijo ruling came before the jury on numerous occasions; the trial court permitted the Sharbonos to discuss it at length. RP 406, 710-11, 746-48. By contrast, the trial court precluded Universal from disclosing *the contents* of the Commissioner's ruling. RP 747-50, 923-25. A *brief* mention of the ruling came before the jury in the testimony of Maureen Falecki, who testified in passing that the motion for discretionary review was granted. RP 747.

The trial court abused its discretion in allowing only a one-sided version of the decision on the disclosure of Universal's proprietary underwriting file to come before the jury.

(ii) Mediation Evidence

The Sharbonos claim the trial court did not abuse its discretion in permitting their witnesses to testify to what transpired at two mediations conducted in the case. Br. of Resp'ts at 76-78. In specific, the Sharbonos claim RCW 5.60.070 does not apply and, even if it did, Universal somehow waived its application by responding to the improper evidence they presented. Both arguments lack merit.

The Sharbonos do not deny the trial court's admission of evidence presented in the mediation sessions would be an abuse of discretion; they merely claim RCW 5.60.070 does not apply to the mediation sessions in this case because there was no court order to mediate, or no written mediation agreement. Br. of Resp'ts at 76. There is no record on either of the Sharbonos' contentions.¹³ But the Sharbonos read mediation confidentiality¹⁴ too narrowly and fail to discuss ER 408, the evidentiary rule that further reinforces Universal's argument.

ER 408 applies to this case. That rule states in pertinent part that evidence "of conduct or statements made in compromise negotiations" is inadmissible "to prove liability for or invalidity of the claim or its

¹³ There is no record of a written agreement between the parties or a court order in this case because the Sharbonos raise this contention for the first time on appeal in violation of RAP 2.5(a).

¹⁴ The 2005 Legislature adopted the Uniform Mediation Act, RCW 7.07 et seq. That statute applies to mediations like those conducted in this case. RCW 7.07.020(1). The confidentiality adopted there is also exceedingly broad. RCW 7.07.030.

amount.” The rule applies to mediation proceedings. *See generally* Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 La. L. Rev. 91 (1994). Even if the mediation confidentiality statute does not apply, ER 408 also forbids introduction of the evidence at issue here. Apparently, the Sharbonos *concede* the rule forecloses the introduction of such evidence as they neglect to argue to the contrary.

The Sharbonos also contend that Universal somehow “waived” the error because the evidence was presented at summary judgment, and in the reasonableness hearing. This argument also fails. Universal presented such evidence only *in response* to the Sharbonos’ initial presentation of the evidence.¹⁵ Universal is not obliged to be inert and decline to respond to the Sharbonos’ use of improper evidence. Karl B. Tegland, 5 *Wash. Prac. Evidence*, § 103.14 at 61 (introduction of evidence in response to

¹⁵ The record indicates the Sharbonos first put what transpired at the mediations into evidence. RP 343-45, 361-64, 429-30. The Sharbonos then offered even more evidence from the mediation. RP 667-69, 707-09, 778-79, 1125-27. The transcript passages the Sharbonos cite in their brief *responded* to the Sharbonos’ introduction of such evidence.

Similarly, any reference to what transpired in the mediation in Universal’s summary judgment pleadings principally involved references in passing in the exchange of correspondence between Universal and Ms. Falecki or Mr. Barcus. *See, e.g.*, CP 985-86, 989, 999-1000, 1006. Universal did not waive its right to enforce confidentiality in the mediation process when the Sharbonos attempted to open up the entirety of the two mediations to prove their case.

improperly admitted evidence does not constitute a waiver of the party's objection).

Finally, in a burst of hyperbole, the Sharbonos go so far as to assert Universal's argument on this issue is "unprincipled," Br. of Resp'ts at 77, as they claim the mediation privilege statute should not be read broadly. The Legislature, not Universal, articulated the principle supporting mediation privilege when it amended RCW 5.60.070 in 2005 and it enacted the broad confidentiality provision of the Uniform Act. Ch. 172, Laws of 2005. A central policy of the Act is confidentiality in mediation proceedings: "The stated intent of the UMA is the promotion of candor of parties through confidentiality, encouragement of prompt, economical, and amicable resolution of disputes, and advancement of the policy that decision-making authority in the mediation process rests with the parties." Final Bill Report, SB 5173, 2005 Reg. Sess. at 1. Far from "unprincipled," Universal's argument is entirely in accord with the public policy upon which mediation confidentiality as adopted by the Legislature by statute and by the Supreme Court by court rule is based.

The Sharbonos used evidence of what transpired at mediation to establish Universal's liability. The trial court abused its discretion in allowing them to do so. RCW 5.60.070; ER 408.

(iii) Undisclosed Experts

The Sharbonos contend that their attorney witnesses were not expert witnesses and could give wide-ranging opinions about the propriety of Universal's conduct. Br. of Resp'ts at 78-80. The Sharbonos misstate the nature of the testimony these witnesses were disclosed to render.

First, the Sharbonos *concede* they did not disclose Maureen Falecki, Ben Barcus, and David Bufalini as expert witnesses.

Second, they further *concede* that these witnesses gave wide-ranging testimony not merely confined to the facts in the case; they gave opinions. Br. of Resp'ts at 80.¹⁶ They gave expert opinions on the *legal effect* of certain actions as well as their opinions regarding Universal's conduct. Br. of Appellant at 61-62. Such expert testimony was beyond the purview of mere fact witnesses.

The principal case the Sharbonos cite in favor of their position, *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 947 P.2d 1275 (1997), is readily distinguishable. In *Kimball*, a physician was consulted by the plaintiff to evaluate her medical condition in connection with an industrial insurance claim. His deposition was taken in the plaintiff's civil case and

¹⁶ Ben Barcus, for example, declined to provide answers to questions regarding this case, claiming such information was protected by attorney-client or work product. RP 872-73. He testified to what a "reasonable attorney" would do. RP 780-84. This allowed the Sharbonos to have the best of both worlds: an expert who could render his opinion in the case but who could invoke privilege to foreclose cross-examination for his opinion's basis.

admitted into evidence because the physician was unavailable for trial. The Court of Appeals held the doctor was not an expert witness for purposes of CR 26(b) because his opinion was not acquired and developed in anticipation of the particular litigation, but from some other involvement. *Id.* at 175.

The status of the witness as an expert depends not on the witness' professional status, but whether the facts and opinions were obtained for the specific purpose of preparing for litigation. *In re the Matter of Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996). *See also In re Estate of Cooper*, 81 Wn. App. 79, 913 P.2d 393, *review denied*, 130 Wn.2d 1011 (1996) (accountant was expert where he prepared accounting for trustee and beneficiary challenged accounting).

The opinions offered by the expert witnesses here were opinions unnecessary to their earlier representation of either the Sharbonos or the Tomyns. Their opinions on Universal's culpability were developed in anticipation of this litigation. Moreover, Falecki and Barcus were far from disinterested witnesses. Falecki represented the Sharbonos and helped to develop the litigation strategy leading to the present lawsuit. Similarly, Barcus was counsel for the Tomyns; he or his counsel were present for the entire trial; and he and his law firm, through their fee agreement with the

Sharbonos and the Sharbono-Tomyn settlement agreement, had much riding on this litigation that he, like Falecki, helped to engineer.¹⁷

To allow witnesses like these, whose opinions were generated in anticipation of this action, to testify to their opinions without being disclosed as experts, only advances a policy of trial by ambush Washington courts have rejected. *See, e.g., Lybbert v. Grant County*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000).

The trial court abused its discretion in allowing the three witnesses to testify.

(b) Instructional Errors

As delineated in Universal's brief, Br. of Appellant at 62-66, the trial committed two prejudicial errors in instructing the jury on its prior rulings and on proximate cause.

(i) Instruction Number 5 – Prior Rulings

The Sharbonos contend that the trial court committed no error in giving instruction number 5 to the jury that recounted in detail its various rulings against Universal. Br. of Resp'ts at 80-82.

¹⁷ The assertion in the Sharbonos' brief that Mr. Barcus was entitled to special treatment in being allowed to remain in the courtroom throughout the case and then testify as an expert because "as a lawyer and an officer of the court [he] would not allow his testimony to be influenced by observing the proceedings," Br. of Resp'ts at 71 n.9 is naïve, particularly given Mr. Barcus' financial interest in the outcome of the case against Universal.

First, if this Court overrules any of the trial court decisions recounted in instruction number 5, reversal of the judgment on the verdict of the jury is necessary to repair the prejudice created by that instruction. The court's instruction unnecessarily detailed all of the ways the trial court ruled against Universal and this Court cannot know if one, or all, of those rulings was a basis for the jury's decision on proximate cause.

Second, far from "neutral" or "justified under the circumstances," the instruction needlessly emphasized the trial court's rulings against Universal. The decisions on coverage were essentially unrelated to the bad faith issue before the jury.

The Sharbonos cite two cases, *Hill v. Cox*, 110 Wn. App. 394, 41 P.3d 495, *review denied*, 147 Wn.2d 1024 (2002) and *Safeco Ins. Co. v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 680 P.2d 409 (1984) in support of the proposition that juries should be informed of prior rulings by the court. In *Safeco*, the Court of Appeals affirmed a trial court instruction informing the jury of a prior jury's ruling in a bifurcated trial. The Court approved the instruction to avoid having the second jury retry the issue resolved by the first jury. *Id.* at 6. The information was neutral and the second jury was told not to use the first verdict to affect its decision. *Id.*

In *Hill*, the instruction at issue was an "orientation" instruction given to the jury for the purpose of advising them about the nature of the

case in a neutral fashion informing them of findings of fact on liability and damages. *Hill*, 110 Wn. App. at 409. The Court of Appeals declined to find this instruction an unconstitutional comment on the evidence pursuant to article IV, § 16 of the Washington Constitution. *Id.*

By contrast, instruction number 5 was not an orientation instruction, nor was it necessary to avoid having the jury decide issues already resolved by the trial court. The trial court's rulings on coverage, stacking, or the reasonableness of the Tomy-Sharbono settlement had *nothing* to do with the jury's decisionmaking on bad faith. The trial court's instruction unduly emphasized its rulings against Universal, lending credence to the Sharbonos' contentions that Universal acted improperly.¹⁸

Most critically, the last paragraph of instruction number 5 is entirely misleading on Consumer Protection Act liability and conflicts with instruction number 12 on proximate cause. That paragraph clearly implies that Universal was liable for a Consumer Protection Act violation where it said "the court has also ruled that Universal acted in bad faith and violated Washington's Consumer Protection Act . . ." CP 2272. The jury could readily believe from this statement that its job was done: Universal

¹⁸ Where an issue is withdrawn from the jury's consideration such as liability, the brevity of the standard instructions stand in sharp contrast to the laundry list of prior

was liable. It is not at all clear from the instruction that proximate cause had to be decided before the jury could find Universal liable to the Sharbonos. Instruction Number 5 was erroneous.

(ii) Instruction Number 12 – Proximate Cause

The Sharbonos contend in their brief that they were entitled to a “substantial factor” proximate cause instruction based on WPI 15.02. Br. of Resp’ts at 82-86. Contrary to their assertion that Universal failed to offer any authority for its view that the substantial factor instruction is erroneous, Br. of Resp’ts at 82, Universal clearly articulated why the traditional proximate cause instruction is proper for a CPA case. Br. of Appellant at 64-65. For example, in *Blasick v. Yakima County*, 45 Wn.2d 309, 274 P.2d 122 (1954), the Supreme Court rejected the substantial factor approach in a CPA case. The Sharbonos did not address *Blasick* in their brief.

The substantial factor test was first applied by a two-justice “majority” in a medical malpractice case. *Herskovits v. Group Health Coop. of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983). Four justices signed a concurring opinion applying the traditional “but for” test of

rulings recounted in instruction number 5. See, e.g., WPI 23.01, 23.02 (instructions on liability where liability or negligence is admitted or directed).

proximate causation. The Supreme Court later *rejected* the substantial factor test in legal malpractice cases in *Daugert v. Pappas*, 104 Wn.2d 254, 262-63, 704 P.2d 600 (1985), a case the Sharbonos misleadingly cite in support of that test.

In fact, the Sharbonos neglect to fully acquaint this Court with the circumstances justifying a substantial factor instruction. For example, the *Daugert* court mentioned three situations from Dean Prosser's treatise on torts where a substantial factor instruction could be given:

First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the but for test. In such cases, it is quite clear that each cause has played so important a part in producing the result that responsibility should be imposed on it. Second, the test is used where a similar, but not identical, result would have followed without the defendant's act. Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.

Id. at 262. The Court of Appeals in *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 32, 935 P.2d 684 (1997), an asbestos liability case, echoed the *Daugert* court on the situations where a substantial factor instruction was proper, and noted further:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.

Id. at 30.

It is unclear why the Sharbonos neglected to apprise this Court of the circumstances for giving a substantial factor proximate cause instruction, but they were clearly not entitled to such an instruction here. *Under the Sharbonos' own theory of the case*, the only contributing force to a Consumer Protection Act violation was Universal's refusal to turn over its proprietary underwriting file, compelling the Sharbonos to litigate to obtain it. CP 2272, 2275. This was not like the situation in *Mavroudis*, where repeated exposures over time to asbestos resulted in harm to the plaintiff, no one exposure necessarily being the exposure that caused harm to the plaintiff. *See also Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995) (exposure over time to defendant's pesticide contained in mixture of pesticides applied by crop duster).

The securities cases cited by the Sharbonos are entirely inapposite. For purposes of the proximate cause instruction, the Sharbonos seem to confuse the nature of the business with the cause of the harm to them. Br. of Resp'ts at 84-85. The Sharbonos contend insurance is a regulated business like securities, and that is enough to justify a substantial factor proximate cause instruction. In fact, the securities cases they cite do not even address proximate cause in a tort liability setting. In *Haberman v.*

Washington Public Power Supply System, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987), the Supreme Court addressed the scope of liability of a seller of securities under RCW 21.20, the Washington Securities Act. The Court held that a securities “seller” was not simply someone who was in privity with the purchaser of the security but, using a test somewhat analogous to the substantial factor analysis, anyone who had the attributes of a seller substantially contributing to the dissemination of the security was liable under RCW 21.20. See *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 787 P.2d 8 (1990) (test for seller not met as to law firm giving professional advice to corporation issuing securities).

It is a far cry from the type of liability under the Securities Act to anything resembling a justification under Dean Prosser’s three factors for the giving of the alternative “substantial factor” instruction for proximate cause in a tort case.

The traditional “but for” instruction on proximate cause was the proper instruction here. *Blasick, supra*. This instruction was essential to a fair trial on bad faith for Universal. The Sharbonos had to show that but for Universal’s refusal to turn over portions of its proprietary underwriting file, they were harmed. The Sharbonos have never identified what information they lacked or specifically how they were harmed. A substantial factor instruction effectively relieved the Sharbonos of the

burden of proving but for Universal's failure to turn over the proprietary portions of its underwriting file, they were harmed.

(7) The Jury Award for the Sharbonos' Alleged Emotional Distress Was Excessive

The Sharbonos argue their award for emotional distress damages of \$1 million is justified even in the absence of any specific evidence of emotional distress they allegedly suffered. Br. of Resp'ts at 86-90. They *concede* they did not seek any medical treatment, *id.* at 88, and the trial court did not limit their alleged emotional distress to the period culminating in the execution of a settlement agreement that completely protected all of their personal assets from being reached to satisfy any judgment the Tomyns might obtain against them for Cassandra's negligence.¹⁹

The Sharbonos rely on two cases for their contention that the jury's award for emotional distress damages must stand – *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 116 P.3d 381 (2005) and *Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 122 P.3d 733 (2005), *review denied*, 157 Wn.2d 1011 (2006). Neither case supports the excessive jury verdict rendered here.

¹⁹ The failure of the trial court to so limit the duration of the emotional distress damages in its damages instruction, Instruction Number 13, CP 2280, was clear error.

In *Bunch*, the Supreme Court again noted that the standard of review for an excessive jury verdict is abuse of discretion. 155 Wn.2d at 178. In assessing whether a trial court abused its discretion, the Court stated the jury's award must be outside the range of the evidence, shock the conscience of the court by being flagrantly outrageous, or be the result of passion or prejudice. *Id.* at 179-80. The Court upheld an award of \$260,000 in noneconomic damages on a \$340,000 award of special damages:

The evidence of emotional distress is limited, but it is sufficient to support an award of noneconomic damages. Bunch testified that he was overwhelmed by the discrimination, and that he was depressed and angry. The county discriminated against him over a six year period, which is substantial. The record contains the numerous instances in which he was disciplined for petty offenses that others committed with impunity. He now works for significantly less pay with minimal benefits. He had to explain to his family why he was fired. All of these facts provide a basis from which the jury could infer emotional distress.

Id. at 180.

In *Lopez*, Division III upheld a jury verdict of \$3536.80 in special damages and no general damages at all. The *Lopez* court applied the rule set forth in *Palmer v. Jensen*, 132 Wn.2d 193, 201-02, 937 P.2d 597 (1997) that juries may decline to award any general damages to a plaintiff whose pain is minimal or of a short duration.

In this case, the evidence of the Sharbonos' "emotional distress" is even scantier than that present in *Bunch*. There is no basis for \$1 million in emotional distress damages, particularly where the Sharbonos negotiated a settlement that protected all of their personal assets. Br. of Appellant at 69-71. The jury's award was excessive, outside the range of the evidence, indicating it was the product of passion or prejudice.

(8) The Sharbonos' Cross-Appeal Issues

The Sharbonos raise two issues on cross-review. Br. of Resp'ts at 3-4, 90-98. Neither is meritorious.

(a) Van de Wege Liability

The first issue relates to the alleged negligence of Len Van de Wege. *Id.* at 90-94. The trial court granted summary judgment to Van de Wege in light of its ruling permitting stacking. CP 2177. Without conceding any liability whatsoever on Mr. Van de Wege's part, if this Court reverses the trial court's rulings on coverage and stacking, the Sharbonos' claim against Mr. Van de Wege would be viable.

However, the Sharbonos seem to argue that even if the trial court's erroneous coverage and stacking rulings are affirmed, their claim against Van de Wege persists. The logic of such an argument is difficult to follow.

The Sharbonos assert Van de Wege allegedly was negligent in failing to provide them \$3 million in commercial umbrella coverage. CP 5-6. The trial court's rulings on coverage and stacking made an additional \$6 million in coverage available from the All Transmission & Automotive and Trans-Plant umbrella coverages, more than enough to cover the \$4.525 million Tomy-Sharbono settlement, particularly when the \$1 million in the personal umbrella coverage from the Universal policy was added.

The Sharbonos suffered no harm as a matter of law from any conduct by Len Van de Wege in light of the trial court's rulings. The Sharbonos received ample coverage by those rulings.

(b) Attorney Fees

The Sharbonos contend the trial court's attorney fee award of \$203,585 under RCW 19.86.090 and *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1993) was erroneous. Br. of Resp'ts at 94-98. They claim the "lodestar figure" was somehow incorrect. The Sharbonos confuse the concept of the lodestar and a multiplier in the lodestar method for calculating a reasonable attorney fee.²⁰

²⁰ The Sharbonos' citation of *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983) and *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993) for the proposition that lodestar method permits an award of attorney fees based

First, under RCW 19.86.090 and *Olympic Steamship*, a prevailing party is entitled to a reasonable attorney fee. The calculation of such a reasonable fee is within the discretion of the trial court and reviewed for an abuse of that discretion by this Court. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

Second, the trial court here did not abuse that discretion. A lodestar fee is calculated by multiplying “the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result. . .” *Id.* at 434. Contrary to the Sharbonos’ request to use an hourly rate they now deem is reasonable *after-the-fact*, Washington courts use contemporaneous rates actually charged to the client to calculate the lodestar fee in CPA cases. *Id.*; *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 376-77, 798 P.2d 799 (1990).

The lodestar fee charged to the client is presumed to adequately compensate counsel for services. *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 847, 9 P.3d 948 (2000).

on historical, rather than contemporaneous, hourly rates of counsel, Br. of Resp’ts at 97, is entirely wide of the mark. *Neither* case stands for such a proposition. Both follow the formula for a lodestar fee later stated by the Supreme Court in *Mahler*. The *Scott Fetzer* court, in fact, told trial courts to avoid rubberstamping inflated hourly rates and hours sought by counsel. The court *cut* a fee award of \$116,788 sought for handling a motion to dismiss to \$22,454.28. The party had originally sought \$180,914 in fees for the motion. *Scott Fetzer Co.*, 122 Wn.2d at 143, 157. The Court emphasized the unreasonableness of the hours requested.

Finally, a court may only adjust the lodestar fee upward or downward in *rare* circumstances. *Mahler*, 135 Wn.2d at 435. In Washington, the two reasons for alteration of the lodestar fee mentioned in the case law are for contingent risk or exceptional results. *See, e.g., Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 425-26, 759 P.2d 418 (1988) (reversed 1.5 multiplier where there was no showing of exceptional work or contingent risk); *Bowers*, 100 Wn.2d at 598.

In this case, although their counsel might like a higher “market” rate, the case law does not permit counsel such a rate. In calculating the lodestar, the Sharbonos’ counsel must be content with what counsel charged the Sharbonos hourly for services and what they paid counsel. To the extent the Sharbonos seek a multiplier paid on the basis of historical, not contemporaneous, rates, they failed to give the trial court any justification whatsoever for such a multiplier. Their attorney’s fee was not contingent and the work performed was not exceptional. The Sharbonos cite *Pham v. City of Seattle*, 124 Wn. App. 716, 203 P.3d 827 (2004), *review granted*, 155 Wn.2d 1001 (2005), in support of their position, but it does not help them. In *Pham*, a case of employment discrimination, the Court of Appeals permitted use of market rates for part of an attorney’s time because that was the only way to address delays in payment and

inflation. The case involved public interest issues as well. The Supreme Court has granted review in that case.

By contrast, there is no evidence this case that the Sharbonos' counsel had any contingent risk, nor was any evidence presented of exceptional work. This is not a public interest case. Mr. Gosselin's declaration on fees merely claims an entitlement to a higher hourly rate because other attorneys in another case secured such a rate. CP 2326, 2347. That is not enough under the lodestar method case law to justify what amounted to a multiplier. The trial court did not abuse its discretion in awarding the Sharbonos \$203,585 in attorney fees in the trial court.²¹

D. CONCLUSION

The Sharbonos have not offered anything in their brief that should dissuade this Court from determining the trial court committed multiple errors on summary judgment and at trial. The policy language does not support the stacked coverage they received. They have recovered a judgment approaching \$10 million while failing to explain exactly how Universal harmed them. They faced a \$4.5 million exposure because Cassandra Sharbono's negligence killed Cynthia Tomyn. Nothing

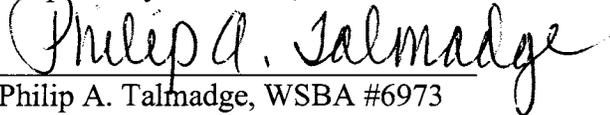
²¹ Universal contests the Sharbonos' right to recover fees at all. To the extent Universal is successful on appeal, the Sharbonos' trial court fee award should be vacated and they should be denied fees on appeal. RAP 18.1(a).

Universal did exacerbated that liability or subverted their opportunity to settle for a lesser amount.

The Court should reverse the trial court's decisions on coverage and hold Universal's liability was confined to \$1 million under the Sharbonos' personal umbrella coverage. The Court should find Universal acted reasonably as a matter of law in asserting its proprietary interest in its underwriting file. The issue of Len Van de Wege's alleged negligence in providing appropriate coverage should be remanded to the trial court for further proceedings. The trial court's judgment on the Sharbonos' bad faith claim should be vacated. Costs on appeal should be awarded to appellant Universal.

DATED this 29th day of August, 2006.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I deposited in the U. S. mail a true and accurate copy of the following documents Motion for Leave to Submit Over-Length Reply Brief of Appellant and Reply Brief of Appellant in Court of Appeals Cause No. 33379-1-II to the following:

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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: August 30, 2006, at Tukwila, Washington.

Christine Jones

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