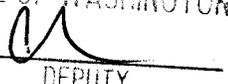


FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 38425-6-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

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

Respondents/Cross-Appellants

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

Interveners/Respondents/Cross-Respondents

CROSS-APPELLANTS' REPLY BRIEF

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REPLY ARGUMENT

1. The meaning of the judgment is not at issue.

The Tomyns' argue that this court should defer to the trial court's interpretation of the judgment. But the Tomyns did not make this argument to the trial court (See CP 327-31) and the judgment is not the document at issue in this case. If it was at issue, however, the judgment is clear on its face and not susceptible to interpretation.

On its face, the May 20, 2005 judgment is clear: it awards post-judgment interest to the Sharbonos. On page 1, the judgment identifies the Sharbonos as both the sole plaintiffs and the sole judgment creditors. On page 3, at paragraphs 1, 2, 3, 4 and 5, the judgment repeatedly provides: "Judgment is hereby entered in favor of the plaintiffs . . ." Then, in paragraph 7, the court awards post-judgment interest on the awards to the plaintiffs in paragraphs 1 and 2. Thus, if the provisions of the judgment were the issue, the trial court's decision to award post-judgment interest to the Tomyns' would be clear and unequivocal error.

But the issue of who ultimately was entitled to the post-judgment interest turned on the settlement agreement between the Tomyns and the Sharbonos, not the judgment. The trial court did not award the post-judgment interest to the Tomyns because of the language of the judgment, it

awarded it because it decided that the post-judgment interest was one of the recoveries the Sharbonos assigned to the Tomyns in the settlement agreement. That fact explains why the Tomyns did not argue to the trial court that the issue turned on the court's interpretation of the judgment. See CP 329-31. Thus, the court's interpretation of the settlement document underlies the issue in this appeal, not its interpretation of the judgment.

2. The rule of construction against the drafter does not apply.

The Tomyns contend that the settlement agreement should be construed against the Sharbonos because their attorney drafted it. They raise this argument for the first time on appeal. See CP 329-31. And, they cite nothing in the record to support the contention.

The argument is both unsupportable and incorrect. It is unsupportable because neither party alone drafted the agreement. The settlement terms were the product of intense, occasionally acrimonious, long term negotiations. The record in the previous appeal shows that fact clearly. See CP 588-623, Docket No. 33379-1-II. Indeed, in *Sharbono I* this court relied upon that fact as one basis for affirming the reasonableness of the settlement. See *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383 at ¶60, 161 P.3d 406 (2007). Since both parties had a direct say in the final terms of the agreement, the agreement cannot be construed for or against either of

them.

The argument is incorrect because the rule does not apply to the circumstances here. Interpretation against the drafter is a tool used only when the contract is ambiguous. Even then it is a tool of last resort, applicable only after the court has determined that the ambiguity is incapable of resolution through other more reliable means, such as extrinsic evidence. *Kwik-Lok Corp. v. Pulse*, 41 Wn. App. 142, 148, 702 P.2d 1226 (1985)(“[T]his rule applies only where, after examining the entire contract, the relation of the parties, their intention, and the circumstances under which they executed the contract, the ambiguity remains unresolved.); *Universal/Land Constr. Co. v. Spokane*, 49 Wn. App. 634, 637-40, 745 P.2d 53 (1987). Where the language of a contract is clear, that language controls regardless of who drafted it. The overriding concern is always to ascertain and give effect to the intent of the parties, and the first source of that intent always is the language of the agreement itself.

Here, the language of the Tomyns/Sharbono settlement agreement (CP 99-106, 127-31 (attached as **Appendix D** to Brief of Respondent/Cross-Appellant)) is clear on its face. It states that the Sharbonos assigned only the “benefits payable under any liability insurance policy” to the Tomyns. CP 100, 128. It states explicitly that the Sharbonos retained “any other rights,

claims, causes of action or awards . . .” CP 101, 129. Post-judgment interest is not a “benefit payable under any liability insurance policy which, because of an act of bad faith, Universal was estopped to deny.” Post-judgment interest is a separate award, given pursuant to statute, not pursuant to the insurance policy. As a separate element of recovery (i.e., as a separate “award” to use the terms of the settlement agreement), it is one of the awards the Sharbonos did not assign, and an award to which they alone are entitled.

3. Applying the Tomyn/Sharbono settlement agreement as worded does not violate public policy or create absurd results.

The Tomyns argue at length (see Intervenor’s Reply to Cross-Appeal 22-32), and for the first time, that awarding the paragraph 7 interest to the Sharbonos would violate public policy and create absurd results because the Sharbonos’ attorney acted with a conflict of interest. In the course of this argument, the Tomyns make broad, unsupported and inflammatory allegations that the Sharbonos attorney was really their attorney, that he owed duties to them which prohibited him from arguing for the Sharbonos’ right to paragraph 7 interest, and that if the court awards paragraph 7 post-judgment interest to the Sharbonos it will be sanctioning the attorney’s misconduct. The Tomyns invite this court to make factual findings and resolve factual disputes not decided by the trial court.

Except in limited circumstances, appellate courts will not consider arguments raised for the first time on appeal. RAP 2.5(a); *Eldredge v. Kamp Kachess*, 90 Wn.2d 402, 408, 583 P.2d 626 (1978); *Citizens For Fair Share v. Dep't of Corr.*, 117 Wn. App. 411, 422 n. 14, 72 P.3d 206(2003); *Lewis v. Mercer Island*, 63 Wn. App. 29, 31, 817 P.2d 408 (1991). This is because the record pertaining to the arguments cannot be developed, and the trial court did not have an opportunity to rule on the issue first. *Port of Edmonds v. Fur Breeders Coop., Inc.*, 63 Wn. App. 159, 164, 816 P.2d 1268 (1991).

Those concerns are particularly warranted here. The Tomyns offer only rhetoric and accusation in place of a record fully developed after properly raising the issue in the trial court. The Tomyns provide no evidence that the Sharbonos' attorney established, or even could establish, an attorney-client relationship with them, previously the Sharbonos' bitter adversaries. On their third party beneficiary theory, they fail to mention that the theory cannot apply if it results in the attorney having divided loyalties.

Washington ethical rules are clear that “[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated.” Public policy prohibits an attorney from owing a duty to anyone other than the client when the collateral duty creates a risk of divided loyalty due to conflicts of interest or breaches of confidence.

Mazon v. Krafchick, 158 Wn.2d 440 at ¶14, 144 P.3d 1168 (2006).

Likewise, the Tomyns literally toss out the doctrine of judicial estoppel. With no analysis, they suggest this doctrine would preclude the Sharbonos' attorney from denying he represented the Tomyns, yet offer no evidence showing he ever indicated he represented them in the first place. Intervenor's Reply to Cross-Appeal at 34, n.13. To believe this court would actually rule on the basis of such arguments disrespects the appellate process and the integrity of the court.

But the Tomyns' ultimate failure is in not explaining why they are entitled to the award of post-judgment interest even if a conflict with the Sharbonos' attorney existed. The question of who is entitled to the post-judgment interest turns on the language of the settlement agreement, not on who represented the opposing parties to the disagreement. When the Tomyns raised the question through Mr. Barcus, the attorney who represented them throughout this matter, the Sharbonos had to respond. The Tomyns fail to provide any authority, or logical reasoning, showing they are entitled to the interest merely because the Sharbonos responded through Mr. Gosselin.

4. The Sharbonos interpretation of the settlement agreement does not produce absurd or unjust results.

In their one substantive argument, the Tomyns contend that

interpreting the settlement agreement so that the Sharbonos retain the post-judgment interest would produce absurd and unjust results because it would allow the Sharbonos to profit from “claims” they assigned to the Tomyns. But to reach that conclusion, the Tomyns ignore the wording of the agreement and misinterpret the result of its application.

First, the agreement did not assign “claims.” The agreement assigned amounts awarded as particular types of damages, not the underlying claims.

The agreement states:

The defendants assign to plaintiffs all amounts awarded against or obtained from Universal for the following:

B. The benefits payable under any liability insurance policy which, because of an act of bad faith, Universal is estopped to deny or deemed to have sold to Defendants.

CP 100, 128 (**Appendix D** to Brief of Respondent/Cross-Appellant)(emphasis added). The underlying claims remained the Sharbonos. And this was for a purpose: those claims also gave rise to awards which were not assigned, and which remained the Sharbonos’ sole property. If the Tomyns had wanted the underlying claims, and all the recoveries that came from them, they should have negotiated to that end. Having not negotiated for that result, they cannot claim the result they actually receive is either unfair or unjust.

Moreover, even in the abstract, the result is neither unfair nor unjust. The amount of damages the Tomyns agreed they suffered was set forth both in the settlement agreement and the Consent Judgment entered in their action against the Sharbonos. CP 62-66 (attached as **Appendix C** to Brief of Respondent/Cross-Appellant). That amount was \$4,525,000.00 plus 12% interest until the judgment was paid. When, pursuant to paragraph 1 of the May 20, 2005, Sharbono/Universal judgment, the trial court ordered Universal to pay the Tomyn/Sharbono judgment, the Tomyns were going to receive every cent of what they agreed were their damages, both principle and interest. Thus, when the Tomyns now also ask this court to award the paragraph 7 post-judgment interest to them, they ask for more than they agreed were their damages, and more than they bargained for. There is nothing unfair, even in the abstract, in denying that request.

Finally, the Tomyns argue it is fair that they receive the post-judgment interest because the purpose of this lawsuit “was for the primary benefit of the Tomyns.” Intervenor’s Reply to Cross-Appeal at 36. The purpose of the lawsuit, however, was to hold the defendants accountable for the damages they wrongfully caused to the Sharbonos. If recovered, some of those damages could go to Tomyns and some could go to the Sharbonos. Neither was guaranteed any recovery. Nothing in the settlement agreement

makes either recovery the primary or secondary motivation or purpose for the lawsuit.

CONCLUSION

The only “fair” result in this case is the one that reflects the intention of the parties as gleaned from the language of the settlement agreement. If the settlement agreement provides that the Tomyns are entitled to the paragraph 7 post-judgment interest, that is the “fair” result regardless of how unfair the Sharbonos may subjectively believe the result is, and *vice versa*. Hyperbole about “chutzpah” and conflicts of interest, and relative severity of what each has lost does nothing to address the issue in this case: What did the parties to the settlement agreement agree to, and did the trial court correctly apply that agreement. On that issue, the only relevant evidence is the language of the settlement agreement.

In the settlement agreement, the Sharbonos assigned to the Tomyns all amounts awarded against or obtained from Universal for “the **benefits payable under any liability insurance policy** which, because of an act of bad faith, Universal is estopped to deny or deemed to have sold to Defendants.” Like a residuary clause, the Sharbonos specifically and explicitly retained “any other rights, claims, causes of action or awards against Universal or any other person or entity” Because the post-

judgment interest the Sharbonos recovered from Universal was not a “benefit payable under any liability insurance policy” it was not an award the Sharbonos assigned to the Tomyns. For that reason, this court should reverse the trial court’s order awarding that interest to the Tomyns.

Dated this 12th day of February, 2010.

By: 
TIMOTHY R. GOSSELIN, WSBA # 13730
Attorney for Respondents/Cross-Appellants

FILED
COURT OF APPEALS
DIVISION III

10 FEB 16 AM 9:22

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON STATE OF WASHINGTON
DIVISION TWO

BY _____
DEPUTY

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

Respondents/Cross-
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,

Appellants

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

Intervenors/Respondents/
Cross-Respondents

NO. 38425-6-II

DECLARATION OF SERVICE

ORIGINAL

I, TIMOTHY R. GOSELIN, declare and state:

I am a citizen of the United States of America and the State of

DECLARATION OF SERVICE

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

Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 12th day of February, 2010, I did place in the United States Mail, first class postage affixed, the following documents:

1. CROSS-APPELLANTS' MOTION TO EXTEND TIME TO FILE REPLY BRIEF
2. CROSS-APPELLANTS' REPLY BRIEF

and this declaration directed to and to be delivered to:

Jacquelyn A. Beatty
KARR TUTTLE CAMPBELL
1201 Third Avenue, Suite 2900,
Seattle, WA 98101-3028

Philip A. Talmadge
Emmelyn Hart-Biberfeld
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18010 Southcenter Parkway
Tukwila, WA 98188-4630

Ben F. Barcus
LAW OFFICES OF BEN F.
BARCUS
4303 Ruston Way
Tacoma, WA 98402

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 12th day of February, 2010 at Tacoma, Washington.

By : 
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Cross-Appellants

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