

No. 38425-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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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.

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A. INTRODUCTION

This is the second appeal arising out of the tragic automobile accident between Cassandra Sharbono and Cynthia Tomyn that killed Ms. Tomyn. The Tomyns and Sharbonos settled the claims between them arising out of that accident. The Sharbonos then sued Universal, which had paid its personal umbrella limits on the Sharbonos' behalf, but which denied coverage under its commercial umbrella coverages. The Sharbonos alleged breach of contract, common law bad faith, and violation of the Consumer Protection Act, RCW 19.86 ("CPA"), and obtained a judgment against Universal on May 20, 2005. This Court reversed many of the key trial court rulings supporting the judgment against Universal.

Upon remand, the Sharbonos sought to execute on the supersedeas bond for those portions of the May 20, 2005 judgment they claimed were unaffected by this Court's opinion.<sup>1</sup> The trial court found that the "presumptive damages" portion of its May 20, 2005 judgment awarding the Sharbonos \$3.275 million plus interest remained viable, despite this Court's ruling on causation.

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<sup>1</sup> For example, this Court reversed a part of the judgment awarding \$4.5 million for the Sharbonos' alleged emotional distress damages, but, on remand, the Sharbonos did not address that portion of the judgment.

The trial court erred in three significant ways. First, it erred in permitting the Sharbonos to recover prejudgment interest, particularly where their claim was not liquidated until the trial court ruled the Sharbono-Tomyn settlement was reasonable. Second, it erred by disregarding this Court's *Trask* decision and allowing the Sharbonos to recover both prejudgment interest until October 15, 2008 *and* postjudgment interest after May 20, 2005. In essence, the trial court awarded the Sharbonos compound interest forbidden under Washington law. Finally, the trial court failed to apply RCW 4.56.110(3)'s tort judgment interest rate to any prejudgment and postjudgment interest award when the Sharbonos' recovery against Universal was tort-based.

#### B. ASSIGNMENTS OF ERROR

##### (1) Assignments of Error

1. The trial court erred in entering its October 3, 2008 order granting the motion to execute on the supersedeas bond.

2. The trial court erred in entering its November 7, 2008 order striking Universal's motion to vacate and/or amend the judgment.

##### (2) Issues Pertaining to Assignment of Error

1. Did the trial court abuse its discretion by refusing to address the vacation of its May 20, 2005 judgment, where the interest issue was not addressed in the first appeal, the interest rate in the trial

court's May 20, 2005 judgment was clearly erroneous, and it would be unjust to impose a 12% rate of interest pre- and postjudgment? (Assignments of Error Numbers 1, 2)

2. Did the trial court err in awarding prejudgment interest on the Sharbono-Tomyn settlement, the basis for the presumptive damages portion of its May 20, 2005 judgment against Universal, from March 30, 2001, rather than from May 20, 2003, the date when the reasonableness of that settlement was determined by the court? (Assignment of Error Numbers 1, 2)

3. Did the trial court violate this Court's *Trask* decision when it allowed the Sharbonos to recover prejudgment interest from March 30, 2001 until October 15, 2008 and simultaneously recover judgment interest from May 20, 2005 to the present time? (Assignments of Error Numbers 1, 2)

4. Did the trial court err by allowing the recovery of prejudgment interest and postjudgment interest at 12%, rather than the tort judgment interest rate of RCW 4.56.110(3)? (Assignments of Error Numbers 1, 2)

### C. STATEMENT OF THE CASE

The facts relating to the underlying automobile accident between the Sharbonos' then 16-year-old daughter, Cassandra, and Cynthia Tomyn

are set forth in *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 161 P.3d 406 (2007), *review denied*, 163 Wn.2d 1055 (2008). Universal will not recite the facts again, but it does submit the following additional facts pertinent to the interest calculation by the trial court.

As part of the settlement between the Tomyns and the Sharbonos, the Sharbonos confessed to judgment on March 30, 2001 in the amount of \$4.525 million with interest at 12%, CP 74-78, and agreed to pursue recovery from Universal. CP 179-83. Although the Sharbonos confessed to judgment in the amount of \$4.525 million, the amount of the judgment in ¶ 1 of the May 20, 2005 judgment against Universal is \$3.275 million, representing a reduction for the \$250,000 limits paid by the Sharbonos' primary auto liability carrier and the \$1 million paid by Universal.

The Sharbonos then commenced an action against Universal in the Pierce County Superior Court for breach of contract, the tort of bad faith, and violation of the Consumer Protection Act, RCW 19.86 ("CPA"). CP 180-81. In that litigation, the trial court, the Honorable Roseanne Buckner, made numerous rulings, including a December 27, 2002 order finding that the Sharbonos were entitled to coverage under Universal's policies under Part 980, a commercial umbrella coverage, CP 353; a January 24, 2003 order that allowed the Sharbonos to stack their coverage limits, *id.*; a May 2, 2003 order declaring the settlement between the

Sharbonos and Tomyns to be reasonable, *id.*; a March 30, 2005 order which found Universal liable as a matter of law for bad faith and for violation of the CPA, CP 309-13; and a May 20, 2005 order on the Sharbonos' presumptive damages. CP 79-80.

On May 20, 2005, the trial court entered judgment in favor of the Sharbonos against Universal. CP 81-84. *See* Appendix. The judgment contained the following seven paragraphs:

1. Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company in the amount of the unpaid balance of Judgment by Confession entered against plaintiffs [in the *Tomyn* action] to wit \$3,275,000, together with interest that has accrued thereon since the date of entry, March 30, 2001, which as of May 13, 2005 [. . .] 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.
2. Judgment is hereby entered in favor of plaintiffs James and Deborah Sharbono and against defendant Universal . . . in the additional sum of \$4,500,000.00 as and for past and future general and special damages as found by the jury.
3. Judgment is hereby entered . . . for punitive damages pursuant to RCW 19.86.090 in the amount of \$10,000.
4. Judgment is hereby entered . . . in the additional sum of \$203,585.00 for actual attorney fees.
5. Judgment is hereby entered . . . in the additional sum of \$505.00 for costs.
6. [Stricken]

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 percent per annum. 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 percent per annum.

*Id.*

Both parties appealed. In its opinion, this Court *rejected* the trial court's decision that Universal had a contractual duty to pay more than the \$1 million limits of its personal umbrella coverage Universal conceded it owed and had long since paid. 139 Wn. App. at 395-400. Also, this Court agreed with Universal that the Sharbonos' commercial umbrella coverages did not apply and could not be stacked, thereby rejecting any *contract-based* recovery by the Sharbonos. *Id.* at 399-400. The Court concluded the Sharbono-Tomyn settlement was reasonable. *Id.* at 400-07.

This Court also reversed the trial court's determination that Universal acted in bad faith and violated the CPA by compelling the Sharbonos to litigate. *Id.* at 407-16. This Court said that the Sharbonos did not have a cause of action against Universal for compelling insureds to institute or submit to litigation, concluding "The trial court's error in granting summary judgment on Universal's alleged violation of WAC 284-30-330(7) requires that we vacate the bad faith judgment. The trial court instructed the jury that it could consider Universal's CPA violation

in awarding damages. Yet the jury verdict form did not ask the jury to apportion damages between bad faith and the CPA violation.” *Id.* at 415.

Finally, this Court found that the trial court erroneously instructed the jury on proximate cause. *Id.* at 422. Consequently, after this Court’s opinion, only ¶¶ 1, 7 of the May 20, 2005 judgment remained viable;<sup>3</sup> ¶¶ 2-6 were inoperative due to this Court’s decision.

Following this Court’s mandate, rather than seek entry of a new judgment, or pursue retrial of any issues,<sup>4</sup> the Sharbonos moved to execute on the appeal bond that Universal had posted for the amounts due under ¶¶ 1, 7 of the May 20, 2005 judgment. CP 1-66. The Tomyns asked the trial court for permission to intervene, CP 67-71, which was granted. CP 159-

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<sup>3</sup> ¶ 1 of the May 20, 2005 judgment specifically notes the judgment by confession, entered on March 30, 2001. The judgment by confession, the principal of which is \$3,275,000, was a tort judgment: “The judgment and our confession thereto arise out of a two-car motor vehicle accident. . . . The accident resulted from the sole negligence of Cassandra Sharbono.” CP 77. ¶ 1 of the May 20, 2005 judgment continues:

Judgment is hereby entered in favor of plaintiffs . . . to wit \$3,275,000, together with interest that has accrued thereon wince the date of entry, March 30, 2001, which as of May 13, 2005, (four years, 43 days @ 12%/yr.) totals \$1,618,298.63 . . .

CP 83. Thus, the award of principal in ¶ 1 of the May 20, 2005 judgment has two elements: 1) the liquidated amount of the judgment by confession, and 2) the postjudgment interest accruing thereon since March 30, 2001 (or May 2, 2003), which, when viewed from the perspective of this case, is prejudgment interest. These all remain tort-based recoveries.

<sup>4</sup> The Sharbonos presumably chose not to seek entry of a new judgment to avoid the argument that no interest was available to them on an award reversed on appeal. *Hadley v. Maxwell*, 120 Wn. App. 137, 146, 84 P.3d 286, *review denied*, 152 Wn.2d 1030 (2004).

61. Universal answered the Sharbonos' motion. CP 132-58.<sup>5</sup> At the initial hearing on the motion, the trial court ordered the parties to retain accounting professionals to perform interest calculations, CP 162, 192, 230, which they did. The parties submitted additional briefs and declarations. CP 163-220, 240-67. The trial court granted the Sharbonos' motion and entered an order directing that execution take place on ¶¶ 1, 7 of the May 20, 2005 judgment in the amount of nearly \$8.6 million. CP 332-34. Universal timely appealed. CP 335-37.

Universal then filed a motion to vacate ¶¶ 1, 7 of the May 20, 2005 judgment. CP 351-434. The Sharbonos and Tomyns answered the motion, CP 445-73, but the trial court declined to consider the motion, entering an order striking it. CP 621-22. From that order, too, Universal timely appealed. CP 776-80. This Court consolidated both appeals for consideration by a letter dated December 10, 2008.<sup>6</sup>

#### D. SUMMARY OF ARGUMENT

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<sup>5</sup> Universal asked the trial court to continue the hearing on the motion, CP 221-23, but the trial court refused to do so. CP 332.

<sup>6</sup> The Sharbonos and Tomyns moved to dismiss Universal's appeal. The motions were denied in a Commissioner's Ruling dated November 13, 2008. The Sharbonos and Tomyns moved to modify the Commissioner's Ruling pursuant to RAP 17.7, and the motion was granted in part and denied in part on January 23, 2009 leaving only the interest issue for resolution by this Court. This Court entered an amended order on the motions to modify on February 4, 2009. Universal has sought discretionary review under RAP 13.5 by the Supreme Court concerning the validity of the May 20, 2005 judgment as to presumptive damages.

The trial court's order on the motion to execute on the supersedeas bond was erroneous for three reasons. First, the trial court erred in allowing the Sharbonos to recover prejudgment interest at all, but particularly where the Sharbono-Tomyn settlement was not deemed reasonable, and thus did not become a liquidated amount, until May 2, 2003, the date of the trial court's order finding the settlement reasonable. Second, the trial court erred in allowing the Sharbonos to recover prejudgment interest from March 30, 2001 to October 15, 2008 *and* recover postjudgment interest to the present time. Finally, the trial court erred in applying a 12% rate to its prejudgment and postjudgment interest awards, rather than the lower tort judgment interest rate of RCW 4.56.110(3).

¶¶ 1, 7 of the trial court's May 20, 2005 judgment relating to "presumptive damages" arise out of the tort of insurance bad faith. This Court reversed any other basis for sustaining that portion of the judgment such as policy-based contractual liability or the CPA.

The trial court's imposition of a 12% rate for prejudgment and postjudgment interest on the presumptive damages portion of its May 20, 2005 judgment, rather than the tort judgment interest rate of RCW 4.56.110(3), was improper. 12% applies to awards based on breach of contract, not to tort claims. 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 allowed by those paragraphs. After this Court's decision in the first appeal, the trial court should also have applied the tort judgment interest rate to ¶ 1.

The law of the case doctrine does not bar consideration of the interest rate issue, as that issue was not the subject of an assignment of error, RAP 2.5(c)(1), and the trial court's use of the 12% is clear error. RAP 2.5(c)(2). This Court should vacate the 12% interest rate allowed to the Sharbonos prejudgment and postjudgment by ¶ 7 of the trial court's May 20, 2005 judgment.

To the extent that the Sharbonos are entitled to prejudgment interest at all on their settlement with the Tomyns (the basis for the presumptive damages award in ¶ 1 of the May 20, 2005 judgment), they are not entitled to prejudgment interest unless the amount is liquidated. That amount was not liquidated as a matter of law until the trial court determined the settlement was reasonable by its May 2, 2003 order.

Finally, the trial court's calculation of interest on the presumptive damages award was contrary to this Court's *Trask* decision. The trial court allowed the Sharbonos to recover prejudgment interest at 12% on the presumptive damages award from March 30, 2001 to October 15, 2008 *and simultaneously* recover judgment interest at 12% from May 20, 2005

to the present time, resulting in a compounding of interest that Washington law forbids.

E. ARGUMENT<sup>7</sup>

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

Universal's CR 60 motion asked the trial court to vacate that portion of its May 20, 2005 judgment relating to interest awarded on the presumptive damages portion of the judgment. CP 621-22. The trial court refused to address the motion, without explanation. *Id.* It is likely, however, that the trial court's refusal stems from its erroneous application of the law of the case doctrine. Under RAP 2.5(c)(1), the trial court and this Court should have addressed the interest issue.

The term, "law of the case," "has been used to indicate the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand." Karl B. Tegland, 2A *Wash.*

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<sup>7</sup> This appeal presents issues regarding the review of the trial court's CR 60 decision, and its calculation of judgment interest. The refusal to consider Universal's CR 60(b) motion is reviewed for an abuse of discretion. *In re Guardianship of Adamec*, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983). An abuse of discretion is present when the decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1981).

Interest calculations are reviewed by this Court for an abuse of discretion. *Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006) (prejudgment interest reviewed for abuse of discretion). But in this case, the trial court's decision on the calculation of interest is largely one based on statutory interpretation and documentary evidence. This Court should review that issue de novo. *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 559, 106 P.3d 212 (2005).

*Practice* (6<sup>th</sup> ed. 2004) at 215 (hereinafter “Tegland”). RAP 2.5(c) provides that 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.

The import of this section is that the trial court should have addressed, and this Court should now review, the propriety of a decision of the trial court even though a similar decision was not disputed in the first appeal. As the 1976 Task Force that worked on RAP 2.5(c) stated:

Subsection (c)(1) 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 decision to which error was not assigned in the prior review, and these decisions are subject to later review by the appellate court. Prior law to the contrary is superseded.

Tegland at 237.

Thus, the rule permitted the trial court on remand to exercise independent judgment as to an issue not raised in the first appeal and permits this Court to review the resulting decision in a later appeal. *Id.* at 215.

In *State v. Trask*, 98 Wn. App. 690, 990 P.2d 976 (2000), an eminent domain case, the appellant sought reversal of the trial court’s

order denying interest. Although the appellant “imprecisely presented his interest claim” in his initial appeal, *id.* at 694, this Court held that the law of the case doctrine did not bar reconsideration of interest calculation issues in a second appeal:

Citing the law of the case doctrine, the State now asserts (1) that we cannot consider anything we failed to consider in the first appeal, and (2) that we cannot correct anything we incompletely or inaccurately considered in the first appeal. We disagree on both counts. The law of the case doctrine does not apply to matters we did not explicitly or implicitly consider, and it is highly discretionary with respect to matters that we did consider.

*Id.* at 695. In this case, the interest issue was not addressed in the first appeal. Thus, the trial court erred in failing to consider Universal’s CR 60 motion as to the appropriate interest rate to be applied.

There is a powerful reason why the trial court should have addressed, and this Court should now address, the interest issue in any event – it is entirely unclear from the May 20, 2005 judgment why the trial court allowed prejudgment interest in ¶ 1 or applied a rate of 12% in ¶ 7 of that judgment when it properly applied the tort judgment interest rate of RCW 4.56.110(3) in the rest of the May 20, 2005 judgment. The trial court might have based its award under ¶ 1 of the judgment on contract grounds. It might have awarded prejudgment interest on the belief that the Sharbonos were entitled to such interest based on its rulings on bad faith.

*This Court cannot know the trial court's rationale and the court did not clarify the ambiguity in its decision.* Either way, the trial court's ruling cannot stand.

Moreover, an appellate court "retains the power to change a decision as provided in rule 2.5(c)(2)." *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). RAP 2.5(c)(2) provides that if a case returns to an appellate court following a remand, "[t]he 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." *See also, Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005). ¶¶ 1, 7 of the trial court's May 20, 2005 judgment pertaining to presumptive damages in a bad faith claim are clearly erroneous as to judgment interest because that aspect of the judgment was based in tort and the trial court applied the wrong judgment interest statute. The trial court should have applied RCW 4.56.110(3), the tort judgment interest statute.

- (2) The Trial Court Erred by Failing to Apply RCW 4.56.110(3), the Tort Judgment Interest Statute, to the Prejudgment Interest Component of the May 20, 2005 Judgment

The trial court's May 20, 2005 judgment allowed the Sharbonos to recover interest at 12% on the judgment by confession they executed with the Tomyns. The Sharbonos agreed with the Tomyns on a rate of interest they now seek to apply *against Universal* for the period between the March 30, 2001 consent judgment and October 15, 2008. CP 83. But Universal is not bound in the present action by that agreement as might be true for parties under RCW 4.56.110(1); RCW 19.52.010(1). The trial court should have limited prejudgment interest to the period between May 2, 2003 and May 20, 2005, or should not have permitted recovery of a prejudgment interest award at all. Moreover, it should have awarded any prejudgment or judgment interest at the rate set forth in RCW 4.56.110(3).

(a) Prejudgment Interest

The trial court never clearly articulated its rationale either for awarding prejudgment interest or for binding Universal to the rate agreed to by the Sharbonos and the Tomyns.

First, the trial court may have concluded that the settlement, once deemed reasonable, became a liquidated amount, upon which liquidated damages may be awarded. *See, e.g., PUD No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 810, 881 P.2d 1020 (1998); *Polygon Northwest v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 790, 189 P.3d 777, *review denied*, 164 Wn.2d 1033 (2008). However, if that was indeed

the trial court's rationale for an award of prejudgment interest, the trial court erred because the Sharbono-Tomyn settlement was not deemed reasonable until the trial court entered its May 2, 2003 order declaring it so. Under the applicable case law on the tort of insurance bad faith, *it was not until the trial court declared the settlement to be reasonable that it could be deemed the Sharbonos' presumptive damages*. This assertion is supported by the fact that a court assessing a settlement may find it to be unreasonable and the settlement does not then become the insured's presumptive damages in a later bad faith action against the insurer. *See, e.g., Werlinger v. Warner*, 126 Wn. App. 342, 349, 109 P.3d 22, *review denied*, 155 Wn.2d 1025 (2005); *Meadow Valley Owners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 156 P.3d 240 (2007). A trial court's decision on reasonableness of the settlement is a *discretionary* decision, reviewed for an abuse of discretion. *Warner*, 126 Wn. App. at 349. Thus, until the trial court ruled the Sharbono-Tomyn settlement was reasonable, the Sharbonos' damages in the bad faith action were unliquidated.

Where any opinion or discretion is required to determine damages, a claim is unliquidated. As noted in *Kiewit-Grice v. State*, 77 Wn. App. 867, 872-73, 895 P.2d 6, *review denied*, 127 Wn.2d 1018 (1995), a decision requiring the determination of the reasonableness of damages is

inherently one involving opinion or discretion, and prejudgment interest is unavailable. *See also, 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) (“A claim is unliquidated if the principal must be arrived at by a determination of reasonableness.”). The Sharbonos were not entitled to prejudgment interest prior to May 2, 2003, if at all.

Second, the trial court erred in awarding the Sharbonos prejudgment interest *at all* where it neglected to articulate its rationale for such interest. The trial court should have explained its thought process. Prejudgment interest is permissive, and should not have been awarded here. *Scoclo Constr.*, 158 Wn.2d at 519 (“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. Maint. Co. West*, \_\_\_ Wn. App. \_\_\_, 198 P.3d 1042, 1056 (2009); *Colonial Imports v. Carlton Northwest, Inc.*, 83 Wn. App. 229, 241-45, 921 P.2d 575 (1996), *aff’d* 121 Wn.2d 726, 853 P.2d 913 (1993). In this case, an award of prejudgment interest was inappropriate.

The basis for prejudgment interest is usually that a party has the “use value” of another party’s money. *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). Here that is not so. The Sharbonos have

not lost the use of any funds, and they are the only party to whom Universal could owe any money prior to a judgment.

Further, the trial court erred by applying the contract judgment interest rate to an award of prejudgment interest in a tort case. Based on this Court's decision in the first appeal, Universal's obligation to satisfy the judgment by confession could not possibly be based on a contract.

Washington law recognizes that parties may agree by contract to an interest rate different from that provided for by the judgment interest statutes. RCW 4.56.110(1); RCW 19.52.010(1). While the Sharbonos and Tomyns could agree to such an interest rate between themselves as a matter of contract, their agreement was voluntary between themselves and should not bind *Universal* and become an element of "presumptive damages" for Universal's bad faith, the *only* legal basis left to sustain ¶ 1 of the May 20, 2005 judgment. It would be unjust to permit the parties to agree to what was an illegal interest rate between themselves and thereby bind an insurer like Universal. The trial court should not have authorized prejudgment interest at all, but, if it did, it should have limited prejudgment interest to the period between May 2, 2003 and May 20, 2005.

(b) RCW 4.56.110(3) Applies Here

The trial court erred by applying the contract rate for interest prejudgment and postjudgment rather than the tort judgment interest rate of RCW 4.56.110(3). After this Court's opinion, the Sharbonos' only basis for recovery under ¶ 1 of the judgment was in tort.

The tort judgment interest rate of RCW 4.56.110(3) applies to awards of prejudgment *and* postjudgment interest. *Mercier v. GEICO Indem. Co.*, 139 Wn. App. 891, 903-04, 165 P.3d 375 (2007), *review denied*, 163 Wn.2d 1029 (2008).<sup>9</sup> That judgment rate should have applied here.

Without any discussion of *Mercier*, Division I of the Court of Appeals in *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 173 P.3d 977 (2007) held that where parties in a tort claim settled their dispute in a written contract which provided for a judgment interest rate and the

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<sup>9</sup> Division I abandoned *Mercier* in the subsequent case of *Little v. King*, 147 Wn. App. 883, 198 P.3d 525 (2008). The Court of Appeals there held that a judgment for uninsured motorist ("UIM") benefits is founded on contract, rather than tort, for purposes of judgment interest, after the Supreme Court's decision in *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 51-52, 169 P.3d 473 (2007). Like *Little*, *Mercier* was a UIM case. The Court of Appeals felt compelled to apply the contract judgment interest statute because UIM insurance provides a layer of excess insurance that "floats" on top of any recovery for the injured party from other sources. Such coverage is contract-based.

In applying judgment interest, the *Stevens* court directed that the question of which judgment interest rate was applicable must be analyzed by looking at the applicable statute of limitations for the underlying claim. *Stevens*, 162 Wn.2d at 51. For UIM claims, the contract statute of limitations applies. *Little*, 147 Wn. App. at 889. By contrast, there is no question but that the negligence statute of limitations applies to common law bad faith actions. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992); RCW 4.16.080. Thus, *Mercier* remains good law in this case; the tort judgment interest rate of RCW 4.56.110(3) must apply.

court then entered a judgment based on the contract, the appropriate interest rate was the contract interest rate. While contracting parties may agree between themselves as to an interest rate that one will pay the other—it is not equitable to subsequently impose that rate on an insurer like Universal in a bad faith case. In that case, the insurer participated in a reasonableness hearing held under RCW 4.22.060. The insurer moved for reconsideration or, alternatively, for relief from the judgment. The trial court then reduced the interest rate, applying the judgment interest rate for tort claims. RCW 4.56.110(3). The Court of Appeals reversed, holding that the provisions of RCW 4.56.110(1), which allow parties to agree to an interest rate, apply.

*Jackson* is distinguishable for a number of reasons. First, the decision makes no reference to *Mercier* and predates *Little*. The underlying Sharbono-Tomyn matter was undeniably based in tort. Any recovery by the Sharbonos against Universal, too, is based in the tort of insurance bad faith. Second, it appears that any recovery by the insured in *Jackson* was based on a finding of coverage under the policy; the insurer participated in the mediation of the settlement, but refused to pay more than its assault and battery coverage limits. The tort of bad faith, as the sole means of recovery from the insurer, was not at issue in that case. Here, the only basis for recovery from Universal is in tort. Universal did

not agree, tacitly or otherwise, to the judgment interest rate negotiated by the Sharbonos and Tomyns to maximize subsequent tort-based damages against Universal. Thus, the tort judgment interest rate applies here to prejudgment and postjudgment interest.

When the March 20, 2001 judgment by confession was entered, the maximum postjudgment interest rate for all judgments except those founded on written contracts specifying their own rates, was 12%. However, the Legislature amended RCW 4.56.110(3) in 2004 to provide a lower rate for tort judgments. *See* Appendix. That lower rate is not only constitutional, *Faust v. Albertson*, 143 Wn. App. 272, 286-87, 178 P.3d 358 (2008), *review denied on the interest issue*, 164 Wn.2d 1025 (2008), but the Legislature may apply such a new interest rate to *existing* judgments. *Puget Sound Nat'l Bank v. St. Paul Fire & Marine Ins. Co.*, 32 Wn. App. 32, 48, 645 P.2d 1122, *review denied*, 97 Wn.2d 1036 (1982) (“We recognize that a legislative body may provide that a new interest rate will apply to existing judgments as well as those entered after the act’s effective date, the right to such interest being not contractual but a matter of legislative discretion.”).

The effective date of RCW 4.56.110(3) was June 10, 2004 and, per the Notes accompanying the revision to RCW 4.56.110:

The rate of interest . . . applies to the accrual of interest . . .

(2) As of June 10, 2004, with respect to a judgment that was entered before June 10, 2004 and that is still accruing interest on June 10, 2004.

CP 304, 306. As any recovery here by the Sharbonos was tort-based, the rate authorized by RCW 4.56.110(3) should have applied prejudgment and postjudgment after June 10, 2004.

(3) The Trial Court Erred in Calculating the Interest on the May 20, 2005 Judgment

The trial court, by adopting the Sharbonos' interest calculations, perpetuated a miscalculation that, in effect, imposes compound interest on Universal for a period of time exceeding three years.

The Sharbonos explained their method for calculating interest below as follows. 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 to it added “the interest that has accrued on that amount since [that] date” *through October 15, 2008*. CP 4, 163. In other words, in determining the principal due on May 20, 2005, the Sharbonos included *future* interest for the period May 20, 2005 to October 15, 2008, an arbitrary date. CP 4, 163. Next, the Sharbonos applied “post-judgment interest to *this amount* pursuant to ¶ 7 of the May 20, 2005 judgment. CP 163. Postjudgment interest accrued from May 20, 2005, the date the Sharbono judgment was entered.” *Id.*

The Sharbonos' attorney's declaration concluded that "the total of principle [sic] and post-judgment interest is \$8,594,222.03," using 12% as the interest rate throughout. *Id.*<sup>10</sup> The trial court agreed, CP 333, thereby allowing prejudgment interest at 12% from March 30, 2001, the date of the confessed judgment through October 15, 2008, and postjudgment interest at 12% on the combined sum after May 20, 2005. CP 83.

The trial court's calculation is contrary to Washington law for numerous reasons. First, prejudgment interest cannot be imposed past the date of judgment; it may not be included in the principal sum upon which postjudgment interest is then determined. In *Trask*, this Court held that the proper methodology for addressing prejudgment interest on an award was to take the principal, add to it the prejudgment interest that had accrued on the award through the date of the entry of the judgment, and thereafter to apply postjudgment interest forward. 98 Wn. App. at 696-97. ("When prejudgment interest is awarded, it is added to the judgment and

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<sup>10</sup> The Sharbonos' consultant did not follow the method that the Sharbonos' attorney, Mr. Gosselin, claimed he used, rendering the Sharbonos' submission inconsistent and therefore unreliable. Gosselin concludes paragraph 4 of his declaration by stating that \$6,240,265.75 was the principal amount of the judgment in this case if it is paid by October 15, 2008, and starts paragraph 5 by saying that "[p]ost-judgment interest applies to *this* amount pursuant to paragraph 7." CP 163. However, the Sharbonos' consultant did not use \$6,240,265.75 as the principal amount upon which he calculates postjudgment interest under paragraph 7. CP 165. Instead, he used four different principals -- \$5,294,912.33, \$5,687,912.33, \$6,080,912.33, and \$6,295,178.08 -- to develop a postjudgment interest award of \$2,353,956.28. It is to this sum that the Sharbonos' consultant added \$6,295,178.08 "for a combined total of \$8,594,222.03 due on the *Sharbono v. Universal Underwriters* judgment if paid by October 15, 2008." *Id.*

becomes part of the judgment principal. The judgment principal draws post-judgment interest until paid in full.”). To do anything else would result in compound or double interest long forbidden under Washington law. *Goodwin v. Northwestern Mut. Life Ins. Co.*, 196 Wash. 391, 404, 83 P.2d 231 (1938); *Trask*, 98 Wn. App. at 696-97 (“Interest means simple interest absent agreement or statute to the contrary.”)

Not only did the trial court fail to apply this Court’s teaching in *Trask*, it actually disregarded the plain language of ¶ 1 of its May 20, 2005 judgment in adopting the Sharbonos’ approach.

1. Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company in the amount of the unpaid balance of Judgment by Confession entered against plaintiffs [in the *Tomyn* action] to wit \$3,275,000, together with interest that has accrued thereon since the date of entry, March 30, 2001, which as of May 13, 2005[] totals \$1,618,298.63 . . .

CP 83. The next phrase, “and together with interest that continues to accrue thereon . . . until said judgment is paid,” is postjudgment interest language. In other words, the trial court apparently concluded that the judgment by confession reduced the Tomyns’ damages to a liquidated sum on March 30, 2001, and awarded as prejudgment interest the interest that accrued on the judgment by confession from March 30, 2001 until the May 20, 2005 judgment in this case was entered against Universal. While Universal disagrees with the award of prejudgment interest from March

30, 2001 through May 20, 2005, that award is at least consistent with *Trask*. On remand, the trial court's decision to interpret the language "and together with interest that continues to accrue thereon as set forth in said judgment until said judgment is paid," as allowing prejudgment interest to accrue from March 30, 2001 to October 15, 2008 and then to apply postjudgment interest on that sum together with the principal amount of the judgment by confession was erroneous.<sup>11</sup>

In order to prevent compound interest, this Court should interpret ¶¶ 1, 7 of the May 20, 2005 judgment to allow only simple interest at the rate authorized in RCW 4.56.110(3) prejudgment (to whatever extent authorized) and postjudgment, on the principal amount. By including interest on the underlying principal (the judgment by confession amount) that accrues *after* the May 20, 2005 judgment as prejudgment interest in the case, and then imposing that postjudgment interest on the entire sum, the trial court erred.

#### F. CONCLUSION

The amount of interest allowed by the trial court was excessive. The trial court's use of a 12% rate for prejudgment and postjudgment

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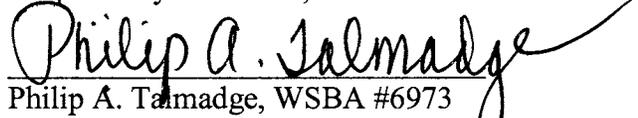
<sup>11</sup> As noted, *supra*, the Sharbonos used 12% as the interest rate for all of their calculations, CP 4, 163, 165-66, but the judgment by confession was a tort judgment, as it was predicated upon the bad faith award against Universal. The proper postjudgment interest rate for torts set forth in RCW 4.56.110(3) should have applied.

interest, and its compounding of interest contrary to this Court's *Trask* decision was error.

The 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. The trial court should properly calculate the interest due to the Sharbonos. Costs on appeal should be awarded to Universal.

DATED this 11<sup>th</sup> day of March, 2009.

Respectfully submitted,



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# APPENDIX

RAP 2.5(c):

(c) **Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision 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.

(2) *Prior Appellate Court Decision.* 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.

RCW 4.56.110:

(3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(emphasis added).

DECLARATION OF SERVICE

On said day below, I deposited with the US Postal Service a true and accurate copy of: Universal's Brief of Appellant, Court of Appeals, Div. II, Cause No. 38425-6-II to the following parties:

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

DATED: March 11, 2009, at Tukwila, Washington.

Christine  
Christine Jones

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