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COUNTER-STATEMENT OF THE CASE

This is an action for insurer bad faith and other claims. Following various rulings in the trial court culminating in an award of damages as a matter of law, and following a jury trial in which additional damages were awarded, the plaintiffs, the Sharbonos, had judgment entered against Universal Underwriters on May 20, 2005. (CP 7-10 (Attached as **Appendix A**)) The judgment had two primary parts. The first awarded presumptive damages; the second awarded actual damages. The two awards were set out separately in paragraphs 1 and 2 of the judgment. Those paragraphs state:

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

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

(CP 9) In addition, the judgment awarded post-judgment interest separately for each part of the principle judgment award. The award of post-judgment

interest was set forth in paragraph 7 of the judgment. (CP 9) That paragraph states:

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.

Paragraphs 1 and the first sentence of paragraph 7 are at issue in this appeal. Those provisions did two things. Paragraph 1 made the value of the Tomyn consent judgement the principle judgment amount being awarded. It told Universal that Universal was responsible to pay the debt reflected by that judgment. Because that judgment/debt was accruing interest, its value was growing over time. Paragraph 1 acknowledged that fact and made Universal responsible for the increase amount owed by stating the then-current amount owed, and then stating that Universal was responsible for paying that amount “together with interest that continues to accrue thereon as set forth in said judgment until said judgment is paid.” Paragraph 7 awarded statutorily required post-judgment interest on the principle judgment amount.

Universal did not except to either the accrual of interest or growth in the paragraph 1 principle judgment amount, or the award or rate of interest in paragraph 7 when the judgment was entered. As far as the trial court

knew, Universal agreed that both were correct and proper statements of the award.

Universal appealed the judgment. In its appeal, it did not challenge either the accrual of interest or growth in the paragraph 1 principle judgment amount, or the award or rate of interest in paragraph 7. (CP 12-49) As far as the Court of Appeals knew, Universal agreed that both were correct and proper statements of the award.

In a decision issued on June 26, 2007, (*Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383,161 P.3d 406 (2007)),and amended on October 9, 2007 (CP 51-52), the Court of Appeals affirmed the paragraph 1 and interest awards because Universal did not assign error to those trial court decisions:

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.

(CP 52 (emphasis added))

Universal sought discretionary review of this decision. The Supreme Court denied review.

After the Court of Appeals issued the Mandate on August 21, 2008 (CP 59), which finalized its decision, plaintiffs sought payment of the affirmed part of the judgment. (CP 1-5) Universal resisted. (CP 132-54) It

argued primarily that the despite the Court of Appeals already having ruled on the judgment, the trial court should ignore the ruling because the Court of Appeals actually vacated the judgment. (CP 133) In the process, Universal also challenged the award of post-judgment interest in paragraph 7 of the judgment, and argued that the Sharbono's calculation of the amount due under paragraph 7 was faulty. (CP 268-95)

On October 3, 2008, the trial court rejected all of Universal's arguments. (RP 10/03/2008 at 32) The Court enforced the judgment as it was clearly worded, and ordered Universal's appeal surety, Ohio Casualty Insurance Company, to pay the amounts owed by October 15, 2008. Those amounts totaled \$8,594,222.03: \$6,240,265.75 as the principle judgment amount under paragraph 1, and \$2,353,956.28 as post-judgment interest under paragraph 7. (CP 332-34 (Attached as **Appendix B**)) The trial court also ordered that all the money—both paragraph 1 principle judgment amount and the paragraph 7 post-judgment interest – be paid to the Tomyns. (CP 333, lns. 9-13)

On October 7, 2008, Universal filed its second appeal, which it amended on October 15, 2008. On October 17, 2008, the Sharbonos filed their appeal of that part of the trial court's October 3, 2008 order requiring paragraph 7 post-judgment interest to be paid to the Tomyns.

On October 17, 2008, the Sharbonos moved to dismiss Universal's second appeal. They argued that the issues Universal raised already had been decided by the first appeal. By Ruling filed November 13, 2008, Court Commissioner Eric B. Schmidt denied the motion. By order dated January 23, 2009 and amended February 4, 2009, this Court modified Commissioner Schmidt's ruling, stating: "Universal may challenge the trial court's **calculation of post-judgment interest** on appeal. It may not, however, challenge **the \$3.275 million judgment, which this court affirmed in the previous appeal.**" (Emphasis added). Thus, what remains for review is the trial court's calculation of post-judgment interest per Universal's appeal, and the trial court's order that amounts due under paragraph 7 should be paid to the Tomyns per the Sharbonos' appeal.

ASSIGNMENTS OF ERROR ON CROSS-APPEAL

The trial court erred when, in its October 3, 2008, "Order Granting Motion to Execute on Appeal Bond" it ordered that, in execution of the first sentence of paragraph 7 of the judgment entered in this matter on May 20, 2005, Ohio Casualty Insurance Company shall pay the amounts then accrued under that paragraph (\$2,353,956.28) to the Tomyns or their attorneys rather than to the Sharbonos or their attorneys.

ISSUES ON CROSS-APPEAL

Did the settlement agreement between the Tomyns and the Sharbonos assign the rights to post-judgment interest to the Tomyns or did the Sharbonos retain the right to such interest for themselves?

RESPONSE ARGUMENT

- 1. Because Universal failed to preserve error in the trial court, failed to assign error in the Court of Appeals, and this court has affirmed the principle judgment award and post-judgment interest, Universal is not entitled to challenge the principle judgment amount set forth in paragraph 1 or the award of post-judgment interest set forth in paragraph 7.**

Universal challenges the trial's court's order enforcing the mandate.

Universal argues that the trial court erred by following the language of the May 20, 2005 judgment and (1) allowing the Tomyn judgment – the principle judgment amount set forth in paragraph 1 – to grow by the rate of interest (12%) set forth in that judgment; and (2) awarding the post-judgment interest at the rate set in paragraph 7. At the heart of Universal's appeal is the contention that the judgment already affirmed by the Court of Appeals can be re-visited or attacked collaterally. It makes this argument despite having failed to make either argument when the judgment was entered, despite having failed to assign error to either decision in its first appeal of the judgment, and despite the Court of Appeals in its first decision having specifically affirmed both parts of the judgment.

Because Universal did not assign error to the directed verdict in the amount of \$3,275,000, *together with interest*, we affirm that judgment and remand for further proceedings.

(CP 52 (emphasis added))

Multiple principles apply to preclude Universal's challenge to the May 20, 2005 judgment more than three years after it was entered: failure to preserve the claimed error in the trial court when the judgment was entered; failure to raise the claimed error in the Court of Appeals during its first appeal; the law of the case; its current appeal of the May 20, 2005 judgment is untimely; its appeal of the order executing on the mandate is an improper collateral attack on the May 20, 2005 judgment, and others. One case, however, *Bushong v. Wilsbach*, Dkt. No. 61558-1, ___ Wn. App. ___, ___ P.3d ___ (Div. I, July 27, 2009), illustrates them all very simply. In *Bushong*, the Court of Appeals held that appeal of an order calculating the attorney fees awarded did not bring up for review the separate order awarding fees. And, because the appellant did not timely appeal from the order awarding fees, and its brief only presented arguments challenging the award, not the calculation of fees, the appeal was properly dismissed.

Universal's protestations notwithstanding, the fact remains that all of the errors Universal purports to appeal were embodied in and evident on the face of the judgment when it was entered on May 20, 2005, it did not appeal any of those errors, and it seeks to use a trial court order which enforced simply enforced the mandate affirming that judgment as its avenue for appeal.

Orders enforcing the mandate, however, are not appealable.

[RAP 12.2] is a limit on the appealability of the order enforcing the mandate in this case. RAP 12.2 is a broad statement of the authority and binding power of the appellate decision. The decision is binding unless the appellate court recalls the mandate or unless the trial court properly makes a new substantive decision and the appellate court changes its view of the law during the second appeal. RAP 2.5(c), 12.2, 12.9.

Farhood v. Allyn, 132 Wn. App. 371, 378, 131 P.3d 339 (2006); accord *State v. Scheel*, 74 Wn.2d 137, 139-40, 443 P.2d 651 (1968)(appeal attempting to reopen prior judgment following order on equitable disbursement disallowed as improper collateral attack on judgment). RAP 12.7(a) provides: "The Court of Appeals loses the power to change or modify its decision (1) upon issuance of its mandate in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9 . . ."

That these rules apply even in cases where the stakes are high is illustrated by *Shumway v. Payne*, 136 Wn.2d 383, 964 P.2d 349 (1998). Shumway was convicted of first degree murder. She exhausted her appeals in state courts and collaterally attacked her conviction in those courts as well. In all those efforts she did not raise issues of severance and ineffective assistance of counsel. Then she filed a petition for writ of habeas corpus in federal court raising those issues for the first time. The district court

determined Shumway had to exhaust her state court remedies on those issues before she could seek federal habeas relief. It certified to the Washington Supreme Court the question whether Shumway could still seek relief on those issues in state courts. The Supreme Court held she could not. Its words are clear:

There is no basis under Washington law for Ms. Shumway to now raise the severance issue as part of her direct appeal. It has been three years since this court denied Ms. Shumway's petition for review of the Court of Appeals decision on her direct appeal. Ms. Shumway does not seriously argue, nor could she, that this court should (1) order the Court of Appeals to recall its mandate in this case; (2) vacate our order denying the petition for review; or (3) grant Ms. Shumway a three-year extension of time in which to file an amended petition for review so that she might correct the tactical or inadvertent omission of the severance issue in her original petition.

RAP 13.4 requires a party seeking discretionary review of a Court of Appeals decision on direct appeal to file a petition for review within 30 days of the entry of the decision or order terminating review. A petition for review will be granted only in certain circumscribed cases, RAP 13.4(b), and, if this court accepts review, the court will review only the questions raised in the petition and in the answer to the petition, unless the court orders otherwise. RAP 13.7(b).

Ms. Shumway did not raise the severance issue in her petition for review, and we denied review of the petition which she filed in this court. The Court of Appeals then issued its mandate, relieving the appellate courts in this state of jurisdiction to revisit and act on the merits of the case. See *Reeploeg v. Jensen*, 81 Wn.2d 541, 547, 503 P.2d 99 (1972).

RAP 12.9(b) provides that an "appellate court may recall a mandate issued by it to correct an inadvertent mistake or to modify a decision obtained by the fraud of a party or counsel in the appellate court." (Emphasis added.) We have been cited no authority to support an interpretation of this rule that would authorize this court to order the Court of Appeals to recall its mandate in order to provide a party the opportunity to add an issue to a petition that has already been denied. See Reeploeg, 81 Wn.2d at 546 (to require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice (citing *Kosten v. Fleming*, 17 Wn.2d 500, 505, 136 P.2d 449 (1943)); 3 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE 348 (4th ed. 1991) (the rule should not be considered as authorizing a recall of the mandate for the purpose of reexamining the case on its merits). Additionally, RAP 12.9(c) requires a motion to recall a mandate to be made within a reasonable time. The mandate in this case was issued by the Court of Appeals on June 26, 1995. More than 1,000 days have passed since the mandate was issued. There is no argument on behalf of Ms. Shumway attempting to explain why allowing this passage of time before seeking relief should be deemed reasonable.

Even if Ms. Shumway were able to demonstrate that the mandate issued by the Court of Appeals should-and could-be recalled, there is no procedure under our appellate rules to amend a petition for review after review has been denied by this court.

Ms. Shumway no longer has an opportunity to seek discretionary review in this court of the Court of Appeals decision, on direct appeal, that the trial court properly denied her motion to sever.

Shumway v. Payne, 136 Wn.2d 392-94. This decision shows clearly that Universal has no basis for re-visiting that part of the judgment affirmed by

this court.

Universal seeks to avoid the law of the case doctrine by relying on *State v. Trask*, 98 Wn. App. 690, 990 P.2d 976 (2000).

Law of the case is a doctrine that derives from both RAP 2.5(c)(2) and common law. This multifaceted doctrine means different things in different circumstances, *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992), and is often confused with other closely related doctrines, including collateral estoppel, res judicata, and stare decisis.

In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Id.* (citing 15 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: JUDGMENTS § 380, at 55-56 (4th ed. 1986)). . . . In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process. See 5 AM. JUR. 2D Appellate Review § 605 (1995).

Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Universal's reliance is terribly misplaced. In *Trask*, the issue in the second appeal arose because of the Court's decision in the first appeal. The trial court had denied interest, both pre-judgment and post-judgment. In other words, it failed to make an award. As a result of its failure to make the award, issues regarding how the award would have been calculated if the award had been made, did not arise. Thus, the trial court made no decision how the interest should be calculated. The appellant appealed and, though imprecisely, challenged both

pre-and post-judgment interest. 98 Wn. App. at 694. The Court of Appeals reversed, deciding that the appellant was entitled to interest. In doing so, however, the appellate court did not address how the interest should be calculated. *Id.* at 692. When, following remand, the trial court incorrectly calculated the interest, the appellant appealed. The Court of Appeals held the law of the case doctrine did not bar the second appeal.

Unlike the circumstances in *Trask*, Universal is challenging the decision of the trial court to make an award, the award was part of the original judgment, and the award provided the method for calculating the amounts owed. Thus, unlike the circumstances in *Trask*, everything Universal needed to obtain the result it now seeks was present in the original judgment. Nothing new arose because of the Court of Appeals' decision in the first appeal; the court simply affirmed paragraphs 1 and 7. Nothing new arose on remand; the trial court simply applied the judgment as worded. Universal could have fully challenged the judgment, including the trial court's decisions regarding the principle judgment amount and the award of post-judgment interest in the first appeal. It simply chose not to.

Nor does Universal's "powerful reason" (Brief of Appellant at 13) – that it is unclear from the May 20, 2005 judgment why the trial court allowed the interest it did at the rates it did – justify review. If Universal questioned

the basis for these awards, its time to do so was when the awards were entered, not three and a half years later. The trial court was not obliged to answer the question any time Universal got around to asking it.

In simplest terms, Universal asks the court to apply *Trask* to defeat the rules that failure to preserve error waives error, failure to timely appeal waives error (*Bushong v. Wilsbach*, Dkt. No. 61558-1, ___ Wn. App. ___, ___ P.3d ___ (Div. I, July 27, 2009)), failure to assign error waives error (RAP 10.3(g); *Manteufel v. Safeco Ins. Co. of Am.*, 117 Wn. App. 168, 174, 68 P.3d 1093(2003)), failure to argue issues waives error (*Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Brower v. Pierce County*, 96 Wn. App. 559, 567, 984 P.2d 1036 (1999); *Mannington Carpets, Inc. V. Hazelrigg*, 94 Wn. App. 899, 910; 973 P.2d 1103 (1999)), and judgments may not be collaterally attacked through orders executing on them (*Farhood v. Allyn*, 132 Wn. App. 371, 378, 131 P.3d 339 (2006)). According to Universal, any order not pursued in a first appeal may, for that very reason, be pursued in a second appeal. That, of course, would stand the appellate process on its ear. Universal knew what paragraph 1 and paragraph 7 were ordering when the judgment was entered and when it filed its first appeal. Universal knew that if it failed to obtain reversal of the paragraph 1 award, both paragraph 1 and paragraph 7 would be enforced. If it wanted to

challenge the terms of those awards, its time was then, in its first appeal, not now, years later. Universal's appeal of these terms of the judgment should be denied.

2. Paragraph 1 of the May 20, 2005 judgment states a proper award of the Tomy judgment.

Universal makes two arguments challenging the paragraph 1 award. It argues that the trial court improperly awarded pre-judgment interest when the claim was unliquidated, and improperly failed to apply RCW 4.56.110(3). Neither argument was made when the judgment was entered. Both are wrong because and both misperceive the issue.

The argument is wrong because paragraph 1 does not award interest, it awards the amount of the Tomy judgment. The trial court decided, and the court of appeals agreed, that Universal acted in bad faith towards the Sharbonos as a matter of law. “[I]n the third-party context, ‘if the insured shows by a preponderance of the evidence the insurer acted in bad faith, there is a presumption of harm.’” *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co.*, 161 Wn.2d 903, 169 P.3d 1, 10 (2007), quoting *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992). “[I]f the insured prevails on the bad faith claim, the insurer is estopped from denying coverage.” *Id.*; *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 564, 951 P.2d

1124 (1998); accord *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 739, 49 P.3d 887 (2002); *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 390, 823 P.2d 499 (1992). Where coverage by estoppel applies, "the amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant judgment is reasonable." *Besel*, 146 Wn.2d at 738, 49 P.3d 887.

In paragraph 1, the trial court did not award pre- or post-judgment interest. Just as the law required, the trial court awarded the amount of the covenant judgment entered against the Sharbonos in favor of the Tomyns. That judgment (CP 62-66 (Attached as **Appendix C**)), by its terms, accrued post-judgment interest from the date it was entered. (CP 64, Ins. 7-8) Just as a principle judgment obligating a defendant to pay off a loan would continue to grow as long as the defendant failed to pay the loan, the principle judgment in this case – the Tomyn covenant judgment – continues to grow until Universal pays it. It grows not because the trial court awarded interest, but because the judgment by its terms accrues interest.

Nor was the covenant judgment faulty because the interest rate was 12%. First, that was the correct post-judgment interest rate on tort judgments at the time the judgment was entered. See Laws of 1989, ch. 360, § 19. Second, regardless, the interest was the product of the settlement agreement

between the Tomyns and the Sharbonos. The trial court determined that settlement to be reasonable, and the Court of Appeals affirmed that decision. As noted above, where coverage by estoppel applies, "the amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant judgment is reasonable." *Besel*, 146 Wn.2d at 739-40("Once the court determined that the covenant judgment was reasonable, the burden shifted to Viking to show the settlement was the product of fraud or collusion. **Having failed to meet this burden, Viking was liable for the full settlement amount.** Insurers can avoid this result in the future by acting in good faith." (Emphasis added)). The trial court properly awarded the amount set forth in the covenant judgment. Accord *Jackson v. Fenix Underground, Inc.*, 142 Wn. App. 141, 173 P.3d 977 (2007)("[RCW 4.56.110] subsection (1) plainly manifests a legislative intent to allow contracting parties the freedom to specify a different interest rate. . . . [S]ettlement agreements are contracts. 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.")

The trial court followed the law. It had determined Universal acted in bad faith. As a result, a presumption of harm arose and Universal was estopped from denying coverage. Where coverage by estoppel applies, the

amount of a covenant judgment was the presumptive measure of the Sharbonos' harm. Paragraph 1 properly awarded that amount as the principle judgment.

3. Paragraph 7 of the May 20, 2005 judgment properly awards post-judgment interest at 12%.

On the judgment of May 20, 2005, the Sharbonos are the judgment debtors. RCW 4.56.110 expressly states: "Interest on judgments **shall accrue** as follows:" The Washington Supreme Court has recognized that this statute mandates post-judgment interest.

The post-judgment interest statute, RCW 4.56.110(3), is clear. It **mandates** that interest accrue from the date of entry of the judgment. It provides **no exception** for delays, unreasonable or otherwise.

Rufer v. Abbott Laboratories, 154 Wn.2d 530, 553, 114 P.3d 1182 (2005)(emphasis added). The Sharbonos were absolutely entitled to post-judgment interest on the principle judgment amount.

Universal's contention that the 12% interest rate awarded in paragraph 7 is wrong, is itself wrong. RCW 4.56.110(4) expressly states: "Except as provided under subsections (1), (2), and (3) of this section, judgments **shall bear interest** from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof." When an insurer breaches its contract, post-judgment interest accrues under this section at 12%. *Little v.*

King, 147 Wn. App. 883, 198 P.3d 525, 528 (2008). Paragraph 1 of the judgment is awarded based on insurance coverage. As stated previously, “if the insured prevails on the bad faith claim, the insurer is estopped from denying coverage.” *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co.*, 161 Wn.2d 903, 169 P.3d 1, 10 (2007). Though the insurance coverage in this case is imposed by estoppel, insurance coverage is nevertheless a contract. An action to enforce that contract is a contract action. The end result is enforcement of a contract.

Universal’s contention that the judgment compounds interest again is wrong.¹ Compounding refers to paying interest on interest one has previously earned. Universal claims it is paying interest under paragraph 1, and then paying interest again under paragraph 7. That is not what is occurring because Universal is not paying interest under paragraph 1. Under paragraph 1, Universal is the judgment debtor on the award in favor of the Sharbonos. The judgment, in the nature of an order requiring Universal to perform a specified act, requires Universal to pay a debt owed by the

1. Universal’s argument notwithstanding, Washington law does not prohibit compounding pre-and post- judgment interest. In *State v. Trask*, 98 Wn. App. 690, 990 P.2d 976 (2000), the court stated that in the context of property loss, pre-judgment interest is added to the value of the property to comprise the principle judgment amount, and post-judgment interest is calculated on the total. This result allowed post-judgment interest to be calculated on pre-judgment interest, resulting in compounding. Thus, even if compounding was occurring here, it is not prohibited if appropriate for the case.

Sharbonos to the Tomyns. The debt, which reflects the amount the Sharbonos owe the Tomyns (i.e., the covenant judgment), is increasing over time for as long as Universal fails to pay it. It is not increasing because Universal is being assessed interest, it is increasing because the Sharbonos are being assessed interest. It is increasing as to Universal only because the debt the Sharbonos owe, and the debt for which its bad faith makes it responsible, is increasing.

In this case there are two separate judgments, the May 30, 2001 judgment entered in favor of the Tomyns against the Sharbonos, and the May 20, 2005, judgement entered in favor of the Sharbonos against Universal. There also are two separate parties entitled to interest from those separate judgment debtors: the Tomyns get interest from the Sharbonos and the Sharbonos get interest from Universal. The fact that Universal's bad faith compels it to pay the Sharbonos' debt, however, does not mean it is paying interest on interest. Universal is paying a debt, and paying interest only on that debt. Universal is not paying interest on any other interest it is obligated to pay.

4. The trial court properly calculated amounts due under the paragraphs 1 and 7 of the May 20, 2005 judgment.

On the single issue Universal properly brings before this court – how

the trial court applied paragraphs 1 and 7 to determine the amounts owed – Universal’s brief argument is entirely unpersuasive. First, Universal argues that the trial court improperly calculated the amount due under paragraph 1 by imposing pre-judgment interest past the date of the judgement. Brief of Appellant at 23. But, that is not what the court did. As stated previously, the award in paragraph 1 reflects the rule that where coverage by estoppel applies, “the amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant judgment is reasonable.” *Besel*, 146 Wn.2d at 738, 49 P.3d 887. In enforcing the award, the trial court thus calculated the amount of the covenant judgment, which was the amount then owed by the Sharbonos. It simply determined what amount the Sharbonos owed to the Tomyns, then assessed that amount as the principle judgment amount awarded in paragraph 1. It did not add in pre-judgment interest. Calculating the amount owed any other way, especially by applying a lesser interest rate, would have left the Sharbonos owing the Tomyns more than what Universal paid as the paragraph 1 award. It also would allow Universal to profit from its delay and pay less than the full amount of the covenant judgment.

Second, Universal argues that the court erred by not interpreting paragraph 1 as awarding the interest referenced in paragraph 7. Brief of

Appellant at 24. In other words, Universal contends that the interest referred to in paragraph 1 was the interest awarded in paragraph 7. Of course, accepting this argument makes paragraph 7 of the judgment redundant, superfluous and meaningless, which the court should not do. See *Navlet v. Port of Seattle*, ___ Wn.2d ___, 194 P.3d 221 at ¶36 (2008); *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980) (“An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.”) More importantly, it deprives the Sharbonos of their statutorily mandated post-judgment interest. As discussed previously, as judgment creditors, the Sharbonos were absolutely entitled to post-judgment interest on the principle judgment amount. RCW 4.56.110; *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 553, 114 P.3d 1182 (2005).

Third, Universal again argues that the trial court’s calculation results in compounding. Brief of Appellant at 25. For the reasons previously stated, see *supra* at 18-19, it does not.

A reviewing court must construe a judgment so as to give effect to the intention of the court, not the intention of the parties. *In re Marriage of Pippins*, 46 Wn. App. 805, 807, 732 P.2d 1005 (1987). The language of the judgment controls. *Id.* The language of this judgment is crystal clear.

Paragraph 1 of the Judgment entered against Universal describes the principle judgment amount as “the amount of the unpaid balance of the Judgment by Confession entered against plaintiffs in the matter of *Tomyn v. Sharbono*. Paragraph 7 provides for post-judgment interest: “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.” The calculation of the amount owing is simple: calculate the principle amount of the judgment and then calculate post-judgment interest on that.

CONCLUSION

Universal’s efforts to challenge the terms of paragraphs 1 and 7 of the May 20, 2005 judgment are untimely, procedurally defective, and wrong. Because this court affirmed those parts of the judgment, the trial court did just what it should have done: enforce those paragraphs as they are worded. That is precisely what it did. Its decision on the amounts owing should be affirmed.

ARGUMENT ON CROSS-APPEAL

During the proceedings to execute on the affirmed parts of the May 20, 2005, judgment, and without seeking leave of court, the Tomyns introduced a new issue, asking the trial court to interpret the settlement agreement between the Tomyns and the Sharbonos and award the Tomyns

not only the principle amount of judgment awarded in paragraph 1, but also the Sharbono's post-judgment interest awarded in paragraph 7. (CP 167-71, 329-31) Over the Sharbonos' objection (CP 231-33), the trial court granted the Tomyns' request. (CP 333, Ins. 9-13) The Sharbonos appealed that decision.

The Tomyns stated their argument for entitlement to the Sharbonos' post-judgment interest in a single sentence: "Therefore, the Plaintiffs in the above-captioned matter [Sharbonos] . . . agreed to settle the Intervener [Tomyns'] claims by assignment of **the recovery against Universal Underwriters in the contemplated suit herein.**" (CP 170-71). This statement is incorrect.

A settlement agreement is no more than a contract between the parties. It is subject to the principles of contract construction. *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 942, 974 P.2d 1261 (1999); *Byrne v. Ackerlund*, 44 Wn. App. 1, 5, 719 P.2d 1363 (1986). The goal of contract interpretation is to determine the parties' mutual intent. *City of Woodinville v. Northshore United Church of Christ*, 139 Wn. App. 639, 651, 162 P.3d 427 (2007) In doing so, a court should consider a party's objective manifestations of intent expressed in the contract itself, not the party's unexpressed subjective intentions. Washington courts may consult extrinsic

evidence of the circumstances under which the contract was made to aid interpretation, but not to show a party's unilateral intent, intent independent of the contract, or to contradict or modify the contract as it was written. A court must examine the contract as a whole and not adopt an interpretation that renders a term absurd or meaningless. The interpretation of an unambiguous contract is an issue of law. *Id.* The court cannot ignore the language agreed upon by the parties, or revise or rewrite the contract under the guise of construing it. *Byrne*, 44 Wn. App. at 5, citing *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980). In construing a contract, the court should apply that construction that will give each part of the instrument some effect. *Id.*

The settlement agreement between the Tomyns and the Sharbonos (CP 99-106, 127-31 (Attached as **Appendix D**)) contains two provisions relevant to this disagreement. The first is found on page 2 of 5 in paragraph 2.B. (CP 128) That paragraph tells what the Sharbonos assigned to the Tomyns:

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.

(Emphasis added). The second is at the end of paragraph 2 on page 3 of 5 (CP 129):

Except as set forth in paragraphs 2A., 2B and 2.C. above, **defendants retain unto themselves and do not assign any other rights, claims, causes of action or awards** against Universal or any other person or entity . . .

(Emphasis added) Thus, as the agreement clearly states, the Sharbonos did not assign their “recovery” against Universal. Rather, they assigned the “benefits payable under any liability insurance policy.” They explicitly retained all other rights claims and awards as their own.

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 entitlement awarded pursuant to statute, RCW 4.56.110, not the insurance policy. It is awarded only if Universal failed to pay the principle judgment when entered. Post-judgment interest is intended to compensate the judgment creditor for the lost use of money.

The purpose of requiring a defendant to pay interest on a judgment is to compensate the plaintiff for the lost value of money when it was properly attributable to the plaintiff, but in the defendant's possession.

Rufer v. Abbott Laboratories, 154 Wn.2d 530, 552, 114 P.3d 1182 (2005).

“[T]he purpose of post-judgment interest is to compensate the successful

plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant.” *Id.* at 553, quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990)(quoting *Poleto v. Consol. Rail Corp.*, 826 F.2d 1270, 1280 (3d Cir.1987).

The Sharbonos are the plaintiffs and the judgment creditors in this action. They are entitled to post-judgment interest because the judgment was in their favor, and RCW 4.56.110 mandates they receive it. It is not a benefit of liability insurance from Universal or anyone else. As a separate element of recovery, it is among the amounts which the Sharbonos did not assign and to which they alone are entitled.

Moreover, what is a benefit payable under liability insurance already has been answered in this case. As the court stated in *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co.*, 161 Wn.2d 903 @ ¶ 33, 169 P.3d 1, 10 (2007), “if the insured prevails on the bad faith claim, the insurer is estopped from denying coverage.” “Where coverage by estoppel applies, ‘the amount of a covenant judgment is the presumptive measure of an insured's harm caused by an insurer's tortious bad faith if the covenant judgment is reasonable.’” *Id.* at ¶ 42, quoting *Besel v. Viking Ins. Co. of Wis.*, 146

Wn.2d 730, 738, 49 P.3d 887 (2002); *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 564, 951 P.2d 1124 (1998)(“Once the insurer breaches an important benefit of the contract, harm is assumed, the insurer is estopped from denying coverage, and the insurer is liable for the judgment.”). Thus, the benefits payable pursuant to coverage by estoppel is the covenant judgment. That is the amount awarded pursuant to paragraph 1 of this court’s judgment.

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% .

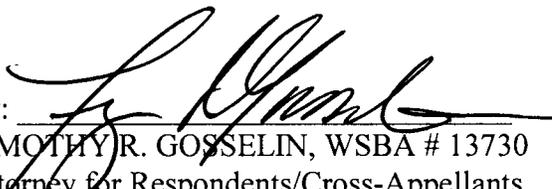
The Sharbonos agree that under their settlement agreement the Sharbonos assigned to the Tomyns the amounts they (the Sharbonos) recovered through coverage by estoppel. The Sharbonos also agree that paragraph 1 of the May 20, 2005, judgment reflects the amount recovered through coverage by estoppel. However, nothing in the settlement agreement entitles the Tomyns to the amounts awarded to the Sharbonos as post-judgment interest. Because the Sharbonos’ right to post-judgment interest

was not a right that was assigned, it was a right that was retained. The trial court wrongly ordered that the Tomyns were entitled to the amounts awarded under paragraph 7.

CONCLUSION FOR CROSS-APPEAL

The trial court erred in concluding that the Tomyns were entitled to the paragraph 7 award of post-judgment interest. The settlement agreement did not assign awards of post-judgment interest to the Tomyns. The Sharbonos ask, therefore, that this court reverse the trial court's order and instruct that any post-judgment interest awarded under paragraph 7 be paid to them.

Dated this 10th day of September, 2009.

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

Appendix A

FILED
IN COUNTY CLERK'S OFFICE

A.M. MAY 20 2005 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

01-2-07954-4 23081587 JD 05-23-05

The Honorable Rosanne Buckner
TRIAL DATE: MARCH 28, 2005

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

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

Plaintiffs,

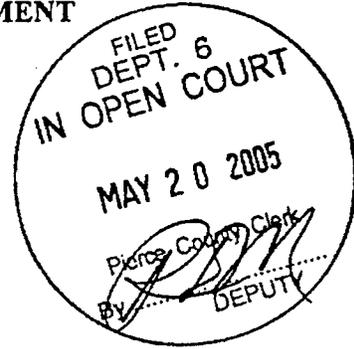
vs.

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

Defendants.

NO. 01 2 07954 4

JUDGMENT



I. JUDGMENT SUMMARY

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

JUDGMENT - Page 1 of 4

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BURGESS FITZER, P.S.

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

1 5. Attorney Fees and Costs:

\$ 204,090.⁰⁰/_{KK}

2 6. Other Recovery Amounts:

\$ 10,000.⁰⁰/_{KK}

3 7. Post- Judgment Interest:

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

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

15 II. JUDGMENT

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

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

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

JUDGMENT - Page 2 of 4

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BURGESS FITZER, P.S.

ATTORNEYS AT LAW

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

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

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

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

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

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

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

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

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

26

27

28 JUDGMENT - Page 3 of 4

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BURGESS FITZER, P.S.

ATTORNEYS AT LAW

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

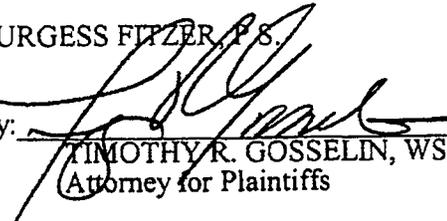
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Signed this 20th day of May, 2005.


HONORABLE ROSANNE BUCKNER

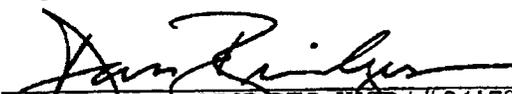
PRESENTED BY:

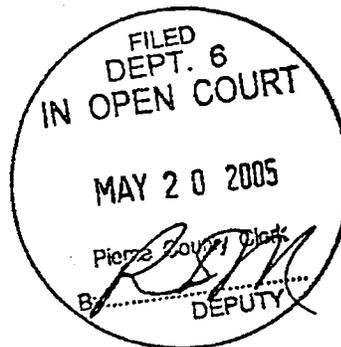
BURGESS FITZER, P.S.

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

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED.

LAW OFFICES OF DAN'L W. BRIDGES

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



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Appendix B

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

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

Plaintiffs,

vs.

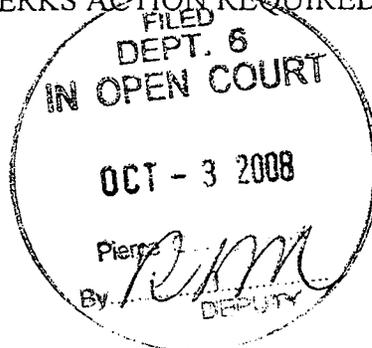
UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer; LEN VAN DE WEGE and "JANE
DOE" VAN DE WEGE, husband and wife
and the marital community composed
thereof,

Defendants.

NO. 01-2-07954-4

ORDER GRANTING MOTION TO
EXECUTE ON APPEAL BOND

CLERKS ACTION REQUIRED



COPY ORIGINAL

This matter having come on duly and regularly before the undersigned judge of the above entitled court on the Plaintiffs' Motion to Execute on Appeal Bond, and the court having reviewed the files and records herein, having heard argument of counsel, including counsel for intervenor Clinton Tomy, et al., and being duly advised in the premises, and having concluded that in its decision filed June 27, 2007, Division Two of the Washington Court of Appeals affirmed that part of the judgment awarded at Page 3, ¶ 1 of the Judgment entered by this court on May 20, 2005, together with interest thereon awarded pursuant to ¶ 7 of said judgment, that Plaintiffs are entitled

1 to execute on said judgment, and that Ohio Casualty Insurance Company issued Appeal Bond no.
2 3-883-836-6, assuring payment of said judgment, it is now, hereby

3 ORDERED, ADJUDGED AND DECREED that, in execution of paragraph 1 of the
4 judgment entered in this matter on May 20, 2005, Ohio Casualty Insurance Company shall, on or
5 before October 15, 2008, pay the sum of ~~\$6,844,717.30~~ ^{6,240,265.²⁵} to and pursuant to instructions of the
6 plaintiffs in Pierce County cause no. 99-2-12800-7 or their attorneys of record on behalf of such
7 plaintiffs, whom the judgment creditors James and Deborah Sharbono have designated to receive
8 such payment; and it is further

9 ORDERED, ADJUDGED AND DECREED that, in execution of the first sentence of
10 paragraph 7 of the judgment entered in this matter on May 20, 2005, Ohio Casualty Insurance
11 Company shall, on or before October 15, 2008, pay the sum of \$2,353,956.28 to and pursuant to
12 ~~instructions of the judgment creditors James and Deborah Sharbono or their attorneys of record on~~
~~behalf of them;~~ ^{(Plaintiffs in Pierce County Cause No. 99-2-12800-7 or their attorneys of record on behalf of such plaintiffs (James and Deborah Sharbono))} and it is further

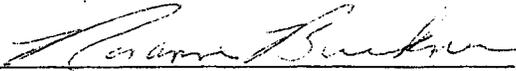
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14 ORDERED, ADJUDGED AND DECREED that pursuant to Civil Rule 65.1, the Clerk of
15 the Court shall immediately, forthwith and without delay, give notice by fax and overnight mail of
16 this order to Ohio Casualty Insurance Company as set forth in Appeal Bond no. 3-883-836-6, or if
17 said bond does not contain instructions for notice, then to such location as may reasonably
18 determined by the Clerk to provide Ohio Casualty with notice of this order; and it is further

19 ORDERED, ADJUDGED AND DECREED that upon payment described above, those
20 portions of the judgment described above – paragraph 1 and the first sentence of paragraph 7 – shall
21 be satisfied in full; and it is further

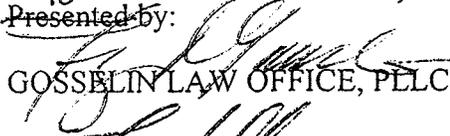
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1 ORDERED, ADJUDGED AND DECREED that upon payment described above, Appeal
2 Bond no. 3-883-836-6 and Ohio Casualty Insurance Company shall be fully exonerated and released
3 from further obligation.

4 Dated this 3rd day of October, 2008

5
6 
7 HONORABLE ROSANNE BUCKNER

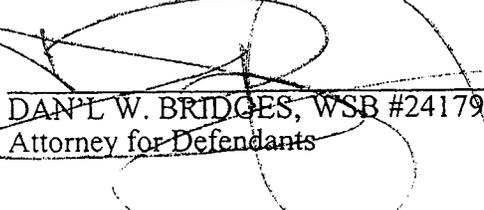
8 *Approved as to form,*
9 *Presented by:*

10 
11 GOSSELIN LAW OFFICE, PLLC

12 
13 TIMOTHY R. GOSSELIN, WSB #13730
14 Attorneys for Plaintiffs

15 Copy received; Approved as to form.

16 MCGAUGHEY BRIDGES DUNLAP

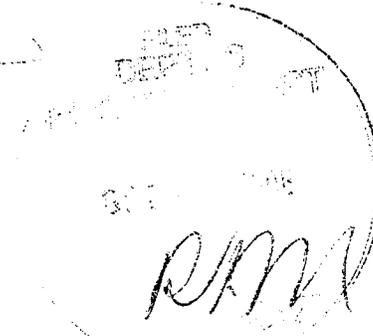
17 
18 DAN L. W. BRIDGES, WSB #24179
19 Attorney for Defendants

20 KARR TUTTLE CAMPBELL

21 
22 JACQUELYN A. BEATTY, WSB #17567
23 Attorney for Defendants

24 *Presented by:*
25 LAW OFFICES OF BEN F. BARCUS

26 
27 BEN F. BARCUS
28 Attorney for Intervenors



Order on Plaintiffs' Motion to
Execute on Appeal Bond Page - 3

GOSSELIN LAW OFFICE, PLLC

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

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Appendix C



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

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,

Plaintiffs,

vs.

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

Defendants.

NO. 99-2-12800-7

JUDGMENT BY CONFESSION

JUDGMENT SUMMARY

1. Judgment Creditors:

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, for them
and on their behalf.

JUDGMENT BY CONFESSION - 1

S:\WP\CASES\2181\JUDGMENT.rev.WPD

BURGESS FITZER, P.S.

ATTORNEYS AT LAW

1501 MARKET STREET, SUITE 300

TACOMA, WASHINGTON 98402-3333

(253) 572-5324 FAX (253) 627-8928

1 2. Judgment Debtors: CASSANDRA SHARBONO, individually; JAMES and
2 DEBORAH SHARBONO, individually and as a marital
3 community
4 c/o Timothy R. Gosselin
5 BURGESS FITZER, P.S.
6 1501 Market, Suite 300
7 Tacoma, WA 98402-3333

6 3. Principal Judgment Amount: \$4,525,000
7 (Estate of Cynthia L. Tomy - \$ _____)
8 (Clinton Tomy, individually - \$ _____)
9 (Nathan Tomy, individually - \$ _____)
10 (Aaron Tomy, individually - \$ _____)
11 (Christian Tomy, individually - \$ _____)

10 5. Interest to Date of Judgment -0-
11 6. Statutory Attorney's Fees (RCW 4.84.080) -0-
12 7. Costs (RCW 4.84.010) -0-
13 8. Other Recovery Amounts -0-

14 9. Principal Judgment Amount shall bear interest at 12% per annum (RCW 19.52.010)

15 10. Attorneys for Judgment Creditors: Ben F. Barcus, Attorney at Law
16 4303 Ruston Way
17 Tacoma, WA 98402
18 (253) 752-4444

18 **JUDGMENT BY CONFESSION**

19 THIS MATTER having come on regularly for hearing this date, the plaintiffs appearing by and
20 through their attorney, Ben F. Barcus, the defendants appearing through their attorneys of record,
21 Dennis J. La Porte, KRILLICH, LA PORTE, WEST & LOCHNER, P.S., and Timothy R. Gosselin,
22 BURGESS FITZER, P.S., and the Court finding based upon the declaration subjoined hereto and upon
23 the representations of counsel for the respective parties, that the requisites for confession of judgment
24 as set forth in RCW 4.60.060 have been met, and concluding that under RCW 4.60.010, this confession
25 of judgment is valid; pursuant to RCW 4.60.070, it is now, hereby

1 ORDERED, ADJUDGED AND DECREED that the plaintiffs, CLINTON L. TOMYN,
2 individually and as Personal Representative of The Estate of CYNTHIA L. TOMYN, deceased; and
3 as Parent/Guardian of NATHAN TOMYN; AARON TOMYN; and CHRISTIAN TOMYN be, and the
4 same hereby are granted judgment, jointly and severally, against the defendants, CASSANDRA
5 SHARBONO, individually; JAMES and DEBORAH SHARBONO, individually and as a marital
6 community, in the sum of \$4,525,000.00; it is further

7 ORDERED, ADJUDGED AND DECREED that the principal judgment amount shall bear
8 interest at the rate of 12% per annum (RCW 19.52.010); and it is further

9 ORDERED, ADJUDGED AND DECREED that each party shall bear their own costs and
10 attorney fees incurred herein; and it is further

11 ORDERED, ADJUDGED AND DECREED that his judgment fully and finally resolves all
12 claims among all the parties to this action arising out of the motor vehicle accident of December 11,
13 1998.

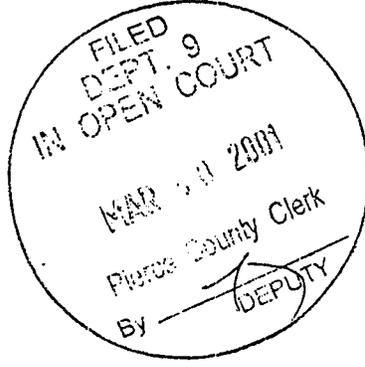
14 DONE in Open Court this 30th day of March, 2001.

15 
16 HONORABLE SERGIO ARMIJO

18 APPROVED AND PRESENTED BY:

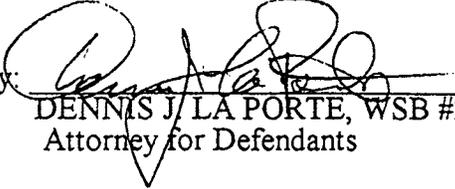
19 LAW OFFICES OF BEN F. BARCUS

20 
21 By: BEN F. BARCUS, WSB # 15576
22 Attorney for Plaintiffs

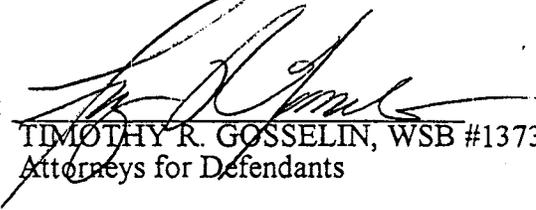


1 Approved as to Form and Content, Notice
of Presentation Waived:

2 KRILLICH, LA PORTE,
3 WEST & LOCHNER, P.S.

4 By: 
5 DENNIS J. LA PORTE, WSB #2971
6 Attorney for Defendants

7 BURGESS FITZER, P.S.

8
9 By: 
10 TIMOTHY R. GOSSELIN, WSB #13730
11 Attorneys for Defendants

12 We the undersigned, pursuant to RCW 4.60.060, after being fully advised of the consequences
13 hereof, and after consultation with our attorneys identified above, submit this statement and verification
14 as authorization for entry of judgment against us in the amounts set forth above, specifically
15 \$4,525,000.00.

16 This judgment and our confession thereto arise out of a two-car motor vehicle accident that
17 occurred on or about December 11, 1998. One vehicle was driven by Cassandra Sharbono, the natural
18 daughter of James and Deborah Sharbono. The other was driven by Cynthia L. Tomy, the wife of
19 Clinton Tomy, and the natural mother of Nathan, Aaron and Christian Tomy. At the time of the
20 accident, Cassandra Sharbono was a minor, and was residing with her parents. The vehicle she was
21 driving was owned by James and Deborah Sharbono and maintained in part as a family car.

22 The accident resulted from the sole negligence of Cassandra Sharbono. Cassandra crossed the
23 centerline between her lane of travel and oncoming traffic to strike Ms. Tomy head-on.

24 Cynthia Tomy died as a result of the accident. Our counsel's investigation has revealed that Ms.
25 Tomy was born on July 28, 1965 and was 34 years old at the time of her death. She had met her
26

27
28 JUDGMENT BY CONFESSION - 4

S:\WP\CASES\2181\JUDGMENT.rev.WPD

BURGESS FITZER, P.S.

ATTORNEYS AT LAW

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

65

1 husband Clinton during high school. They had been married for 15 years. Ms. Tomyne was a high
2 school graduate. She had been employed at Tacoma General Hospital for 5 1/2 years. She worked as
3 a heart monitor technician at the time of her death. Cynthia and Clinton had three children. At the time
4 of Cynthia's death, Nathan was 12, Aaron was 14, and Christian was 7 years old. Cynthia volunteered
5 extensively at her children's school.

6 Our counsel's investigation indicates Cynthia was a loving wife, devoted mother and a fine person.
7 Under the circumstances, we believe a jury could reasonably respond with a substantial award of
8 damages, possibly well in excess of the amount to which we have consented. For that reason, we
9 believe this confession of judgment is in our best interests and agree accordingly.

10
11 We declare and state under the penalty of perjury under the laws of the State of Washington that
12 the foregoing is true and correct.

13 Signed the 30th day of March, 2001, at Tacoma, Washington.

14 
15 _____
16 CASSANDRA SHARBONO

17 
18 _____
19 JAMES SHARBONO

20 
21 _____
22 DEBORAH SHARBONO

Appendix D

**SETTLEMENT AGREEMENT
(INCLUDING COVENANTS AND ASSIGNMENT OF RIGHTS)**

PARTIES

The parties to this agreement are the plaintiffs and defendants in Pierce County Superior Court Cause No. 99-2-12800-7. The plaintiffs are Clinton Tomy; the Estate of Cynthia Tomy, by and through Clinton Tomy its personal representative; Nathan Tomy, by and through David Bufalini, his guardian ad litem; Aaron Tomy, by and through Stanley J. Rumbaugh, his guardian ad litem; and Christian Tomy, by and through John Combs, his guardian ad litem. They will be referred to collectively as plaintiffs and individually by their individual names. The defendants are Cassandra Sharbono; James Sharbono, individually and on behalf of his marital community; and Deborah Sharbono, individually and on behalf of her marital community. They will be referred to collectively as defendants and individually by their individual names.

PURPOSE OF AGREEMENT

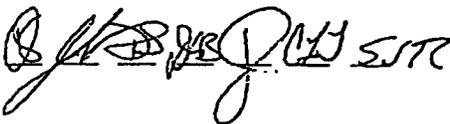
COPY

The purpose of this agreement is to protect the assets, earnings and personal liability of defendants from a verdict in excess of the limits of primary insurance acknowledged as applicable by State Farm Automobile Insurance Company (hereafter State Farm) and umbrella insurance acknowledged as applicable by Universal Underwriters Insurance Company (hereafter Universal), as well as to protect defendants from the expense and hardship of bankruptcy proceedings.

Plaintiffs have filed suit against defendants in Pierce County Superior Court under cause number 99-2-12800-7 for damages suffered from a car accident that occurred on December 11, 1998. The accident resulted in the death of Cynthia Tomy, the wife of Clinton Tomy, and the natural mother of Nathan, Aaron and Christian Tomy.

Defendants have primary liability insurance in the amount of \$250,000.00 with State Farm. Defendants have umbrella liability insurance with Universal. The amount of insurance Universal provides is disputed. Universal contends and therefore acknowledges that it provides \$1 million in insurance coverage. Universal has denied any further obligation. Defendants contend Universal is obligated to provide at least \$3 million in insurance coverage. Defendants also contend that in the event Universal provides only \$1 million in insurance coverage, the coverage Universal sold to

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defendants was sold through fraud, misrepresentation, negligence or other misconduct on the part of Universal, the selling agent or others.

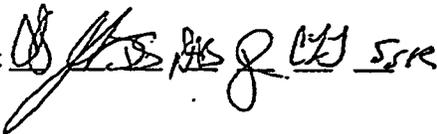
Plaintiffs suffered damages as a result of the death of Cynthia Tomy. The parties, by and through their respective attorneys, have conducted independent investigations and evaluations of the plaintiffs' claims against the defendants and concluded that defendants face a real and substantial risk that judgment will be entered against defendants in excess of the \$250,000 insurance provided by State Farm and the \$1 million insurance Universal acknowledges. Universal's denial of additional insurance has left the defendants' property, earnings and personal assets exposed to substantial risk of attachment to satisfy any such judgment.

Therefore, in an effort to settle all of plaintiffs' claims against defendants in a way that offers some protection of defendants' assets; eliminates or reduces the risk that any defendant must file bankruptcy to protect their personal financial well-being; as a consequence of the extreme severe adverse financial impact of a judgment which is likely to exceed all available insurance coverages and Defendants' net assets; and preserves the ability to challenge any wrongful conduct by Universal or others with regard to the insurance available to defendants, the parties have agreed to settlement on the following terms and conditions.

TERMS AND CONDITIONS

1. Confession of Judgment: The defendants will comply with and take all steps needed to confess judgment pursuant to RCW ch. 4.60 in the amount of \$4,525,000. The signature of defendants and their attorneys on a confession of judgment in the form attached hereto and marked as attachment 1 will be deemed full compliance with this paragraph.
2. Assignment of Rights: The defendants assign to plaintiffs all amounts awarded against or obtained from Universal for the following:
 - A. The benefits payable under any liability insurance policy in which Defendants have any interest for a covered loss that Universal has breached with respect to claims arising out of the December 11, 1998 motor vehicle accident.
 - 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.
 - C. If one or both insurers fail immediately to tender the undisputed

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liability coverage amounts, any and all causes of action against such insurers resulting from such failure of tender, including claims for the lost use of such monies, bad faith insurance practices, violation of Washington's Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duties, negligence, non-feasance, misfeasance, malfeasance, or other such similar causes of action.

Plaintiffs will apply the proceeds, if any, they obtain by virtue of this assignment towards the judgment referred to in paragraph 1. above, and execute full or partial satisfaction of said judgment as is thereby appropriate.

Except as set forth in paragraphs 2A., 2B and 2.C. above, defendants retain unto themselves and do not assign any other rights, claims, causes of action or awards against Universal or any other person or entity, including but not limited to claims or awards for bad faith, violation of Washington's Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duty, negligence, non-feasance, misfeasance, malfeasance, or similar conduct.

3. Suit Against Universal: A. The defendants will, no later than April 30, 2001, initiate suit against Universal asserting such claims as are reasonable and prudent to establish a right to recover the amounts assigned in paragraphs 2.A. and 2.B., and, if necessary, 2.C., above. Plaintiffs, through their chosen counsel, may participate and assist in the prosecution of those claims as they choose.

B. In such suit, the defendants may assert claims against additional parties -- with the exclusion of Plaintiffs, their legal counsel or the appointed Guardians ad Litem -- and assert additional claims against Universal as they deem prudent; and, as set forth in paragraph 2. above, Defendants retain unto themselves all right of recovery from such claims.

C. The claims that give rise to a right to recover amounts assigned in paragraphs 2.A. and 2.B. above will be settled only upon agreement by plaintiffs.

D. Each party will pay the attorney fees, costs and expenses they incur in the prosecution of the suit; *provided that* in the event defendants obtain a court award of costs or attorney fees (such as an award under the rule in Olympic Steamship v. Centennial Ins. Co., Washington's Consumer Protection Act, general bad faith law, etc.), the award shall be applied to those costs and attorney fees for which the award is made, with only the balance paid by the party who incurs them; *and provided further that* in the event defendants successfully assert claims that result in plaintiffs recovering under the assignments set forth in paragraphs 2.A. and 2.B. above, costs and fees not satisfied by a court award of costs and fees will be shared by plaintiffs and defendants in the proportion that plaintiffs' recovery on the assigned claims bears

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[Handwritten initials: CRIS, GMS, JML, SIR]

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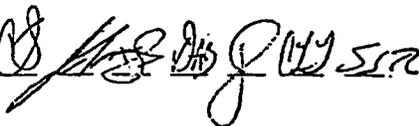
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to the total damages awarded in the suit.

4. Court Approval: Plaintiffs may request a judicial determination that this settlement is reasonable under RCW 4.22.060, and/or that the settlement is in the best interests of the minor plaintiffs under SPR 98.16W, and/or such other proceedings to obtain the same or similar results. Defendants will make themselves reasonably available and provide truthful, accurate testimony or evidence for such proceedings.
5. Covenant not to Execute: In consideration of the foregoing, the plaintiffs agree and covenant not to execute or enforce the judgment referred to in paragraph 1 above against the defendants James and Deborah Sharbono, their successors, heirs or assigns, that they will not proceed against those defendants' personal assets, earnings or property, and that as to those defendants they shall confine collection of the remaining balance of the judgment to the funds obtained pursuant to the assignment set forth in paragraph 2 above. Regardless of the result, upon final resolution of the suit referred to in paragraph 3 above, plaintiffs will execute a full satisfaction of judgment in favor of defendants James and Deborah Sharbono.
6. Covenant to Forebear: In consideration of the foregoing, the plaintiffs agree and covenant to forbear from executing or enforcing the judgment referred to in paragraph 1 above against the defendant Cassandra Sharbono, her successors, heirs or assigns until final resolution of the suit referred to in paragraph 3 above, and that until such time plaintiffs will not proceed against that defendant's personal assets, earnings or property in collection of said judgment. Plaintiffs further agree and covenant not to execute or enforce the judgment against any assets, proceeds or awards Cassandra Sharbono recovers other than those described in paragraphs 2.A. and 2.B above.
7. Condition Precedent: This agreement, and all acts taken in furtherance of it as set forth herein is conditioned upon the immediate tender of the undisputed liability coverages from the Defendants' carriers; to-wit State Farm -- \$250,000.00, and Universal -- \$1,000,000.00. This agreement is voidable upon notice from any party within five days of either carrier's failure to pay. In the event a party declares the agreement void, all parties will take such acts as are necessary to return the parties to the status quo ante.
8. Satisfaction of Liens and Claims: Plaintiffs will satisfy and discharge all liens and rights of subrogation of any type which have or may attach to the proceeds of this agreement. Plaintiffs further agree to indemnify defendants and their attorneys and hold them harmless from any and all claims and causes of action for such liens or subrogation interests. This agreement includes all lien claims for services rendered pursuant to public or private obligation, contract or statute.

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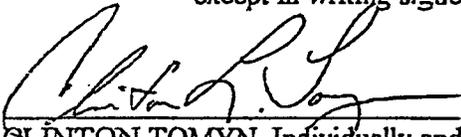
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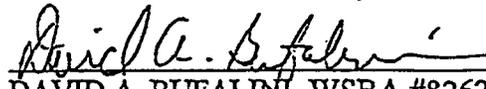
Original 2 of 2
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9. Resolution of All Claims: The parties intend that this agreement fully and finally resolve all claims among them. In the event any such claim is not specifically provided for herein, the parties agree it is compromised, fully released and finally discharged.

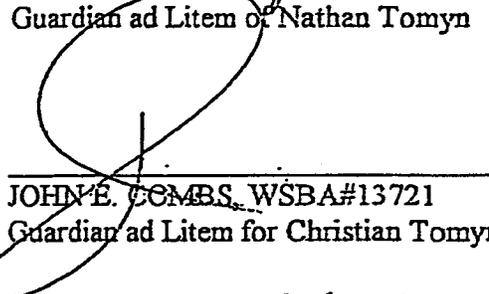
10. Advice and Counsel: Plaintiffs have executed this agreement after advice and counsel by their attorneys, Ben F. Barcus and Peter Kram. Defendants have executed this agreement after advice and counsel by their attorneys, Timothy R. Gosselin and Dennis J. La Porte. Regardless, the parties agree they have read, understood and voluntarily accepted the terms of this agreement for the purposes set forth above, including the full and final resolution of all claims among them.

11. Entire Agreement: This agreement contains the entire agreement of the parties with respect to the subject matter hereof, and shall not be modified or amended in any way except in writing signed by the parties hereto.


 CLINTON TOMYN, Individually and as
 Personal Representative of the Estate of
 Cynthia Tomyn


 DAVID A. BIEALINI, WSBA #8262
 Guardian ad Litem of Nathan Tomyn


 STANLEY J. RUMBAUGH, WSBA #8980
 Guardian ad Litem for Aaron Tomyn

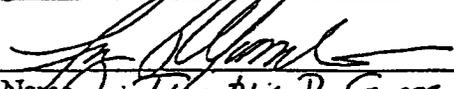

 JOHN E. COMBS, WSBA #13721
 Guardian ad Litem for Christian Tomyn


 CASSANDRA SHARBONO


 JAMES SHARBONO, Individually and
 on behalf of his marital community


 DEBORAH SHARBONO, Individually
 and on behalf of her marital community

Subscribed and sworn to before me this 30th day of MARCH, 2001.


 Print Name: Timothy R. Gosselin
 Notary Public in and for the State of Washington
 Residing at TACOMA, WA 98407
 My Commission Expires: 9-6-03

Initials: 

FILED
COURT OF APPEALS
DIVISION II

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

09 SEP 10 PM 3:24
STATE OF WASHINGTON
BY
DEPUTY

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

Respondents,

vs.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer;

Appellants

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

Defendants

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

Intervenors

NO. 38425-6-II

DECLARATION OF SERVICE
OF BRIEF OF
RESPONDENTS/
CROSS-APPELLANTS

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of
Washington, over the age of twenty-one (21), not a party to the above-

entitled proceeding, and competent to be a witness therein.

On the 10th day of September, 2009, I did place in the United States

Mail, first class postage affixed, the following documents:

1. BRIEF OF RESPONDENTS/CROSS-APPELLANTS

and this declaration directed to and to be delivered to:

Dan'L W. Bridges
MCGAUGHEY BRIDGES DUNLAP, PLLC
325 118th Avenue SE, Suite 209
Bellevue, WA 98005

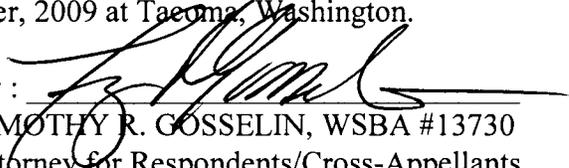
Jacquelyn A. Beatty
KARR TUTTLE CAMPBELL
1201 Third Avenue, Suite 2900,
Seattle, WA 98101-3028

Philip A. Talmadge
TALMADGE FITZPATRICK
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 10th day of September, 2009 at Tacoma, Washington.

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