

Original

No. 38425-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Respondents,

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
a foreign insurer,

Appellant,

and

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

Defendants,

and

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.

REPLY BRIEF OF APPELLANT

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Dan'L W. Bridges, WSBA #24179
McGaughey Bridges Dunlap PLLC
325 118th Avenue SE, Suite 209
Bellevue, WA 98005
(425) 462-4000

Jacquelyn A. Beatty, WSBA #17567
Karr Tuttle Campbell
1201 3rd Avenue, Suite 2900
Seattle, WA 98101-3284
(206) 223-1313
Attorneys for Appellant Universal Underwriters Insurance Company

FILED
COURT OF APPEALS
DIVISION II
09 NOV 10 PM 3:40
STATE OF WASHINGTON
BY [Signature] DEPUTY

TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION	1
B. RESPONSE TO RESTATEMENT OF FACTS.....	2
C. SUMMARY OF ARGUMENT	3
D. ARGUMENT	4
(1) <u>The Trial Court Erred by Failing to Consider Universal’s CR 60 Motion as to Interest</u>	4
(2) <u>The Trial Court Erred in Calculating the Interest Rate</u>	10
(3) <u>The Sharbono-Tomyn Settlement Claim Was Not Liquidated Until the Trial Court Ruled It Was Reasonable</u>	15
(4) <u>The Prejudgment and Postjudgment Interest Overlap</u>	17
(5) <u>Interest Should Not Have Been Awarded</u>	19
E. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Washington Cases</u>	
<i>Allyn v. Asher</i> , 132 Wn. App. 371, 131 P.3d 339 (2006)	9
<i>Anderson v. State Farm Mutual Ins. Co.</i> , 101 Wn. App. 323, 2 P.3d 1029 (2000), <i>review denied</i> , 142 Wn.2d 1017 (2001)	10
<i>Besel v. Viking Ins. Co. of Wisc.</i> , 146 Wn.2d 730, 49 P.3d 887 (2002).....	17
<i>Colonial Imports v. Carlton Northwest, Inc.</i> , 83 Wn. App. 229, 921 P.2d 575 (1996).....	20
<i>Federal Signal Corp. v. Safety Factors, Inc.</i> , 125 Wn.2d 413, 886 P.2d 172 (1994).....	4
<i>Forbes v. Am. Bldg. Maint. Co. West</i> , 148 Wn. App. 273, 198 P.3d 1042, <i>review granted</i> , 166 Wn.2d 1024 (2009)	19-20
<i>Goodwin v. Northwestern Mut. Life Ins. Co.</i> , 196 Wash. 391, 83 P.2d 231 (1938).....	19
<i>Jackson v. Fenix Underground, Inc.</i> , 142 Wn. App. 141, 173 P.3d 977 (2007).....	14, 15
<i>Kiewit-Grice v. State</i> , 77 Wn. App. 867, 895 P.2d 6, <i>review denied</i> , 127 Wn.2d 1018 (1995).....	17
<i>Little v. King</i> , 147 Wn. App. 883, 198 P.3d 525 (2008)	13, 14
<i>Mercier v. GEICO Indem. Co.</i> , 139 Wn. App. 891, 165 P.3d 375 (2007), <i>review denied</i> , 163 Wn.2d 1028 (2008)	12, 13, 14
<i>Polygon v. American Nat’l Fire Ins. Co.</i> , 143 Wn. App. 753, 189 P.3d 777 (2007), <i>review denied</i> , 164 Wn.2d 1033 (2008)	17
<i>Scoccolo Constr., Inc. v. City of Renton</i> , 158 Wn.2d 506, 145 P.3d 371 (2006).....	19
<i>Sharbono v. Universal Underwriters Ins. Co.</i> , 139 Wn. App. 383, 161 P.3d 406 (2007), <i>review denied</i> , 163 Wn.2d 1055 (2008).....	5, 11
<i>Shumway v. Payne</i> , 136 Wn.2d 383, 964 P.2d 349 (1998).....	7, 8
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10, <i>cert. denied</i> , 501 U.S. 1237 (1991).....	6
<i>State v. Trask</i> , 98 Wn. App. 690, 990 P.2d 976 (2000)	9, 10

<i>Stevens v. Brink's Home Sec., Inc.</i> , 162 Wn.2d 42, 169 P.3d 473 (2007).....	12, 13, 14
<i>Tri-M Erectors, Inc. v. Donald M. Drake Co.</i> , 27 Wn. App. 529, 618 P.2d 1341 (1980), <i>review denied</i> , 95 Wn.2d 1002 (1981).....	17
<i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004).....	15

Statutes

RCW 4.56.110	13
RCW 4.56.110(1).....	13, 15
RCW 4.56.110(3).....	<i>passim</i>
RCW 48.01.030	10

Rules and Regulations

CR 60	3, 4, 9
RAP 2.2(a)	8
RAP 2.5(c)	4
RAP 2.5(c)(1).....	<i>passim</i>
RAP 10.3(a)(5).....	3
RAP 10.3(b)	3
RAP 12.2.....	8, 9
RAP 12.9(b).....	8
RAP 13.4.....	8
RAP 13.7(b).....	8

Other Authorities

Karl B. Tegland, 2A <i>Washington Practice</i> (6 th ed. 2004).....	5, 8
--	------

A. INTRODUCTION

As this Court is aware, aspects of this case have been appealed before. The present appeal concerns the interest awarded on remand and the date from which such interest should accrue, if at all. Universal recognizes its obligations under the judgment, and in no way wishes to minimize the tragic loss suffered by the Tomyns. However, the trial court erred in accepting the interest calculations proffered by the Sharbonos. To the extent that prejudgment interest should be awarded, if at all, it was erroneously awarded at the rate applicable to contracts rather than that appropriate to a tort claim of bad faith. The trial court also made Universal liable for double interest payments by overlapping the periods in which it applied pre- and postjudgment interest. Neither the Sharbonos' nor the Tomyn's briefs provide this Court with any adequate reason to uphold the trial court's judgment.¹

This Court should rule that Universal is not obligated to pay prejudgment interest at all. It was not until May 20, 2005 that the judgment was entered on the verdict of the jury finding Universal guilty of bad faith.

¹ The Tomyns' brief offers little independent argument justifying affirmance of the trial court's decisions below. Universal focuses principally on the Sharbonos' brief.

Alternatively, if the Court specifically addresses interest under the various paragraphs of the May 20, 2005 judgment, it should hold that Universal was only obligated under ¶ 1 of that judgment to pay interest at the applicable tort judgment interest rate, not 12%, from May 2, 2003, the date of the order on the reasonableness of the Sharbono-Tomyn settlement.

Universal should not be obligated to pay what amounts to double interest, both the interest on ¶ 1 of the May 20, 2005 judgment, and postjudgment interest pursuant to ¶ 7 of that judgment. In effect, Universal would be paying *double interest* for the period between May 20, 2005 and October 3, 2008 on the same damages.

This Court should rule that Universal has satisfied any obligation to pay interest in this case when the trial court ordered disbursement of funds (which included interest) to the Tomyns on June 12, 2009 and the Tomyns obtained the funds from the Pierce County Superior Court, but the interest should have been awarded at the tort judgment interest rate.

B. RESPONSE TO RESTATEMENT OF FACTS

This Court is well acquainted with the facts of this case by now. It must be noted, however, that the statement of the case in intervenor Tomyn's brief incorporates its own introduction by reference. Br. of Resp'ts Tomyn at 8-9. The introduction it incorporates, like the statement

of facts itself, is replete with argumentative assertions and long statements of alleged fact without citation to the record. *Id.* at 5-10. RAP 10.3(a)(5) and RAP 10.3(b) require a respondent's statement of the case to be a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." Of the fourteen pages in the Tomyn's brief, scarcely four are devoted to legal argument of a single issue: the manner in which the trial court calculated postjudgment interest. This Court should reject the Tomyns' irrelevant and unsupported attacks on Universal.

C. SUMMARY OF ARGUMENT

The trial court erred when it awarded that interest at the 12% rate applicable to an award under a contract instead of the rate applicable to torts under RCW 4.56.110(3), refusing to consider Universal's CR 60 motion to vacate the May 20, 2005 judgment and October 3, 2008 order, a motion which Universal properly made under RAP 2.5(c)(1). The settlement agreement between the Sharbonos and the Tomyns was not liquidated until the trial court found it reasonable, and it was error for the court to apply prejudgment interest prior to the date of its reasonableness ruling. The court erred in awarding prejudgment on the Sharbono-Tomyn consent judgment and postjudgment interest on the recovery in ¶ 1 of the

May 20, 2005 judgment during an overlapping period of time subjecting Universal to compound interest in violation of Washington law.

D. ARGUMENT

(1) The Trial Court Erred by Failing to Consider Universal's CR 60 Motion as to Interest

The trial court denied Universal's motion to vacate the May 20, 2005 judgment and October 3, 2008 order. CP 351-73, 776-80. The court provided no reason for denying the motion beyond referring to the motion as being "procedurally irregular." CP 622. Findings must be made on all material issues in order to inform the appellate court as to what questions were decided by the trial court, and the manner in which they were decided. *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422, 886 P.2d 172, 178 (1994). The court was apparently uncertain about the relationship between CR 60 and RAP 2.5(c)(1). Under RAP 2.5(c)(1) the trial court should have addressed the interest issue. RAP 2.5(c) provides that new issues may be properly brought before the trial court on remand. RAP 2.5(c)(1) states:

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.

On remand, a trial court may exercise independent judgment as to a decision to which error was not assigned in the prior review, and these decisions are subject to later review by the appellate court. Karl B. Tegland, 2A *Washington Practice* (6th ed. 2004) at 215 (hereinafter “Tegland”). In the previous appeal, this Court made no holding about the amount of interest on the \$3,275,000. Rather, the court said:

Finally, we vacate the damage award of \$4,500,000 based on the jury verdict. 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). There is nothing in this Court’s previous opinion affirming a 12% interest rate. Instead, it affirmed “the amount of \$3,275,000, together with interest” and remanded for further proceedings, leaving it to the trial court to determine the amount of interest due.

This Court reversed the trial court’s decision to stack various coverages, and its decision finding contractual liability. *Id.* at 399-400. Thus, the only basis for Universal’s continued liability to the Sharbonos lies in tort based on the finding of bad faith. The trial court erred in applying a 12% rate applicable to contracts to its prejudgment and

postjudgment interest awards rather than the lower tort judgment interest rate of RCW 4.56.110(3).

The Sharbonos assert that nothing new arose on remand because of this Court's decision in the first appeal. Br. of Resp'ts Sharbono at 12. That assertion is plainly incorrect. First, this Court reversed any contract-based grounds for ¶ 1 of the May 20, 2005 judgment when it ruled that the Sharbonos' coverage under Universal's policy was limited to the \$1 million personal umbrella coverage afforded by the policy. The *only* basis then for ¶ 1 was Universal's alleged bad faith, a tort-based recovery. Moreover, the trial court's October 3, 2008 order was entered only after considering *new evidence* in the form of expert CPA testimony ordered by the trial court after remand from this Court. CP 162-66, 192-200, 230. The CPA testimony analyzed the interest due on the \$3,275,000 which represented the unpaid amount of the confession judgment. *Id.* That evidence did not exist and was not before this Court at the time of the previous appeal. It is axiomatic that a ruling made on evidence not considered, much less even in existence, until after the appeal is not something that was, or could have been resolved by the appeal. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991). Furthermore, the contractual basis for any recovery under ¶ 1 had been overturned by this Court on appeal.

The Sharbonos insist that Universal is barred from pursuing this appeal, asserting erroneously that the issues on appeal were settled in the May 20, 2005 judgment or were not otherwise previously appealed. Br. of Resp'ts Sharbono at 7-8.² It supports its argument by quoting extensively from *Shumway v. Payne*, 136 Wn.2d 383, 964 P.2d 349 (1998). *Shumway* is inapposite. Shumway and her mother were convicted of murder. *Id.* at 387. Shumway appealed, raising a number of issues including the trial court's denial of her motion to sever the charges. *Id.* at 388. After the Court of Appeals affirmed, Shumway appealed to our Supreme Court, but did not raise the severance issue in that appeal. *Id.* When our supreme court denied review, she filed a petition for writ of certiorari with the United States Supreme Court. *Id.* Once again, she did not include the severance issue. *Id.* She subsequently filed a personal restraint petition with the Court of Appeals challenging her conviction on several grounds, including the severance issue. *Id.* When her petition was denied, Shumway did not seek discretionary review with the Supreme Court, but instead filed a petition of habeas corpus in federal district court. *Id.* at 389. The district court certified the petition to our Supreme Court. *Id.* at 387. The Supreme Court held there was no basis under Washington law to raise the issue of severance after a three year delay where Shumway had

² The Sharbonos' argument was implicitly rejected by this Court in denying the Sharbono and Tomyn motions to dismiss, and the Court need not even address it.

not raised the issue of severance in her petition for review and the Court of Appeals had issued its mandate. *Id.* at 393.

Shumway turned on the statute of limitations for filing a personal restraint petition and the petitioner's failure to file a petition for discretionary review with our Supreme Court. *Id.* at 391-93, 397-99. The Court relied in part upon RAP 13.4 (requiring a party seeking discretionary review to file a petition for review within 30 days of the entry of decision), RAP 13.7(b) (court will review only questions raised in the motion), and RAP 12.9(b) (an appellate court may recall its mandate to correct inadvertent mistakes or to modify a decision obtained by fraud). Nowhere in the opinion does the Court discuss RAP 2.5(c)(1) which specifically permits the trial court to exercise independent judgment regarding a decision to which error was not assigned in the prior review. Tegland at 237.

Here, this Court explicitly remanded the case to the trial court *for further proceedings* on "the directed verdict in the amount of \$3,275,000, together with interest." The trial court may address, and this Court may review, the propriety of a decision of the trial court even though a similar decision was not disputed in the first appeal. RAP 2.5(c)(1). The rule permitted the trial court on remand to exercise independent judgment as to an issue not raised in the first appeal. RAP 12.2 limits RAP 2.2(a) to

prohibit an appeal of an order enforcing mandate because RAP 12.2 makes a court's earlier decision binding on the parties and on the trial court unless a postjudgment motion challenges issues not already decided by the appellate court. *Allyn v. Asher*, 132 Wn. App. 371, 372-73, 131 P.3d 339, 339-40 (2006). That is precisely what Universal did with its CR 60 motion.

Universal brought its CR 60 motion contesting the lawful interest rate applicable to the award. CP 636. The motion was based on evidence presented to the trial court *after remand*. CP 646. Under RAP 2.5(c)(1), Universal's motion was entirely correct from a procedural standpoint. It directly addressed an issue for which this Court had remanded for further proceedings, and was thus properly before the court.³

The Sharbonos also attempt to distinguish *State v. Trask*, 98 Wn. App. 690, 990 P.2d 976 (2000), arguing that Universal's reliance on that case is misplaced. Br. of Resp'ts Sharbono at 11-12. The Sharbonos attempt to parse a distinction out of the *Trask* court's holding that the law of the case doctrine did not bar a second appeal where the trial court incorrectly calculated interest on remand. Br. of Resp'ts Sharbono at 12. Because Universal is appealing the trial court's decision making an award of interest, the Sharbonos argue that *Trask* is inapplicable. *Id.* This is

³ The Tomyns are entirely correct when they acknowledge that the order executing on the appeal bond is appealable. Br. of Resp'ts Tomyn at 6.

truly a distinction without a difference. The *Trask* court was reviewing the trial court's incorrect calculation of interest. *Trask*, 98 Wn. App. 698-99. Like the court here, it was revisiting an earlier interest ruling: whether the ruling awarded interest or miscalculated the amount of interest is irrelevant to the propriety of review. This Court may consider anything it failed to consider in the first appeal, and may correct anything it incompletely or inaccurately considered in the first appeal. *Id.* at 695.

Because Universal's motion was properly before the trial court under RAP 2.5(c)(1), the trial court erred by failing to consider it.

(2) The Trial Court Erred in Calculating the Interest Rate

The trial court apparently employed the 12% rate to which the Sharbonos and the Tomyns agreed in the confessed judgment rather than the percentage appropriate to a tort judgment. CP 64, 332-34. Universal's liability for the confession of judgment is based on conduct the court found constituted bad faith. Bad faith is manifestly a tort claim, not a contract claim. *Anderson v. State Farm Mutual Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000), *review denied*, 142 Wn.2d 1017 (2001); RCW 48.01.030. The trial court plainly recognized in ¶ 7 of the judgment that ¶¶ 2-6 of the judgment were tort-based, and applied the tort judgment interest rate to the recoveries outlined in those paragraphs. CP 9. After this Court's decision in the first appeal, the trial court should have applied

the same rule to the recovery still allowed by ¶ 1 because any basis in contract for that paragraph of the judgment was overturned by this Court's decision in the first appeal.

The Sharbonos argue that ¶ 1 of the May 20, 2005 judgment does not award interest. Br. of Resp'ts Sharbono at 14, 15. The plain language of the paragraph says otherwise:

Judgment is hereby entered in favor of plaintiffs and against defendant Universal Insurance Company in the amount of the unpaid balance of the Judgment by Confession...to wit \$3,275,000.00, *together with interest* that has accrued thereon since the date of entry, March 30, 2001...

CP 9 (emphasis added). In making that assertion, the Sharbonos do not dispute that this was a tort judgment. Nor do they acknowledge that they lost essentially every substantive policy-based issue on appeal: this Court reversed the trial court's judgment establishing coverage at \$7,000,000; it held that the Sharbonos had umbrella coverage of \$1,000,000 under only one policy. This Court also reversed the trial court's determination that Universal violated the Consumer Protection Act; and reversed the jury verdict for bad faith damages and the trial court's dismissal of the Sharbonos' claim against their agent for negligently procuring the Universal umbrella policy. *Sharbono*, 139 Wn. App. at 389. It affirmed only the summary judgment declaring Universal liable for bad faith and

the trial court's ruling that the Tomy-Sharbono settlement was reasonable. *Id.*

After this Court's opinion, only ¶¶ 1, 7 of the May 20, 2005 judgment remained viable; ¶¶ 2-6 were inoperative due to this Court's decision, and the basis for the interest award under the confessed judgment was void. Under the common law tort of insurance, bad faith was the *only* legal basis left to sustain ¶ 1 of the May 20, 2005 judgment. Because Universal's liability arose in tort rather than in contract, the trial court erred in awarding interest at the 12% rate.

A close analysis of relevant case law is appropriate here because that law supports Universal's position on interest. In *Mercier v. GEICO Indem. Co.*, 139 Wn. App. 891, 165 P.3d 375 (2007), *review denied*, 163 Wn.2d 1028 (2008), the court held that in an uninsured motorist ("UIM") claim, the UIM insurer "stands in the shoes of the tortfeasor," and its liability to the insured is identical to the tortfeasor's up to the UIM policy limits. *Id.* at 888. The court held that a UIM carrier's obligation to pay both prejudgment and postjudgment interest on a tort judgment accrues at the rate provided for tort claims under RCW 4.56.110(3).

Shortly after the *Mercier* opinion was filed, our Supreme Court came to a contrary conclusion in a related issue in *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007). *Stevens* involved claims

under the Washington Minimum Wage Act (“MWA”). *Id.* at 50-52. The Court held that whether the appropriate interest rate was that applicable to tort claims under RCW 4.56.110(3), or that applicable to claims stemming from written contracts under RCW 4.56.110(1) was to be determined by looking to the statute of limitations applicable to the underlying claim. *Id.* It found that under the MWA, the statute of limitations for contracts applied, and RCW 4.56.110(1) provided the applicable rate of interest on the judgment. *Id.* at 51.

Division One subsequently relied upon *Stevens* and departed from *Mercier* in another UIM case. *Little v. King*, 147 Wn. App. 883, 198 P.3d 525 (2008). The court described UIM insurance as follows:

UIM insurance provides a second layer of excess insurance coverage that "floats" on top of recovery from other sources for the injured party. Coverage eligibility requires the insured to demonstrate that he or she is "legally entitled to recover" in tort from the underinsured motorist. RCW 48.22.030(2)...[A] UIM insurer's liability is limited, as a matter of contract, by the policy...

Id. at 888 (internal citations omitted). The court held that the case was grounded in contract, not in tort, as the statute of limitations for UIM claims is the six years provided for written contracts. *Id.* at 889. The court abrogated its decision in *Mercier*, and held that a judgment for UIM benefits is founded on contract for the purpose of calculating postjudgment interest under RCW 4.56.110. *Id.* at 889.

Both *Mercier* and *Little* dealt with UIM insurance (that provision of a policy which “floats on top” of other recovery). Neither case stands for the proposition that interest must be awarded at a contract, rather than a tort, rate in all instances. Under *Stevens*, this Court should look to the statute of limitations pertaining to the underlying claim - in this case, a tort claim.

The *Little* court cited *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 146, 173 P.3d 977 (2007) in support of its holding. *Id.* at 890. In *Jackson*, the plaintiff sued the Fenix nightclub for injuries he sustained in a brawl outside the nightclub. *Id.* at 143. Jackson, the Fenix, and the Fenix’s insurance company (“Scottsdale”) participated in a mediation. *Id.* Jackson and the Fenix then agreed to settle the case without Scottsdale’s approval, and entered into a covenant judgment with interest to accrue at 12%. *Id.* The trial court approved the settlement as reasonable. *Id.* at 144. Scottsdale moved for reconsideration, asserting that the judgment was subject to the interest rate provided in RCW 4.56.110(3) for judgments “founded on the tortious conduct of individuals.” *Id.* The trial court granted the motion and Jackson appealed. *Id.* at 144-45. The Court of Appeals held that once parties have agreed to settle a tort claim, the foundation for the judgment is their written contract, not the underlying allegations of tortious conduct. *Id.* at 146.

At first blush, the court's opinion in *Jackson* could appear to confirm that the 12% contract interest rate should be awarded here. But there is one profound distinction between *Jackson* and the present case which bars the award of contract interest: *Jackson* was not appealed before the interest was awarded. Many of the provisions of the consent judgment were essentially gutted by this Court on appeal. The confessed judgment contains no severance clause. Absent such a clause, there is no basis to award interest according to its provisions once it had been overturned on appeal. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 320, 103 P.3d 753, 768 (2004) (Unless the parties have agreed to a severability clause in an agreement, courts need not preserve a contract's essential terms.). Where a trial court has awarded interest based on an agreement subsequently overruled in large part on appeal, there is no longer an agreement to support contract based interest. The trial court erred in awarding interest pursuant to contract under RCW 4.56.110(1), rather than as a tort under RCW 4.56.110(3).

(3) The Sharbono-Tomyn Settlement Claim Was Not Liquidated Until the Trial Court Ruled It Was Reasonable

The Sharbonos' arguments regarding the amount of interest to be applied, and the date from which it should accrue are frankly nonsensical and thus difficult to rebut. As noted above, the Sharbonos argue that ¶ 1

of the May 20, 2005 judgment does not award interest. Br. of Resp'ts Sharbono at 14, 15. In contradiction of the plain language of the judgment, they assert that Universal is not paying interest under ¶ 1. *Id.* at 18. The judgment explicitly awards the unpaid balance of the judgment together with the interest accruing thereon since the date of entry, March 30, 2001. CP 9.⁴ The Sharbonos' assertion is indicative of the confusion inherent in their arguments regarding pre- and postjudgment interest.⁵ First, they calculated "the principle [sic] amount of judgment" by "taking the amount of the unpaid balance of the Judgment by Confession," which was entered on March 30, 2001 and then add to it "the interest that has accrued on that amount since [that] date...". CP 4, 163.

According to the Sharbonos, prejudgment interest is due from the date of the May 30, 2001 confessed judgment. Br. of Resp'ts Sharbono at 19. This is the erroneous position adopted by the trial court, CP 333, and is directly contrary to Washington law. To the extent that the Sharbonos were entitled to prejudgment interest at all on their settlement with the Tomyns, they were not entitled to prejudgment interest *until the amount was liquidated*. That amount was not liquidated as a matter of law until

⁴ Universal has paid for its liability under ¶ 1 to the Tomyns. The trial court ordered disbursement of funds from the registry of the Pierce County Superior Court on June 12, 2009 in the amount of nearly \$4.9 million.

⁵ The sense of confusion is enhanced by the Sharbonos' persistent use of the word "principle" in place of "principal." CP 15, 17, 20, 23.

the trial court determined the settlement was reasonable by its May 2, 2003 order. Under the case law beginning with *Besel v. Viking Ins. Co. of Wisc.*, 146 Wn.2d 730, 49 P.3d 887 (2002), it was only at this point that the Sharbono-Tomyn consent judgment carried preclusive effect as to Universal. In *Polygon v. American Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 791, 189 P.3d 777 (2007), *review denied*, 164 Wn.2d 1033 (2008), this Court cogently noted: "A settlement made in an underlying lawsuit is generally liquidated with respect to subsequent indemnity claims." Generally, where any opinion or discretion is required to determine damages, a claim is unliquidated. *Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wn. App. 529, 537, 618 P.2d 1341 (1980), *review denied*, 95 Wn.2d 1002 (1981). Any decision requiring the determination of the reasonableness of damages is inherently one involving opinion or discretion, and prejudgment interest is consequently unavailable. *Kiewit-Grice v. State*, 77 Wn. App. 867, 872-73, 895 P.2d 6, *review denied*, 127 Wn.2d 1018 (1995). The Sharbonos were not entitled to prejudgment interest from Universal prior to May 2, 2003.

(4) The Prejudgment and Postjudgment Interest Overlap

According to the Sharbonos, prejudgment interest should run from the confessed judgment entered on March 30, 2001 *through October 15,*

2008.⁶ CP 4, 163. Yet the Sharbonos applied postjudgment interest dating back to the May 20, 2005 judgment. CP 163. This would result in Universal paying double interest, as Universal would be paying interest on the Sharbono-Tomyn consent judgment at 12% and paying postjudgment interest at 12% pursuant to ¶ 7 of the May 20, 2005 judgment on the recovery in ¶ 1. This was plainly erroneous. In fact, in their cross-appeal, the Sharbonos actually advance Universal's own argument that it is being required to pay double interest. In arguing that they, rather than the Tomyns, should receive payment of postjudgment interest, the Sharbonos state:

The trial court's ruling results in a windfall to the Tomyns. Under it, not only do the Tomyns receive post-judgment interest at 12% on the covenant judgment entered in their favor as a result of the settlement agreement, they receive another 12% interest as a result of the Sharbonos' rights to post-judgment interest under paragraph 7. This effectively gives the Tomyns an over 24% interest on their judgment, even though the settlement agreement only called for 12%.

Br. of Resp'ts Sharbono at 27. Universal does not address the issue of which party should receive postjudgment interest payments. But the Sharbonos are absolutely correct in this one respect: there is indeed a windfall tucked away in the trial court's judgment. And it is Universal which has been ordered to pay it. Compound or double interest is

⁶ Indeed, the Gosselin declaration can reasonably be interpreted to require the prejudgment interest to continue accruing beyond that date. CP 163.

forbidden under Washington law. *Goodwin v. Northwestern Mut. Life Ins. Co.*, 196 Wash. 391, 404, 83 P.2d 231 (1938). This Court should hold that prejudgment interest ceased to accrue as of the May 20, 2005, and that postjudgment interest only began to accrue as of that same date.

(5) Interest Should Not Have Been Awarded

The trial court awarded Sharbonos 12% interest on the judgment by confession they executed with the Tomyns. CP 9, 63.⁷ The trial court retained that 12% prejudgment interest award in its October 3, 2008 order granting the Sharbonos' motion to execute on the appeal bond after remand by this Court. CP 332-33. In neither the judgment nor the order did the court spell out its reasoning for awarding 12% prejudgment interest. The trial court erred in awarding the Sharbonos prejudgment interest *at all*, particularly where it neglected to articulate its rationale for such interest.

In numerous cases, Washington courts have held that an award of prejudgment interest is largely discretionary. *Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). ("Prejudgment interest may be awarded when the claim is liquidated.") An award of interest may be disallowed if justice so requires. *Forbes v. Am. Bldg.*

⁷ This award involved prejudgment interest *as to Universal*, because Universal was not finally adjudged to be guilty of bad faith until the trial court entered the judgment on the jury's verdict on May 20, 2005.

Maint. Co. West, 148 Wn. App. 273, 198 P.3d 1042, 1056, *review granted*, 166 Wn.2d 1024 (2009); *Colonial Imports v. Carlton Northwest, Inc.*, 83 Wn. App. 229, 241-45, 921 P.2d 575 (1996). In this case, the trial court did not explain its reasoning, depriving this Court of the ability to decipher its rationale. The trial court should have articulated its reasoning to allow this Court the opportunity to review the basis for the court's decision.

An award of prejudgment interest was inappropriate in any event given the presence of so many decisions requiring an exercise of discretion before Universal could be adjudged responsible to pay anything to its insureds. The trial court had to determine that the Sharbono-Tomyn settlement was reasonable. This did not occur until May 2, 2003, CP 353, *long after* the entry of the Sharbono-Tomyn March 30, 2001 consent judgment. Similarly, the jury did not determine that Universal was guilty of bad faith until 2005 and the judgment was not entered until May 20, 2005. Under traditional principles of prejudgment interest, the amount due in ¶ 1 remained subject to two significant discretionary decisions rendering any award of prejudgment here against Universal unfair until the jury had spoken. No award of prejudgment interest is merited here.

E. CONCLUSION

If prejudgment interest is to be awarded against Universal for bad faith pursuant to the May 20, 2005 judgment, the trial court improperly

calculated such interest; the amount of interest allowed by the trial court was excessive. That court allowed interest at a contract rate instead of the tort rate, and commenced interest before the consent judgment between the Sharbonos and Tomyns was determined by the trial court to be reasonable. The court also allowed double interest between May 20, 2005 and October 3, 2008.

This Court should reverse the order executing on the bond, and remand the case to the trial court to vacate the interest award in the May 20, 2005 judgment and to properly calculate the interest due. Costs on appeal should be awarded to Universal.

DATED this 10th day of November, 2009.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Peter Lohnes, WSBA #38509
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Dan'L W. Bridges, WSBA #24179
Law Offices of Dan'L W. Bridges
2135 - 112th Avenue NE, #120
Bellevue, WA 98004-2912
(425) 818-4880

Jacquelyn A. Beatty, WSBA #17567
Karr Tuttle Campbell
1201 3rd Avenue, Suite 2900
Seattle, WA 98101-3284
(206) 223-1313
Attorneys for Appellant
Universal Underwriters Insurance Company

DECLARATION OF SERVICE

On said day below, I emailed and deposited in the U. S. mail a true and accurate copy of the following document: Reply Brief of Appellant in Court of Appeals Cause No. 38425-6-II to the following:

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
1901 Jefferson Ave., Suite 304
Tacoma, WA 98402-1611

Benjamin Franklin Barcus
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA 98402-5313

Jacquelyn A. Beatty
Attorney at Law
1201 3rd Avenue, Suite 2900
Seattle, WA 98101-3284

FILED
COURT OF APPEALS
DIVISION II
09 NOV 10 PM 3:40
STATE OF WASHINGTON
BY  DEPUTY

Original sent by ABC Legal Messengers for filing with:
Court of Appeals for Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402

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: November 10, 2009, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick