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COURT OF APPEALS
DIVISION II

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No: 38425-6-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JAMES and DEBORAH SHARBONO, individually and the marital
community comprised thereof, CASSANDRA SHARBONO,
Respondents/Appellants,

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, a
foreign insurer; LEN VAN DE WEGE and "JANE DOE" VAN DE
WEGE, husband and wife and the marital community composed
thereof,

Appellant,

CLINTON L. TOMYN, individually and as Personal Representative of
the Estate of CYNTHIA L. TOMYN, deceased; and as
Parent/Guardian of NATHAN TOMYN, AARON TOMYN, and
CHRISTIAN TOMYN, minor children,
Respondents/Intervenors.

INTERVENOR TOMYNS'

RESPONDING BRIEF

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I. INTRODUCTION

This is Universal Underwriter's second attempt to appeal a Judgment which was entered by the trial court on May 20, 2005 (CP 81-84). (Appendix 1). See, *Sharbono v. Universal Underwriters*, 139 Wn.App 383, 181 P.3d 408 (2007), rev. denied, 163 Wn.2d 1055, 187 P.3d 752 (2008).

As discussed in previous pleadings before this Court, this second effort at appeal, includes an attempt to resurrect issues that were already resolved against Universal in the first appeal. Recognizing that the substantial majority of the issues raised within Appellant's Opening Brief were already resolved adversely to Appellant Universal Underwriters, on January 23, 2009, this Court entered an Order granting in part, and denying in part Respondent Sharbonos' and Intervenor Tomyns' Motion to Dismiss Universal Underwriters' Appeal. (See, Appendix 2).

Within that Order, the Court provided the following:

Upon consideration, this Court grants the motion in part and denies the motion in part. Universal may challenge the trial court's calculation of post-judgment interest on appeal. It may not, however, challenge the \$3.75 [sic \$3,275,000.00] million judgment, which this court affirmed in the previous appeal...

Universal, dissatisfied with this ruling, sought discretionary review in the Washington State Supreme Court in an effort to reverse this Court's Order of January 23, 2009, and to expand the issues on appeal, to include those issues which had already been adversely decided against it. A copy of

the Washington State Supreme Court Commissioner Goff's written ruling denying discretionary review is attached hereto as Appendix 3. Thus, it appears that the only issue which remains before the Appellate Court is "the calculation of post-judgment interest."

Such a ruling is consistent with a substantial body of procedural precedent generated by the Appellate Courts within the State of Washington. In any event, the beginning point of analysis is the face of the Judgment at issue herein. The May 20, 2005 Judgment at issue provides the following, within its relevant portions:

1. *Judgment is hereby entered in favor of Plaintiff and against Defendant Universal Underwriters Insurance Company in the amount of the unpaid balance of the Judgment by Confession entered against Plaintiffs in the matter of Tomyn v. Sharbono, Pierce County Cause No. 99-2-12800-7, to wit \$3,275,000.00 together with interest that is accrued thereon since the date of entry, March 30, 2001, which, as of May 13, 2005 (4 years, 43 days at 12% yr.) totals \$1,618,298.63, and together with interest that continues to accrue thereon as set forth in said Judgment until said Judgment is paid.*

7. *Amounts awarded pursuant to paragraph 1 shall bear post-judgment interest pursuant to RCW 4.56.110 (4) and RCW 19.52.020 at the rate of 12% per annum. The amounts awarded pursuant to paragraphs 2 through*

6 shall bear post-judgment interest pursuant to RCW 4.56.110 (3) at the rate of 5.125% per annum. ¹

With respect to paragraphs 1 and 7, it is noted that the Judgment set forth therein, were affirmed by this Court in its prior published appellate decision. This Court provided, at page 424 of its opinion, the following:

*In conclusion, we affirm the trial court's rulings that the Tomyns/Sharbonos settlement is reasonable and that Universal acted in bad faith, as a matter of law, when it refused to produce its underwriting file. We reverse the trial court's summary judgment ruling that umbrella coverage part 980 provided personal liability coverage to the Sharbonos and the trial court's determination that Universal violated the CPA. We also reverse the trial court's summary judgment dismissal of the Sharbonos' negligence claim against Len Van de Wege. Finally, we vacate the damage award of \$4,500,000.00 based on the jury verdict. **Because Universal did not assign error to the directed verdict in the amount of \$3,275,000.00, together with interest, we affirm that judgment and remand for further proceedings.** (Emphasis added).* ²

The Mandate on the first appeal was filed with the trial court on

1

The amounts set forth within paragraphs 2 through 4 of the May 20, 2005 Judgment relate to the Judgment on the jury verdict, which favored the Sharbonos on their individual claims, ultimately due in part to instructional error, were reversed and vacated by the Court of Appeals. That portion of the Judgment which favored the Intervenor Tomyns', i.e. paragraphs 1 and 7, were not subject to reversal.

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At the time the May 20, 2005 Judgment was entered, trial counsel for Universal Underwriters did not object, nor take issue, with the language of paragraphs 1 and 7 and the interest rate set forth therein. (See, Appendix 4, excerpt of transcript from May 20, 2005).

August 29, 2008. Even prior to that time, on August 26, 2008, Plaintiff Sharbonos filed a Motion to Execute on Appeal Bond, for the amounts reflective of that portion of the Judgment which was affirmed, i.e., paragraphs 1 and 7. In addition, shortly thereafter, the Tomyns, who were and are the primary beneficiaries of the Judgment set forth within paragraph 1 of the May 20, 2005 Judgment, sought intervention. On September 5, 2008, the trial court entered an Order allowing for limited intervention by the Tomyns as a party to “represent its interests as it relates to that Judgment previously entered herein, and protection of their interests in said Judgment...” (CP 159-162). The Court further directed at that time that the Sharbonos/Tomyns provide expert calculations as to the method and manner in which interest should be calculated on the affirmed Judgment. (CP 162, 192, 230) (CP 163-220, 240-67). On October 3, 2008, the matter of interest was subject to consideration by the trial court. On that date, October 3, 2008, the trial court entered an “Order Granting Motion to Execute on Appeal Bond.” (CP 332-34). Within that Order, the trial court set forth its simple interest calculation with respect to the interest accruing under the terms of paragraphs 1 and 7. The following week, on October 7, 2008, Universal filed a Notice of Appeal, with respect to the Order Executing on Appeal Bond, which by its very nature, was an Order enforcing the Mandate. (CP 335-37).

Apparently dissatisfied with the appealability of such Order, on October 16, 2008, Universal filed a lengthy Motion to Vacate and/or to Amend the Judgment. (CP 351-434). Both Intervenor Tomyns and the Sharbonos provided substantial responses. It was pointed out in Intervenor Tomyns' response that Appellant Universals' CR 60 motion failed to conform to the procedures set forth within CR 60(e): i.e., the procedural requirements for a motion which seeks to vacate a judgment.

It was further pointed out that Universals' CR 60 motion, even if it had been properly brought before the Court, sought relief violative of RAP 12.2 because Universals' CR 60 motion challenged issues already decided by the appellate court and otherwise subsumed under the terms of the Mandate. It was further noted that pursuant to RAP 2.5 (c), the Court could decline to exercise "independent judgment" in order to ensure that which had already been decided and subject to the Mandate, would not generate another appealable Order. See, *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993); *State v. Kilgore*, 141 Wn.App 817, 872 P.3d 373 (2007) (granting a motion to dismiss is the proper remedy).

Consistent with the guidance afforded by RAP 2.5(c), the trial court, on November 7, 2008, entered an Order striking Universals' CR 60 motion due to its procedural irregularities, and noting that it "declines to further consider these matters set forth in said motion, and further declines to exercise further independent discretion or judgment over these matters that

have already been previously fully and finally considered by this court and/or the defendants have had the opportunity to bring such matters before the court previously.” (CP 621-22).

Undaunted, on November 21, 2008, Universal filed a second Notice of Appeal. These two Notices of Appeal, filed in the fall of 2008, have now been consolidated into this appeal. (CP 776-780).

By way of preliminary matters, it is noted that the case law is exceptionally clear that due to the operation of RAP 12.2, once a Mandate has issued, the terms of the Mandate are unappealable. See, *Allyn v. Asher*, 132 Wn.App 371, 131 P.3d 339 (2006). Here, clearly, on the face of the May 20, 2005 Judgment, which was affirmed on appeal and thus subject to the Mandate, is set forth the interest rate of 12%, which was the basis for the court’s post-Mandate calculation. Further, it is beyond question that the “Order Executing on Appeal Bond,” upon which the first Notice of Appeal was filed, is simply an Order necessary to enforce the Mandate, and as such is largely appealable. *Id.* Given the fact that the interest rate is on the face of the affirmed Judgment, this Court correctly determined that the rate of interest applicable to the subject Judgment can no longer be subject to appeal. Thus, with respect to the first Notice of Appeal, and the underlying Order, the only issue remaining, as adroitly pointed out by this Court’s Order of January 23, 2009, is “the trial court’s calculation of post-judgment interest...” (Appendix No. 2).

Additionally, by way of preliminary observation, it is also noted that Universal's efforts to appeal its procedurally flawed CR 60 motion, which was subject to the second Notice of Appeal, is exceptionally limited. An appeal from a denial of a CR 60 motion does not bring before the appellate court the underlying judgment, but is limited to propriety of denial of the motion to vacate that judgment. See, *Bjurstrom v. Campbell*, 27 Wn.App 449, 618 P.2d 533 (1980). In addition, once a mandate has issued, the Superior Court no longer has jurisdiction even to consider a CR 60 motion to vacate its own judgment, which has previously been affirmed on appeal. See, *Thomas v. Bremer*, 88 Wn.App 728, 949 P.2d 800 (1997).

Although Universal, in this matter, did assign error the trial court's November 7, 2008 Order striking Universals' Motion to Vacate and/or Amend the Judgment, Universal has wholly failed to brief the primary basis set forth within that Order for striking Universals' CR 60 motion. As indicated on the face of the November 7, 2008 Order, the first and foremost reason that Universals' CR 60 motion was stricken, was that it was procedurally irregular and failed to comply with CR 60(e). Thus, the motion was "hereby stricken as it is procedurally irregular." (CP 621-22).

In their Opening Brief, Universal in no way addresses the procedural irregularity issue. If there is no argument or authority supporting an assignment of error, it is deemed waived. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), citing to *Smith v. King*, 106 Wn.2d 443, 451-52,

722 P.2d 796 (1986).

The reason for the failure of Universal to argue the procedural irregularities regarding its CR 60 motions are obvious in that it is simply beyond question that Universals' CR 60 motion did not comport with the requirements of CR 60 (e). As the Court is well aware, the appellate court can affirm the actions of the trial court based on any grounds the record supports, even those not explicitly articulated by the trial court. See, *State v. Ginn*, 128 Wn.App 872, 885, 117 P.3d 1155 (2005). Here, the trial court explicitly cited to procedural irregularities as a justification for its CR 60 decision, and this separate grounds for affirmance, which was not discussed and/or argued by the Appellant herein, would justify the appellate court's affirmance of the trial court's decision regarding the CR 60 motion (to the extent that the Order on the CR 60 motion is even currently before the appellate court).

The appellate court has appropriately denied Universal a second bite of the apple. The only issue properly before the appellate court is simply "the calculation of post-judgment interest".

II. ISSUES ON APPEAL

Did the trial court abuse its discretion in the method and manner in which it calculated post-judgment interest, i.e., did it do the math correctly?

III. STATEMENT OF FACTS

Intervenor hereby incorporates by reference the factual discussion set

forth in the introduction above. It is noted that this controversy is now entering into its second decade. Underlying this recurring dispute is the tragic death of Cynthia Tomy, a mother of three, who at the time of her death in 1998, left behind three (3) minors (all boys), as well as her high school sweetheart and husband, Clinton Tomy. Since Cynthia's death, all of the boys have reached the age of majority. If it is recalled correctly, her youngest son was 8 years old at the time of her death. He is now a young man.

Additionally, it is noted in passing that when the Sharbonos faced a staggering and calamitous potential liability for the death of Cynthia Tomy, Universal Underwriters, their own insurance company, violated their fiduciary obligations, and as this Court initially found, engaged in bad faith as a matter of law by failing to cooperate and provide reasonable information to the Sharbonos when they were attempting to negotiate a resolution of their substantial liabilities to the Tomys. To that end, this Court has already affirmed a determination that such actions constitute bad faith as a matter of law. It is further noted that as Universal did not appeal that portion of the Judgment which favors the Tomys, nor did it appeal the trial court's Order of May 20, 2005, regarding "presumptive damages," wherein the trial court found that as a matter of law the Plaintiffs (Sharbonos) were entitled to an award of the unpaid portion of a Confessed Judgment in favor of the Tomys as "presumptive damages" and had directed a verdict in that regard.

A copy of the Order on Presumptive Damages is attached hereto as Appendix 5.

As indicated within that Order, paragraph 1 of the Judgment is predicated on the notion that as presumptive damages, Universal can be held accountable for the Confessed Judgment entered in the case of *Tomyn v. Sharbono*, Pierce County Cause No. 99-2-12800-7, which was inclusive of \$3,275,000.00 plus then accrued interest. It is noted that until a portion of the Judgment was recently paid to the Tomyns, that Confessed Judgment against the Sharbonos continued to accrue interest at the rate set forth within paragraph 1 of the May 20, 2005 Judgment, and as set forth within the Court's Order memorializing its directed verdict on the issue of presumptive damages, which was not previously appealed, and which is an issue which is beyond review by this appellate court.

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion In The Method And Manner In Which It Calculated Post-Judgment Interest.

As discussed above, any issues regarding the interest rate set forth in paragraphs 1 and 7, and the date at which such interest should have applied, are issues readily apparent on the face of the Judgment of May 20, 2005, which could have been appealed in the first appeal in this matter and was not. Thus, questions with respect to the date interest should be calculated

from, and the rate of such interest, is currently beyond the scope of this second appeal.

It appears that all that is left is simply how the trial court went about doing its math. If one reviews the Opening Brief of Appellant, there is only limited and ambiguous criticism regarding the method and manner in which math was performed.

The method and manner in which interest is calculated on a judgment is a matter vested within the sound discretion of the trial court. See, *Soccoio Const. v. City of Renton*, 158 Wn.2d 506, 518, 145 P.3d 371 (2006), citing to *Kiewit-Grice v. State*, 77 Wn.App 867, 872, 895 P.2d 6 (1995). (Pre-judgment interest). The same abuse of discretion standard is applicable to the court's determination of an award of post-judgment interest. See, *J L Steele v. Lundgren*, 96 Wn.App 773, 787, 892 P.2d 619 (1999).

The trial court abuses discretion when its decisions are manifestly unreasonable, or are based on untenable grounds or reasons. See, *State Ex Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). As explained in *Coggle v. Snow*, 56 Wn.App 499, 784 P.2d 554 (1990), the standards set forth within *Junker* can be explained as follows:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without

doing so arbitrarily or capriciously...where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

See, *Coogle v. Snow*, 56 Wn.App at 506-7.

In this case, the trial court clearly did not abuse its discretion by any stretch of the imagination in the method and manner in which it calculated interest. In fact, the trial court went so far as to direct the parties to provide expert CPA calculations in order to aid it in making an appropriate determination.

As this Court is aware, on return of the Mandate, the trial court was directed that the Judgment reflected in paragraphs 1 and 7 within its May 20, 2005 Judgment had been affirmed on appeal. The paragraph 1 judgment reflected the trial court's determination that presumptive damages were appropriate under the circumstances of the case. ³

Given the nature of the damages addressed in the unappealed paragraph 1 of the Judgment, it was not unreasonable for the trial court to follow its terms. Under the terms of the unappealed paragraph 1 of the May

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Generally, the presumptive damage award is predicated on the amount of settlement entered into with the tort victim. See generally, *Bessel v. Viking*, 145 Wn.2d 730, 736, 49 P.2d 887 (2002). See also, *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 58, 563, 95 P.2d 1124 (1998). As previously indicated, Universal waived the opportunity to argue the propriety of an award of presumptive damages by not properly pursuing or preserving argument of the issue in its first appeal. See, Appendix 3, Commissioner Goff's decision denying review.

20, 2005 Judgment, the trial court was required to calculate simple interest at 12% to the date that it was likely to be paid, i.e., the date set forth within the Order Executing on Appeal Bond. The trial court used the same annual interest calculation that it utilized in calculating the \$1,618,298.62 set forth within the face of the Judgment, i.e. \$393,000.00 per year, or \$32,750.00 per month. This calculation was fully supported by a CPA report, which was attached to the September 23, 2008, declaration of Timothy R. Gosselin regarding execution on appeal bond. The same base number was utilized to calculate post-judgment interest under paragraph 7.

Although currently Universal may complain about the existence of paragraph 7, it is suggested that paragraph 7 requirements that post-judgment interest be calculated is clear on its face, and surely could have been subject to appeal by Universal, had it desired to do so at the time it filed its first appeal. It is noted that at the time Judgment was entered in this matter, there was no objection to the terms of either paragraphs 1 or 7 by trial counsel. See, Appendix 4.

A copy of Mr. Gosselin's declaration with the attached expert calculation of interest are attached hereto as Appendix 6. ⁴

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As is self-evident, paragraph 1 represents the presumptive damages suffered by the Sharbonos, reflective of the amount of the Confessed Judgment, which was and continues to be in part due and owing to the Tomyns. By the nature of such damages, there naturally would be a continuing accrual of interest until paid. Paragraph 7, on the other hand, deals with post-judgment interest, which serves an entirely different purpose. The purpose of awarding interest on a Judgment is to compensate a party for having the right to use money when it is being denied use of that money. See, *Aquirre v. AT&T Wireless Services*, 118 Wn.App 236, 241, 75 P.3d 603 (2003).

In sum, clearly the trial court did not abuse its discretion in the method and manner in which it calculated interest. It did not compound interest, but simply applied a simple interest rate to separate portions of a Judgment, which had been returned to it by way of a Mandate following an appeal. Those portions of the Judgment at issue herein, paragraphs 1 and 7, were unappealed and thus subject to an affirmance by the appellate court in the previous appeal herein.

Under such circumstances, it can hardly be said that the trial court abused its discretion. In fact, it simply did what it was lawfully obligated to do, i.e., enforce the terms of this Court's Mandate.

V. CONCLUSION

For the reasons stated above, the trial court did not abuse its discretion in the method and manner in which it calculated post-judgment interest in this case. The interest rate and the date of accrual for the calculation of the interest are matters which are beyond the scope of this appeal. The only issue is whether or not the trial court engaged in appropriate calculations. It is humbly and respectfully suggested that it is beyond dispute that the trial court did what it was obligated to do under the terms of its own Judgment and the Mandate, i.e., calculate interest at a 12% interest rate on those portions of the Judgment which it was obligated to enforce. The trial court's resolution of the need for calculation of judgment interest was not an abuse of discretion and should be affirmed.

DATED this 11th day of September, 2009.

A handwritten signature in black ink, appearing to read "Paul A. Lindenmuth", written over a horizontal line.

PAUL A. LINDENMUTH, WSBA#15817

Attorney for Intervenor Tomyns
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APPENDIX

1. Universal Underwriter's second attempt at appeal a Judgment
2. Order granting in part, and denying in part Respondent Sharbonos' and Intervenor Tomyns' Motion to Dismiss Universal Underwriters' Appeal.
3. Commissioner Goff's decision denying review.
4. Judgment
5. Order on Presumptive Damages
6. Mr. Gosselin's declaration with the attached expert calculation of interest

Appendix 1

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PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
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The Honorable Rosanne Buckner
TRIAL DATE: MARCH 28, 2005

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

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

Plaintiffs,

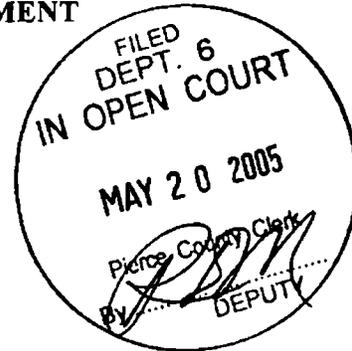
vs.

UNIVERSAL UNDERWRITERS INSURANCE
COMPANY, a foreign insurer; LEN VAN DE
WEGE and "JANE DOE" VAN DE WEGE,
husband and wife and the marital community
composed thereof,

Defendants.

NO. 01 2 07954 4

JUDGMENT



I. JUDGMENT SUMMARY

- 1. Judgment Creditors:** James Sharbono, Deborah Sharbono and Cassandra Sharbono (currently known as Cassandra Barney)
- 2. Attorney for Judgment Creditor:** Timothy R. Gosselin, Burgess Fitzer, P.S., 1501 Market Street, Suite 300, Tacoma, Washington 98402
- 3. Judgment Debtor:** Universal Underwriters Insurance Company
- 4. Principle Judgment Amount:** \$9,393,298.63, plus interest accruing on the unpaid portion of the Judgment by Confession entered in the matter of Tomyn v. Sharbono, Pierce County Cause No. 99-2-12800-7 pursuant to the terms of said judgment.

JUDGMENT - Page 1 of 4

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BURGESS FITZER, P.S.

ATTORNEYS AT LAW
1501 MARKET STREET, SUITE 300
TACOMA, WASHINGTON 98402-3333
(253) 572-5324 FAX (253) 627-8928

1 5. Attorney Fees and Costs:

\$ 204,090.⁰⁰/_{xx}

2 6. Other Recovery Amounts:

\$ 10,000.⁰⁰/_{xx}

3 7. Post- Judgment Interest:

4 Post-judgment interest shall accrue on \$4,893,298.63
5 of the principle judgment amount, and on such
6 additional amounts as become due and owing under
7 paragraph 1 below, at the rate of 12% per annum. Post-
8 judgment interest shall accrue on \$4,500,000.00 of the
9 principle judgment amount, and on attorney fees, costs
10 and other recovery amounts, at the rate of 5.125
11 percent per annum from the date of entry of this
12 judgment until said judgment is paid.

13 8. Attorney for Judgment Debtor: Dan'l W. Bridges, 11100 NE 8th Street, Suite 300
14 Bellevue, W A 98004

15 II. JUDGMENT

16 This matter was tried to a jury of 12 before the Honorable Roseanne Buckner beginning on
17 March 28, 2005. Plaintiffs, James, Deborah and Cassandra Sharbono, appeared personally or through
18 their attorney, Timothy R. Gosselin. Defendants Universal Underwriters Insurance Company, Len Van
19 de Wege and "Jane Doe" Van de Wege appeared personally or through their attorney Dan'l W. Bridges.

20 On December 27, 2002, January 24, 2003, May 2, 2003 and March 28, 2005, the court entered
21 orders on motions for full or partial summary judgment resolving certain issues and claims. During
22 trial, the court dismissed the claims against defendants Van de Wege, and dismissed the claims of
23 Cassandra Sharbono for general damages. During trial the court also determined as a matter of law that
24 Universal Underwriters Insurance Company was obligated to pay the unpaid portion of the Judgment
25 by Confession entered on March 30, 2001 in the matter of *Tomyn v. Sharbono*, Pierce County Cause
26 No. 99-2-12800-7.

27 Following trial on the merits on the issues of whether Universal Underwriter's bad faith and
28 violations of Washington's Consumer Protection Act were a proximate cause of injury and damage to
the plaintiffs, the jury returned a verdict in favor of the plaintiffs. A copy of the verdict is attached
hereto and incorporated herein. Also following trial, the court made additional rulings regarding
attorney fees, costs and other relief. Based upon these rulings, decisions and the verdict of the jury, the

JUDGMENT - Page 2 of 4

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1 court hereby enters judgment against Universal Underwriters Insurance Company as follows:

2 1. Judgment is hereby entered in favor of plaintiffs and against defendant Universal
3 Underwriters Insurance Company in the amount of the unpaid balance of the Judgment by Confession
4 entered against plaintiffs in the matter of *Tomyn v. Sharbono*, Pierce County Cause No. 99-2-12800-7,
5 to wit \$3,275,000.00, together with interest that has accrued thereon since the date of entry, March 30,
6 2001, which, as of May 13, 2005, (four years, 43 days @ 12%/yr.) totals \$ 1,618,298.63, and together
7 with interest that continues to accrue thereon as set forth in said judgment until said judgment is paid.

8 2. Judgment is hereby entered in favor of plaintiffs James and Deborah Sharbono and
9 against defendant Universal Underwriters Insurance Company in the additional sum of \$4,500,000.00,
10 as and for past and future general and special damages as found by the jury.

11 3. Judgment is hereby entered in favor of plaintiffs and against defendant Universal
12 Underwriters Insurance Company for punitive damages pursuant to RCW 19.86.090 in the amount of
13 \$ 10,000.⁰⁰/_{xx}.

14 4. Judgment is hereby entered in favor of plaintiffs and against defendant Universal
15 Underwriters Insurance Company in the additional sum of \$ 203,585.⁰⁰/_{xx} for actual attorney fees.

16 5. Judgment is hereby entered in favor of plaintiffs and against defendant Universal
17 Underwriters Insurance Company in the additional sum of \$ 505.⁰⁰/_{xx} for costs.

18 ~~6. Judgment is hereby entered in favor of plaintiffs James and Deborah Sharbono and
19 against defendant Universal Underwriters Insurance Company in the additional sum of
20 \$ _____ to compensate said plaintiffs for the increased income tax due and owing as a
21 result of receipt of payment of damages in a lump sum.~~

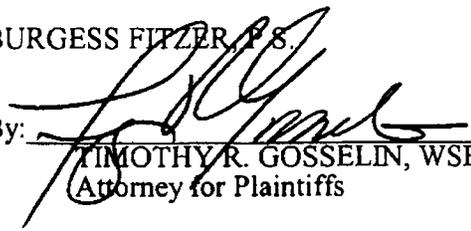
22 7. Amounts awarded pursuant to paragraph 1 shall bear post-judgment interest pursuant
23 to RCW 4.56.110(4) and RCW 19.52.020 at the rate of 12 percent per annum. Amounts awarded
24 pursuant to paragraphs 2 through 6 shall bear post-judgment interest pursuant to RCW 4.56.110(3) at
25 the rate of 5.125 percent per annum.

Signed this 20th day of May, 2005.


HONORABLE ROSANNE BUCKNER

PRESENTED BY:

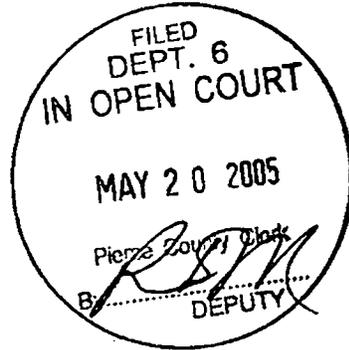
BURGESS FITZER, P.S.

By: 
TIMOTHY R. GOSSELIN, WSBA# 13730
Attorney for Plaintiffs

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED.

LAW OFFICES OF DAN'L W. BRIDGES

By: 
DAN L W. BRIDGES, WSBA# 24179
Attorney for Defendants



Appendix 2

FILED
COURT OF APPEALS
WASHINGTON

09 JAN 23 PM 12:18

STATE OF WASHINGTON

BY [Signature]
CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JAMES SHARBONO, ET AL.,
Respondent/Cross-Appellant,

v.

UNIVERSAL UNDERWRITERS, ET AL.,
Appellant/Cross-Respondent.

No. 38425-6-II
consolidated with
No. 38596-1-II

**ORDER GRANTING IN PART AND
DENYING IN PART RESPONDENT'S
MOTION TO MODIFY**

The Sharbonos moved to modify a Commissioner's ruling denying its motion to dismiss Universal Underwriters' appeal and denying its request for accelerated review. Upon consideration, this court grants the motion in part and denies the motion in part. Universal may challenge the trial court's calculation of post-judgment interest on appeal. It may not, however, challenge the \$3.75 million judgment, which this court affirmed in the previous appeal. Additionally, we deny the Sharbonos' motion to modify the Commissioner's ruling that Universal has standing and the Commissioner's ruling denying accelerated review.

Dated this 23rd day of January, 2009.

FOR THE COURT:

[Signature]
Presiding Judge

Exhibit 1

Appendix 3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RECEIVED

APR 20 2009

TALMADGE/ FITZPATRICK

FILED
SUPREME COURT
STATE OF WASHINGTON

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

Respondents/
Cross-Appellants,

v.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer,

Appellants/
Cross-Respondents,

and

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

Defendants,

CLINTON L. TOMYN, individually and
as Personal Representative of the Estate
of CYNTHIA L. TOMYN, deceased; and
as Parent/Guardian of NATHAN
TOMYN, AARON TOMYN, and
CHRISTIAN TOMYN, minor children,

Respondents.

NO. 82753-2

RULING DENYING REVIEW

Universal Underwriters Insurance Company seeks discretionary review of a

Court of Appeals order providing that it cannot challenge a judgment that the court approved in a previous appeal. Universal argues that this court's rule restricting the

law of the case doctrine, RAP 2.5(c), permits it to challenge the propriety of that earlier decision.

Cassandra Sharbono was driving a truck owned by her parents, James and Deborah Sharbono, when she lost control and collided with a car driven by Cynthia Tomy, killing Ms. Tomy. The Sharbonos were covered for losses in excess of their \$250,000 automobile policy limit through personal umbrella coverage issued by Universal as an adjunct to commercial umbrella policies covering the family businesses. The Sharbonos posited that when they transferred their personal umbrella coverage to Universal they asked for \$3 million in coverage, which they had under their prior carrier. And they claimed that their insurance agent agreed to add \$1 million of personal coverage to each of two commercial policies covering their businesses.

When the Sharbonos began settlement negotiations with Ms. Tomy's family, Universal informed them that they only had \$1 million of personal umbrella coverage. This led to a coverage dispute, which in turn led to an extended dispute over whether Universal should provide the Sharbonos with its underwriting file. The Sharbonos and the Tomy both urged that the file would help resolve coverage and aid in reaching a settlement. But the file was not forthcoming, settlement negotiations failed, and the Tomy filed suit against the Sharbonos for wrongful death. In connection with that suit, the Tomy subpoenaed the underwriting file. Universal moved to quash the subpoena, arguing that the file was not discoverable in a suit against its insureds. The trial court denied the motion to quash and ordered Universal to produce the file. A Court of Appeals commissioner granted discretionary review and stayed enforcement of the subpoena. But before the Court of Appeals could consider the matter, the Sharbonos and the Tomy settled for \$4,525,000.00. The Sharbonos assigned their right to their insurance claims to the Tomy and promised

to bring suit against Universal in exchange for the Tomyns' promise not to execute against the Sharbonos personally.

The Sharbonos then filed this action against Universal, alleging among other things breach of contract, bad faith, and violation of the Consumer Protection Act. The trial court granted the Sharbonos' motion for partial summary judgment, determining that the \$3 million commercial umbrella policies covered the accident. The court later ruled that coverage under the two commercial policies could be combined for \$6 million coverage in addition to the \$1 million personal coverage that Universal conceded was available. The court also entered an order finding that the Sharbonos' settlement with the Tomyns was reasonable.

The Sharbonos filed a second motion for summary judgment arguing that Universal acted in bad faith by refusing to turn over the underwriting file and by failing to explain why it denied coverage under the umbrella policies. The motion also asked for a finding that Universal violated the CPA by forcing the Sharbonos to sue Universal, by failing to provide the underwriting file, and by failing to provide a reasonable explanation. The court granted the Sharbonos summary judgment on the bad faith and CPA claims, ruling on the latter claim that Universal's violation of an administrative code provision constituted a per se CPA violation. It initially left general damages under those claims to the jury, but it later entered a directed verdict providing that Universal was liable at least for the entire Tomyn settlement as presumptive damages for bad faith. (The court did not tell the jury about the directed verdict.)

After trial, a jury awarded the Sharbonos \$4,500,000.00 in damages. The trial court granted the Sharbonos attorney fees and treble damages under the CPA. Separate numbered paragraphs in the written judgment entered (1) judgment on the unpaid balance (\$3,275,000.00) of the confession judgment entered against the

Sharbonos in the Tomyln litigation (plus interest of \$1,618,298.63), (2) judgment on the \$4,500,000.00 jury award, (3) judgment on a punitive treble damages award of \$10,000.00, (4) judgment on an attorney fee award of \$203,585.00, and (5) judgment on a cost award of \$505.00. In a separate order entered the same day, the court explained that when it directed verdict on presumptive damages, it concluded, as a matter of law, that the Sharbonos were entitled to an award of the unpaid portion of the Tomylns' confession judgment plus interest. It also "hereby awarded" the unpaid balance of \$3,275,000.00 and interest of \$1,618,298.63 to the Sharbonos.

Both sides appealed. The Court of Appeals affirmed the finding that the Tomyln settlement was reasonable and the ruling that Universal acted in bad faith. On the bad faith issue the court rejected Universal's argument that its conduct was not the cause of any harm to its insureds. But the court reversed the trial court's determination that the commercial umbrella policies covered Cassandra while driving the family truck and the court's ruling that Universal committed a per se violation of the CPA. The court held that on remand the Sharbonos could attempt to prove a standard CPA violation. The court also vacated the jury's award of damages for bad faith, given that the verdict form did not ask the jury to apportion damages between the bad faith and CPA claims. And in a discussion of issues likely to recur on retrial, the court held that the trial court erred in giving a "substantial factor" proximate cause instruction.

The Sharbonos moved for reconsideration and clarification of the court's opinion. The Court of Appeals denied reconsideration but issued an order amending its opinion to affirm Universal's obligation to pay the Sharbonos the unpaid balance of the Tomylns' confession judgment: "Because Universal did not assign error to the directed verdict in the amount of \$3,275,000, together with interest, we affirm that judgment and remand for further proceedings." *Sharbono v. Universal Underwriters*.

Ins. Co., 139 Wn. App. 383, 424, 161 P.3d 406 (2007), *review denied*, 163 Wn.2d 1055 (2008).

Both sides petitioned for this court's review. Among other things, Universal argued that the trial court erred in ruling that its bad faith made it presumptively liable for the entire balance of the Sharbono-Tomyn settlement. Universal urged that it preserved the error by assigning error to the judgment and arguing that its liability was confined to the \$1 million limit of the personal umbrella policy. As the above citation suggests, this court denied review. The Court of Appeals issued its mandate on August 21, 2008.

On September 5, 2008, the Sharbonos moved to execute on the appeal bond that Universal had posted, based on the judgment of \$3,275,000.00 plus interest affirmed by the Court of Appeals. Universal opposed this motion, arguing that the Sharbonos did not have a judgment to execute upon and that the trial court needed to conduct further proceedings regarding the award. On October 3, 2008, the trial court granted the Sharbonos' motion to execute on the appeal bond, ordering Universal's surety to pay \$8,594,222.03. Universal appealed from that order.

The Sharbonos and the Tomyns (as intervenors) moved to dismiss the appeal on grounds that Universal, having failed to assign error to the confession judgment award in its first appeal, cannot challenge it in this appeal. They also argued that Universal does not have standing to appeal from the October 3, 2008, order, which was entered against its surety. Universal responded that where the Court of Appeals reversed the jury verdict because the trial court gave an erroneous "substantial factor" instruction, it was error for the trial court to subsequently enter an order granting the Sharbonos' motion to execute on an appeal bond "based on the same verdict." More specifically, it urged that harm is an essential element of a bad faith cause of action, that the trial court's summary judgment on bad faith did not

address harm, that proximate cause must still be proven, and that the Sharbonos asked the trial court to authorize execution on a judgment based on an instruction that the Court of Appeals had found erroneous. It said it would ask the court to reconsider its decision on presumptive damages in light of its decision on proximate cause, the CPA, and bad faith for compelled litigation, suggesting also that it had not been permitted to rebut the damages presumption. It further argued that any judgment for bad faith should bear tort rate interest, not the specified 12 percent. And it argued that the law of the case restrictions of RAP 2.5(c)(1) and (2) permit it to raise these issues.

On November 13, 2008, Court of Appeals Commissioner Schmidt entered a ruling denying the motion to dismiss. The commissioner ruled that Universal has standing to appeal. And even if Universal cannot challenge the entry of the \$3,275,000.00 judgment, the commissioner reasoned, it can challenge the post-judgment calculations. The commissioner concluded that the issue of whether Universal can challenge entry of the \$3,275,000.00 judgment "is one that the parties can address in the briefs."

The Sharbonos and the Tomyns then moved to modify the commissioner's ruling, arguing that the appeal is frivolous because it seeks reconsideration of a previous decision that is final and not subject to further review under RAP 12.7, that there was no connection between the erroneous proximate cause jury instruction and the award of presumptive damages, that harm is also presumed when an insurer acts in bad faith, and that it is too late to argue that this is not the sort of bad faith case to which the presumption of damages or harm applies.

On February 4, 2009, the Court of Appeals judges entered an order granting in part and denying in part the motion to modify. The order provides that "Universal may challenge the trial court's calculation of post-judgment interest on appeal. It may

not, however, challenge the \$3.275 million judgment, which this court affirmed in the previous appeal." Universal now seeks this court's review of that order. RAP 13.5.¹

Universal's motion to this court argues that the Court of Appeals committed obvious or probable error by precluding its challenge to the \$3.275 million judgment. RAP 13.5(b)(1), (2) (criteria for acceptance of review). Universal urges that the presumptive damages award cannot stand because this court has decided that presumptive damages are not available in a bad faith case for mishandling of a claim and because proximate cause was not proved as to such damages. And it contends that the law of the case doctrine permits the Court of Appeals to consider these issues.

In its most common form, the law of the case doctrine provides that, once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). But RAP 2.5(c) restricts the law of the case doctrine as it relates to trial court decisions following remand and as it relates to the limits of a subsequent review. Universal relies on both of these restrictions, which will be considered here in turn. First, RAP 2.5(c)(1) provides:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

According to the task force that proposed this rule, the rule "restricts [the law of the case] doctrine as it relates to trial court decisions after the case is remanded by the appellate court. The trial court may exercise independent judgment as to decisions to

¹ Universal also moves to strike the Tomyns' answer to its motion as untimely, and the Sharbonos move to strike Universal's reply because they were not timely served with the reply. While it appears that the Tomyns' answer was untimely and the Sharbonos were not timely served with the reply, each of these pleadings is largely duplicative of earlier submissions, and neither party has shown prejudice warranting the requested sanction. Accordingly, both motions are denied.

which error was not assigned in the prior review, and these decisions are subject to later review by the appellate court.” 2A Karl B. Tegland, WASHINGTON PRACTICE, RULES PRACTICE RAP 2.5, at 237-38 (6th ed.); see *Columbia Steel Co. v. State*, 34 Wn.2d 700, 706, 209 P.2d 482 (1949); *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 258, 948 P.2d 858 (1997); *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d 614, 620, 724 P.2d 356 (1986) (“the doctrine applies only to issues actually decided” in first review). But as author Tegland points out, while this restriction remains sound, “the courts have refused to stretch the rule further to allow review, in a later appeal, of a trial court decision that was not raised in the first appeal and that was not reconsidered by the trial court upon remand. *State v. Bailey*, 35 Wn. App. 592, 668 P.2d 1285 (1983); *State v. Sauve*, 33 Wn. App. 181, 652 P.2d 967 (1982), affirmed 100 Wn.2d 84, 666 P.2d 894 (1983).” Tegland, at 215. As the Court of Appeals said in *Sauve*, “[t]he rule does not permit an appellant to raise an issue in a second appeal unless it was considered by the trial court upon remand.” *Sauve*, 33 Wn. App. at 183 n.2. Apparently, the trial court refused to consider Universal’s challenges to the award on remand, thus arguably precluding application of RAP 2.5(c)(1) here. And as discussed below, the use of the word “may” shows the rule is discretionary, and the Court of Appeals might have simply decided not to revisit its decision in the first appeal.

Second, RAP 2.5(c)(2) provides:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.

This rule codifies at least two historically recognized exceptions to the law of the case doctrine that operate independently. *Roberson*, 156 Wn.2d at 42. First, application of the doctrine may be avoided where the prior decision is clearly erroneous and the

erroneous decision would work a manifest injustice to one party. *Id.* Second, application of the doctrine may be avoided where there has been an intervening change in controlling precedent between trial and appeal. *Id.* Because the rule uses the term "may," application of this exception to the law of the case doctrine has been characterized as discretionary, rather than mandatory. *Id.*; *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008).

This rule potentially applies here, since Universal sought to ask the Court of Appeals to reconsider its affirmance of the \$3,275,000.00 judgment. Given this, it might have been preferable for the Court of Appeals to follow the path of its commissioner and permit Universal to brief the law of the case issue in the usual course, along with its challenge to the earlier decision. While Universal points out that the court's February 4, 2009, order gives no reason for refusing to review the propriety of the earlier decision, such orders do not ordinarily include reasoning. Still, it is somewhat troubling that the commissioner's ruling, which does include reasoning, fails to acknowledge RAP 2.5(c).

But the Court of Appeals might have simply concluded that Universal has made an inadequate showing why it ought to review its earlier decision. As noted, application of this exception to the law of the case doctrine is discretionary. Universal now seeks reconsideration based on arguments that the presumptive damages award cannot stand because this court has decided that presumptive damages are not available in a bad faith case of claim mishandling and because proximate cause was not proved as to such damages. On the latter point, the Court of Appeals in the prior appeal held that the record contains substantial evidence that Universal's conduct harmed the Sharbonos. *Sharbono*, 139 Wn. App. at 413. The court might have also concluded that the trial court, in presuming damages, perforce presumed causation.

See Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co., 161 Wn.2d 903, 921, 169 P.3d 1 (2007) ("As between the insured and the insurer, it is the insurer that controls whether it acts in good faith or bad. Therefore, it is the insurer that appropriately bears the burden of proof with respect to the consequences of that conduct."). The trial court entered a separate order awarding presumptive damages to the Sharbonos, seemingly unrelated to the jury's verdict, noting that it had earlier concluded, as a matter of law, that the Sharbonos were entitled to an award of the unpaid portion of the Tomyns' confession judgment plus interest. Since this directed verdict came before the jury verdict, it was not dependent on the jury finding of causation. And the judgment reflected a judgment for the presumptive damages award and a separate judgment on the jury award, thus also suggesting that the former was not dependent on the jury's determination of causation.

More importantly, the Court of Appeals did not hold in the first appeal that the presumptive damages judgment was proper. Rather, it affirmed the award because Universal did not assign error to it. In other words, the court held that any challenge was waived. Universal must have that ruling overturned before it can challenge the \$3,275,000.00 judgment on the merits. (Put in terms of RAP 2.5(c)(2), Universal would have to convince the Court of Appeals that its waiver decision was clearly erroneous or that the law on waiver has so changed that the court should revisit the question.) But Universal does not argue the waiver issue in its motion to this court, or explain why the ruling ought to be overturned pursuant to RAP 2.5(c). Rather, Universal only says that it "disputes the assertion" that it did not assign error to the order on presumptive damages.

While this failure to provide meaningful argument probably ought to end the inquiry, I have obtained Universal's opening and reply briefs from the previous

appeal to see whether it adequately challenged the award. None of Universal's 16 assignments of error mentions the directed verdict or the trial court's May 20, 2005, order that "hereby awarded" the unpaid balance of \$3,275,000.00 of the confession judgment and interest of \$1,618,298.63 to the Sharbonos. The only assignment of error mentioning a judgment says "[t]he trial court erred in entering judgment on the verdict of the jury on May 20, 2005." (Brief at 4.) Universal seems to claim that this adequately challenged the judgment on presumed damages, but even the most charitable reading fails of that purpose. More significantly, none of the issues pertaining to the assignments of error says anything about whether damages should have been presumed. And I have searched both briefs in vain for any argument on presumptive damages, going so far as to scan the briefs and convert them to searchable text using optical character recognition. Universal simply failed to raise or argue the issue.²

I am mindful that cases are not to be determined on the basis of compliance or noncompliance with the Rules of Appellate Procedure except in compelling circumstances where justice demands. RAP 1.2(a). Technical violations of the rules should normally be overlooked so that the case may be decided on the merits. *State v. Olson*, 126 Wn.2d 315, 318-19, 893 P.2d 629 (1995). But when a party completely fails to raise an issue in assignments of error and fails to present any argument on the issue or citation to law, appellate courts will not consider the issue. *Id.* at 321.

Given the above, the Court of Appeals might well have concluded that it would exercise its discretion under RAP 2.5(c) by declining to reconsider its earlier

² Universal's opening brief argued that the trial court erred in its interpretation of the policy, that the court erred in concluding that the Sharbono-Tomyn settlement was reasonable, that the court erred in finding Universal was liable as a matter of law for bad faith, that the court erred in its handling the bad faith issue at trial (including the instruction on probable cause), and that the jury's damage award for emotional distress was excessive.

opinion. The court's decision represents neither obvious nor probable error warranting review under RAP 13.5(b). The motion for discretionary review is denied.



COMMISSIONER

April 17, 2009

DECLARATION OF SERVICE

On said day below, I sent by email and deposited with the U.S. Postal Service a true and accurate copy of the Motion to Modify Commissioner's Ruling in Supreme Court Cause No. 82753-2, to the following parties:

Dan'L W. Bridges
McGaughey Bridges Dunlap PLLC
325 118th Avenue SE, Suite 209
Bellevue, WA 98005-3539

Timothy R. Gosselin
Gosselin Law Office PLLC
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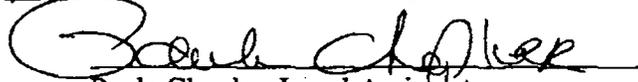
Benjamin Franklin Barcus
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Jacquelyn A. Beatty
Attorney at Law
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Seattle, WA 98101-3284

Original efiled with:
Washington Supreme Court
Clerk's Office
415 12th Street West
Olympia, WA 98504-0929

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: May 7, 2009, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

Appendix 4

1 to go through and identify, add up those numbers to
2 put into the order. We can do that off the record
3 and then come back.

4 The last issue that we have got is, I guess, the
5 form of judgment. And before we write in the amounts
6 that we have got, I want to make sure that we have
7 covered all objections to the form of judgment. We
8 have covered --

9 I have handed the court the original. Paragraph
10 6 should be stricken. We have already acknowledged
11 that.

12 MR. BRIDGES: There is only one question on
13 the form of judgment, and I don't suppose it's
14 really, perhaps, material in the big picture. But in
15 terms of Cassandra's damages and what she was
16 awarded -- she was not awarded any damages by the
17 special verdict form, but the judgment simply lists
18 her as a judgment creditor for the full amount. I
19 don't know if that's an issue that really needs
20 concern my client, per se. The dollar amount is the
21 dollar amount, but it does seem to be imprecise.

22 MR. GOSSELIN: The only area that it does
23 that is, it lists her as a judgment creditor in the
24 judgment summary. The judgment itself identifies who
25 was awarded what, I believe.

1 MR. BRIDGES: Paragraph 1 on page 3, for
2 example.

3 MR. GOSSELIN: No. Paragraph 2, "Judgment
4 is hereby entered in favor of plaintiffs James and
5 Deborah Sharbono and against defendant Universal
6 Underwriters Insurance Company in the additional sum
7 of \$4,500,000.00. I guess I have to agree with that.
8 It doesn't break it out, because Cassandra has an
9 interest.

10 MR. BRIDGES: No, she doesn't.

11 MR. GOSSELIN: No, she doesn't. She has an
12 interest only in the contract damages.

13 MR. BRIDGES: Arguably, and that's why I
14 intended that motion pretrial to be dispositive. I
15 mean, she had no claims left in the case.

16 MR. GOSSELIN: Well, she did. The argument
17 was that she was covered under the insurance and that
18 the insurance had an obligation to pay on her behalf
19 as well. So the coverage aspect of the case was in
20 favor of Cassandra.

21 THE COURT: I don't think we need to worry
22 about that at this point in time.

23 MR. BRIDGES: I should just really quickly,
24 though, for the record state that even then she was
25 not deemed covered under the business coverages, Your

1 Honor found, but this is probably semantics.

2 THE COURT: Yes. I don't think we need to
3 worry about it.

4 MR. GOSSELIN: Then we'll go through and
5 fill in the blanks and present it.

6 THE COURT: You know where to find me.

7 MR. GOSSELIN: We'll present the order on
8 attorney fees as well.

9 ***

10 MR. GOSSELIN: We are on the record
11 regarding Sharbono vs. Universal Underwriters.
12 Mr. Bridges and I have gone through the proposed
13 orders, and I am handing up both the order regarding
14 attorney fees, costs, and treble damages and the
15 judgment. Those are the originals that I am
16 providing with the court. There is a number of
17 interlineations on those originals that we can
18 explain.

19 MR. BRIDGES: I'll also state for the
20 record, we discussed whether we ought to initial all
21 the interlineations and we thought it would be
22 sufficient simply to say on the record that we have
23 looked at them and agreed to all of them.

24 MR. GOSSELIN: On the order regarding
25 attorney fees, we can just explain the changes.

1 Beginning on page 5, Mr. Bridges and I resolved a
2 disagreement about the amount of hours taken to
3 prepare. It's on page 2 of 4, paragraph 5.
4 Mr. Bridges and I resolved a disagreement about the
5 amount of time to prepare the motions for these
6 various motions, and we agreed to cut that amount in
7 half. So that's the amount of time attributed to the
8 proceedings after April 22 is divided by 2.

9 On page 3 of that order, we have removed
10 paragraphs 8 and 9 in light of the court's decision
11 not to apply lodestar and not to apply a multiplier.
12 We have corrected paragraph 10 to reflect the actual
13 amount of fees being awarded. And to save us time,
14 we didn't go through and break out paralegal and
15 attorney time. Those are included in the total. The
16 new total is \$203,585.

17 We deleted paragraph 12 in light of the court's
18 decision that only statutory costs of \$505 would be
19 awarded. The actual order then on page 4 is changed
20 to reflect attorney fees, \$203,585; costs in the
21 amount of \$505; and treble damages of \$10,000, for a
22 total of \$214,090.

23 MR. BRIDGES: And that is agreed as to form.

24 THE COURT: It's probably the largest
25 judgment we have all signed off on in our careers.

1 MR. GOSSELIN: It certainly is for me.

2 MR. BRIDGES: Oh, yes.

3 MR. GOSSELIN: And then you have the
4 judgment in front of you.

5 THE COURT: Yes.

6 MR. GOSSELIN: The judgment reflects
7 attorney fees of \$204,090, attorney fees and costs,
8 and other recovery amounts of \$10,000.

9 MR. BRIDGES: For CPA exemplary damages.

10 MR. GOSSELIN: On page 3, the amounts
11 awarded as exemplary damages, attorney fees, and
12 costs are noted in paragraphs 3, 4, and 5. Paragraph
13 6 has been deleted, and the parties have signed.

14 MR. BRIDGES: And that is agreed as to form
15 also.

16 THE COURT: Thank you, Counsel.

17 Again, I would like to personally thank you for
18 all your hard work and excellent representation in
19 this matter. The jury certainly gave Mr. Bridges a
20 lot of cudos in this matter. They thought you would
21 make a good prosecutor.

22 MR. GOSSELIN: One of our jurors was a
23 negotiator for Alaska Airlines.

24 MR. BRIDGES: Oh, the union guy.

25 MR. GOSSELIN: Yes. And he came and said he

1 wanted to hire you.

2 MR. BRIDGES: Apparently I wasn't good
3 enough though.

4 THE COURT: It was a really fascinating
5 case. Thank you all very much.

6 MR. BRIDGES: Thank you for your time, Your
7 Honor.

8 (Court at recess.)

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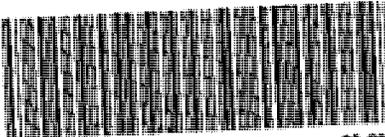
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Appendix 5



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The Honorable Rosanne Buckner
TRIAL DATE: MARCH 28, 2005

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

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

Plaintiffs,

vs.

UNIVERSAL UNDERWRITERS INSURANCE
COMPANY, a foreign insurer; LEN VAN DE
WEGE and "JANE DOE" VAN DE WEGE,
husband and wife and the marital community
composed thereof,

Defendants.

NO. 01 2 07954 4

**ORDER REGARDING
PRESUMPTIVE DAMAGES**

Presentment Hearing ^{FILED} 6 MAR 29 2005
DEPT. OF SUPERIOR COURT
IN OPEN COURT



This matter was tried to a jury beginning March 28, 2005. Before trial began the court ruled that Universal Underwriters Insurance Company had acted bad faith as a matter of law for refusing to provide the plaintiffs with underwriting files and compelling plaintiffs to institute litigation to get them. The court also ruled that the settlement between the plaintiffs on one hand and the Estate of Cynthia L. Tomy, Clinton L. Tomy, Nathan Tomy, Aaron Tomy, and Christian Tomy on the other, which included a Judgment by Confession, was reasonable. During trial, plaintiffs proposed a jury instruction and special verdict form that instructed the jury to award the unpaid portion of the Judgment that had been confessed by

ORDER REGARDING PRESUMPTIVE DAMAGES
Page 1 of 2

S:\WP\CASES\2181\Sharbono v. Universal\PLEADINGS\Order on presumptive damages.wpd

BURGESS FITZER, P.S.

ATTORNEYS AT LAW
1501 MARKET STREET, SUITE 300
TACOMA, WASHINGTON 98402-3333
(253) 572-5324 FAX (253) 627-8928

1 plaintiffs. Plaintiffs provided authority for those instructions, and such presumptive damages,
2 in their trial brief and with the instructions. Before submitting the case to the jury, the court
3 considered those authorities, and heard argument of counsel for both sides on the
4 appropriateness of the proposed instructions. The court concluded that, as a matter of law,
5 plaintiffs were entitled to an award of the unpaid portion of the judgment as presumptive
6 damages, that the court would direct a verdict in that regard, but that it would be improper to
7 instruct the jury to make that award. Accordingly, it is now, hereby

8 ORDERED, ADJUDGED AND DECREED that plaintiffs are entitled to and are
9 hereby awarded the unpaid portion of the Judgment by Confession entered in the matter of
10 Tomy v. Sharbono, Pierce County Cause No. 99-2-12800-7, to wit \$3,275,000.00, together
11 with interest that has accrued thereon since the date of entry, March 30, 2001, which, as of
12 May 13, 2005, (four years, 43 days @ 12%/yr.) totals \$ 1,618,298.63, and together with
13 interest that continues to accrue thereon as set forth in said judgment until said judgment is
14 paid.

15 Signed this 20 day of May, 2005.

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17 
HONORABLE ROSANNE BUCKNER

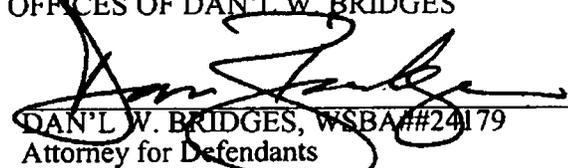
18 PRESENTED BY:

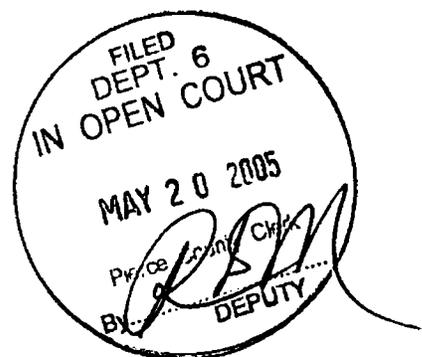
19 BURGESS FITZER, P.S.

20
21 By: 
TIMOTHY R. GOSSEIN, WSBA #13730
Attorney for Plaintiffs

22 APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED.

23 LAW OFFICES OF DAN'L W. BRIDGES

24
25 By: 
DAN'L W. BRIDGES, WSBA #24179
Attorney for Defendants



Appendix 6



The Honorable Rosanne Buckner
Noted for: Oct. 3, 2008 @ 9:00 am

FILED
IN COUNTY CLERK'S OFFICE
A.M. SEP 28 2008 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

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

Plaintiffs,

vs.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer; LEN VAN DE WEGE and "JANE
DOE" VAN DE WEGE, husband and wife
and the marital community composed
thereof,

Defendants.

NO. 01-2-07954-4

DECLARATION OF TIMOTHY R.
GOSELIN REGARDING EXECUTION
ON APPEAL BOND

ORIGINAL

I, TIMOTHY R. GOSELIN, declare and state:

1. I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

2. On Friday, September 5, 2008, this court heard and granted Plaintiffs' Motion to Execute on Appeal Bond. The court however, requested a CPA statement of the amounts claimed to be owed as the principle judgment amount and as post-judgment interest. The Sharbonos and the

DECLARATION OF GOSELIN
RE: MOTION TO EXECUTE ON
APPEAL BOND Page - 1

GOSELIN LAW OFFICE, PLLC
1901 JEFFERSON AVENUE, SUITE 304
TACOMA, WASHINGTON 98402
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

1 intervener, the Tomyn's disagreed as to the amounts owed as the principle judgment amounts.
2 Separate reports will be submitted by both parties reflecting their respective calculations.

3 3. Attached hereto is a true, correct and complete copy of the report secured by the
4 Sharbonos from CPA Bradley D. Krueger. This report reflects the calculations according to the
5 Sharbonos' interpretation of the judgment only. The Tomyns will submit a separate report reflecting
6 their proposed method of calculation.

7 4. Using the Sharbonos' method, the principle judgment amount is calculated by taking
8 the amount of the unpaid balance of the Judgment by Confession entered in the matter of Tomyn v.
9 Sharbono, Pierce County Cause No. 99-2-12800-7 (Motion to Execute on Bond, Exh. 6) –
10 \$3,275,000.00 – and calculating the interest that has accrued on that amount since the date the
11 Tomyn judgement was entered, March 30, 2001, at the rate set forth in that judgment, 12%. This
12 amount becomes the principle judgment amount of the Sharbono judgment (Motion to Execute on
13 Bond, Exh. 1, para. 1). Mr. Krueger's calculation of this amount is set forth in his chart on page one
14 of his report, and totals \$6,240,265.75, if the judgment is paid by October 15th.

15 5. Post-judgment interest applies to this amount pursuant to paragraph 7. Post judgment
16 interest accrued from May 20, 2005, the date the Sharbono judgment was entered. Mr. Krueger's
17 calculation of post judgment interest is reflected in the two charts on page two of his report. The
18 first chart reflects the value of the principle amount of judgment at the end of the first year after the
19 Sharbono judgment was entered. That is the date on which the first annual post-judgment interest
20 accrued. The second chart shows the post judgment interest that accrued thereafter. Mr. Krueger's
21 post-judgment interest calculation is \$2,353,956.28 if the judgment is paid by October 15, 2008.

22 6. **Mr. Krueger's total of principle and post-judgment interest is \$8,594,222.03.**
23 **This is the amount the Sharbonos contend is owed if paid by October 15, 2008.**

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

Signed this 20th day of September, 2008 at Tacoma, Washington.

By : 
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Plaintiffs

RAISL & COMPANY, P.S.

2

Pursuant to paragraph 7, the principle amount of judgment then is subject to post-judgment simple interest at a rate of 12% per annum from May 20, 2005 to the present. My calculation of that interest is as follows.

Sharbono v. Universal Underwriters Insurance Company
Interest Due from May 20, 2005
Annual Value of Principal Judgement Amount

Tomyn Principal	Rate	Simple Interest	Total Due	Payment Due Date
\$ 3,275,000.00	12%	393,000.00	\$ 3,668,000.00	30-Mar-02
3,275,000.00	12%	393,000.00	\$ 4,061,000.00	30-Mar-03
3,275,000.00	12%	393,000.00	\$ 4,454,000.00	30-Mar-04
3,275,000.00	12%	393,000.00	\$ 4,847,000.00	30-Mar-05
3,275,000.00	12%	54,912.33	\$ 4,901,912.33	20-May-05
3,275,000.00	12%	393,000.00	\$ 5,294,912.33	20-May-06

Interest Calculated on paragraph seven award.

Sharbono Principal	Rate	Paragraph Seven Int.	Payment Due Date
\$ 5,294,912.33	12%	635,389.48	20-May-06
\$ 5,687,912.33	12%	682,549.48	20-May-07
\$ 6,080,912.33	12%	729,709.48	20-May-08
\$ 6,295,178.08	12%	306,307.84	15-Oct-08
		<u>2,353,956.28</u>	

The total interest due under paragraph 7 is \$2,353,956.28. This assumes a payment date of October 15, 2008.

Therefore, based on these calculations, the total due as the principle amount of judgment under paragraph 1 is \$6,240,265.75, and the total due as post-judgment interest under paragraph 7 is \$2,353,956.28, for a combined total of \$8,594,222.03 due on the Sharbono v. Universal Underwriters judgment if paid by October 15, 2008.

Sincerely,



Bradley D. Krueger, CPA•MS(Tax)

Raisl & Company, P.S.

Tax and Financial Consulting
2323 N. 30th Street, Suite 300
Tacoma, WA 98403-3322

253.272.7444
FAX 253.272.2060

Bradley D. Krueger, CPA•M.S.
brad@raislco.com

September 16, 2008

Timothy R. Gosselin
1901 Jefferson Avenue
Suite 304
Tacoma, WA 98402

Dear Mr. Gosselin:

At your request, and as I understand it at the request of the Court as well, I have calculated the amounts owed pursuant to paragraph 1 of the Judgment entered May 20, 2005 in the matter of *Sharbono v. Universal Underwriters*, and post-judgment interest pursuant to paragraph 7 of that same judgment. I have used October 15, 2008 as the cutoff for all calculations.

In determining the amounts owed under paragraph one, I have accepted your interpretation of that paragraph: to wit, that principle judgment amount represents the current value of unpaid balance of the Judgment by Confession in the matter of *Tomyn v. Sharbono*, Pierce County Cause No. 99-2-12800-7. That judgment provides for post-judgment simple interest at the rate of 12% on the unpaid balance of the judgment from March 30, 2001 to the present. The unpaid balance is \$3,275,000.00. Therefore, the determination of the principle judgment amount for purposes of paragraph 1 merely requires simple interest is to be calculated on \$3,275,000.00 from March 30, 2001 to October 15, 2008.

Sharbono v. Universal Underwriters Insurance Company

Simple Interest Calculation

Date of Judgement March 30, 2001

Payment Due Date	Principal Balance	Rate	Interest	Total Due
30-Mar-02	\$ 3,275,000.00	12%	393,000.00	\$ 3,668,000.00
30-Mar-03	3,275,000.00	12%	393,000.00	\$ 4,061,000.00
30-Mar-04	3,275,000.00	12%	393,000.00	\$ 4,454,000.00
30-Mar-05	3,275,000.00	12%	393,000.00	\$ 4,847,000.00
30-Mar-06	3,275,000.00	12%	393,000.00	\$ 5,240,000.00
30-Mar-07	3,275,000.00	12%	393,000.00	\$ 5,633,000.00
30-Mar-08	3,275,000.00	12%	393,000.00	\$ 6,026,000.00
15-Oct-08	3,275,000.00	12%	214,265.75	\$ 6,240,265.75

Based on these calculations, the total principle amount of judgment through October 15, 2008, for purposes of paragraph 1 is \$6,240,265.75. This assumes payment on October 15, 2008.

09 SEP 11 PM 3:08

IN THE COURT OF APPEALS STATE OF WASHINGTON
OF THE STATE OF WASHINGTON BY _____
DIVISION II DEPUTY

JAMES and DEBORAH SHARBONO,
individually and the marital community
comprised thereof, CASSANDRA
SHARBONO,
Respondents/Appellants,

vs.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer; LEN VAN DE WEGE and
"JANE DOE" VAN DE WEGE,
husband and wife and the marital
community composed thereof,

Appellant,

CLINTON L. TOMYN, individually
and as Personal Representative of the
Estate of CYNTHIA L. TOMYN,
deceased; and as Parent/Guardian of
NATHAN TOMYN, AARON
TOMYN, and CHRISTIAN TOMYN,
minor children,

Respondents/Intervenors.

No: 38425-6-II

DECLARATION OF
SERVICE

On September 11, 2009, a true and correct copy of Intervenor
Tomyns' Responding Brief, was served on the following by legal messenger
to:

Phillip A. Talmadge, Esq.
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630

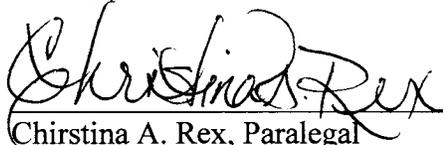
Dan'L W. Bridges, Esq.
McGaughey Bridges Dunlap, PLLC
325 118th Ave SE, Suite 209
Bellevue, WA 98005-3539

Timothy R. Gosselin, Esq.
Gosselin Law Office PLLC
1901 Jefferson Ave, Suite 304
Tacoma, WA 98402-1611

Jacquelyn A. Beatty, Esq.
Karr Tuttle Campbell
1201 3rd Ave, Suite 2900
Seattle, WA 98101-3284

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 this 11th day of September, 2009.



Christina A. Rex, Paralegal
The Law Offices of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, WA 98403
253-752-4444

