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COURT OF APPEALS
DIVISION III

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COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON

No. 40245-9-II

BY Ol
DEPUTY

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

Respondents

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,
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/Appellants

BRIEF OF RESPONDENTS

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STATEMENT OF RELATED CASES

This court has considered, and is considering, this case in multiple other related appeals. They are: docket no. 33379-1-II, which resulted in a published decision, *Sharbono v. Universal Underwriters*, 139 Wn. App. 383, 161 P.3d 406 (2007); docket nos. 38425-6-II and 38596-1-II, which were consolidated, resulted in an unpublished decision on August 5, 2010, and are currently subject to motions for reconsideration; docket no. 39781-1-II, which is briefed and awaiting argument; and this matter.

COUNTER-STATEMENT OF THE FACTS

This is an appeal of a trial court order refusing to disqualify the plaintiffs' attorney Timothy Gosselin from further involvement in this action. The intervenors sought Gosselin's disqualification over a year after intervening. To understand the appeal, it is necessary to review, at least briefly and more fairly, the years and types of services Gosselin provided before Appellants asked to have him disqualified.

Cynthia Tomynd died in a car accident on December 11, 1998. The accident occurred when the 16 year-old daughter of James and Deborah Sharbono, Cassandra Sharbono, swerved into oncoming traffic to avoid vehicles stopped in front of her.

Universal Underwriters, Inc. was one of the Sharbonos' insurers. It provided excess insurance. Following the accident, Universal told the

Sharbonos they had \$1 million of excess insurance. The Sharbonos believed they should have had at least \$3 million.

The Sharbonos retained the firm of Burgess, Fitzer PS to help them determine why they did not have the amount of insurance they thought they had purchased. Timothy Gosselin was a shareholder in that firm, Maureen Falecki was an associate. In August, 1999, Falecki began a series of communications with Universal in an attempt to obtain documents relating to the Sharbonos' purchase of insurance. Universal refused, and at one point threatened the Sharbonos' with a lawsuit if they pursued their investigation further.

From shortly after the accident, attorney Ben Barcus represented the Tomyns. In June, 1999, Barcus demanded \$5 million from the Sharbonos to settle the Tomyns' claim. This amount greatly exceeded the insurance available to them.

In 1999, in the course of representing the Sharbonos, Falecki informed Barcus about the Sharbonos' dispute with Universal. Barcus then joined in the demand for information from Universal, threatening suit against the Sharbonos if Universal did not act. When Universal failed to disclose the requested information, the Tomyns, through Barcus, sued the Sharbonos.

When it became apparent Universal would not help the Sharbonos in their coverage investigation despite the Tomyns' involvement, the Sharbonos

and the Tomyns began settlement discussions. Falecki and then Gosselin represented the Sharbonos in those discussions. Barcus represented the Tomyns. The discussions were often acrimonious. Among the reasons: The Tomyns demands exceeded the amounts of admittedly available insurance, and called for sizeable financial contributions from the Sharbonos personally in addition to admittedly available insurance. The Sharbonos believed they had suffered significant personal and business losses as a result of Universal's actions and desired to retain their rights to sue Universal for their losses. (CP 727-60)

Despite the acrimony, the Tomyns and the Sharbonos reached a settlement in March, 2001. (CP 17-21) Under the terms of the settlement, the Sharbonos agreed to have judgment entered against them. (CP 18 at ¶1) In addition, they agreed to file a lawsuit against Universal, and to give certain of the benefits of their recovery against Universal to the Tomyns should they prevail. The Sharbonos retained their rights to other recoveries. The Tomyns have devoted much discussion to whether the agreement assigned claims or just certain types of recoveries. The core of these agreements, which speak for themselves, were set out in paragraphs two and three:

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 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 to the total damages awarded in the suit.

(CP 18-20 (some emphasis added)).¹ In exchange, the Tomyns agreed not to

1. There were several important reasons why the Sharbonos assigned their rights to recoveries (i.e., damages) rather than their rights to the claims themselves, and why the Tomyns accepted that more limited assignment. The first is that the Sharbonos retained some of the recoveries for themselves, and some of those retained recoveries stemmed from the same bad faith conduct that gave rise to the recoveries assigned to the Tomyns. For example, the agreement assigned to the Tomyns the additional insurance proceeds that would be awarded if the court found that Universal's actually provided more insurance than Universal said it did. Additionally, the agreement assigned to the Tomyns the payment of the (cont.)

execute on the judgment against James and Deborah Sharbono, and to forebear from executing against Cassandra. (CP 20 at ¶¶ 5 -6). Important for this action, the settlement resulted from arms length negotiation through Gosselin and Barcus representing adverse parties. Indeed, that was one of the reasons the settlement would later be found to be reasonable. *Sharbono v. Universal Underwriters*, 139 Wn. App. 383, 406 ¶¶61, 161 P.3d 406 (2007).

Gosselin continued to represent the Sharbonos after settlement. There is nothing in the record indicating Barcus or the Tomyns ever communicated a belief that after the settlement Gosselin was representing them or anyone other than the Sharbonos.

On May 10, 2001, the Sharbonos, with Gosselin as their attorney, filed suit against Universal. Suit was in the Sharbonos' name exclusively.

The history of the lawsuit against Universal is documented in *Sharbono v. Universal Underwriters*, 139 Wn. App. 383, 161 P.3d 406

consent judgment that could be awarded if Universal was found to have acted in bad faith. The parties have taken to refer to that payment as payment for "presumed damages." The Sharbonos retained their right to personal damages, such as the injury to their business interest due to Universal's bad faith actions. The parties have taken to referring to these as "actual damages." What is important is that both the presumed damages assigned to the Tomyns and the actual damages the Sharbonos kept arose from the same bad faith conduct. The Sharbonos could not assign away their claims against Universal without giving up their right to prosecute their own damages. The second reason is that the Tomyns did not want the burden or expense of prosecuting the claims, they just wanted the payoff. The Tomyns also wanted the Sharbonos to bear a personal burden for the loss of Cynthia Tomyn. So, they agreed to the Sharbonos keeping the claims themselves, along with the responsibility and financial burden for prosecuting the claims, though the agreement contains a fee-sharing provision based on each parties' recovery. The important point, here, is that the parties carefully considered how the settlement agreement was structured. (CP 727-60)

(2007) (*Sharbono I*). With Gosselin as their attorney, the Sharbonos obtained partial summary judgments determining that their settlement with the Tomyns was reasonable and that Universal acted in bad faith as a matter of law. They obtained a directed verdict establishing Universal's liability for the consent judgment. In March, 2005, they prosecuted a jury trial which determined that Universal's actions caused them personal damages. Gosselin was the only attorney who appeared for the plaintiffs. (CP 706-07) The jury awarded the Sharbonos \$4.5 million dollars in addition to Universal's obligation to pay the consent judgment, then totaling about \$4.9 million. On May 20, 2005, the trial court entered judgment against Universal for approximately \$9.4 million. (CP 23-26)

The Tomyns contend the "primary" purpose of the lawsuit was to prosecute those claims for which the recovery had been assigned to them (Brief of Appellant at 12). The record does not support that contention. The suit included all the claims which could support both a recovery of benefits assigned to the Tomyns, as well recovery of benefits the Sharbonos retained. Indeed, the "claims" were one and the same. The same claims – bad faith, and breach of contract – and the same underlying conduct, gave rise to the benefits the Sharbonos assigned to the Tomyns as well as the benefits they kept for themselves. Thus, for example, the same summary judgment determination that established that Universal had acted in bad faith supported

the directed verdict that Universal was liable for the Tomyn/Sharbono judgment, and removed the breach of duty issue from the trial on the Sharbonos' personal and business losses. Because vigorous prosecution of the claims were necessary for both assigned and unassigned recoveries, the Sharbonos prosecuted all the claims with equal conviction.

Though the settlement agreement allowed the Tomyns to participate in the prosecution of the claims for which benefits had been assigned to them,² with one exception the Tomyns never did until very late in the process. The exception occurred in 2003. In October, 2003, and then again in November, 2003, Universal attempted to depose Mr. Barcus and Mr. Tomyn, as well as the guardians for the Tomyn children, and to have them produce documents. Barcus appeared for the Tomyns, opposed the discovery, and obtained sanctions from Universal in the process. The Tomyns did not ask Gosselin to resist the discovery for them. In that proceeding, Barcus represented himself as "the attorney of record for Clinton L. Tomyn, personal representative of the Estate of Cynthia L. Tomyn." (CP 711-12, 714) (*See also* Emergency Motion for Order/Order Quashing Subpoenas on Shortened Time at 2, Ins. 24-25, Supplemental CP per request of Respondent, at _____

2. The agreement stated: "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.*" (CP 19, ¶3.A. (emphasis added))

(emphasis added))³

Universal appealed the May 20, 2005 judgment. As *Sharbono I* shows, some of the Sharbonos' successes survived that appeal while some did not. The court affirmed summary judgment holding Universal guilty of bad faith. It also affirmed that part of the judgment requiring Universal to pay the Tomyne/Sharbono consent judgment – about \$4.9 million. The court reversed and remanded for retrial that part of the judgment requiring Universal to pay the Sharbonos for their personal damages – \$4.5 million. Gosselin represented the Sharbonos throughout all phases of the appeal.

The case was mandated to the trial court in July, 2008. Shortly thereafter, the Sharbonos, through attorney Gosselin, took two primary actions: they moved to enforce and have paid that part of the judgment the Court of Appeals affirmed, and obtained a trial setting for the part which was reversed. See *Sharbono v. Universal Underwriters*, Dkt. Nos. 38425-6-II and 38596-1-II (consolidated), unpublished opinion at 4-5 (*Sharbono II*).

This is when the Tomyne intervened. On August 28, 2008, the Tomyne, through Barcus, filed a Motion for Intervention. *Sharbono II* at 4, note 5. Barcus again filed an affidavit, and again represented to the court that

3. Volume 6 of the Clerk's Papers is erroneously entitled "Clerk's Papers Per Request of Respondent." In reality, those clerk's papers were generated at Appellants' request. Respondents submitted a supplemental designation of clerk's papers concurrent with the filing of this brief. Respondents anticipate those will appear in the file as Clerk's Papers Vol. 7.

he was “the attorney of record for Clinton L. Tomy, the Estate of Cynthia L. Tomy, and minor children, Nathan Tomy, Erin Tomy and Christian Tomy. (Affidavit of Ben F. Barcus in Support of Motion for Intervention at 1-2, Supplemental CP per request of Respondent, at ____). Though on appeal the Tomys claim they did this because they believed a conflict had arisen between them and the Sharbonos which impaired Gosselin’s representation of their interests, they did not mention any such conflict in their motion or supporting affidavit. (Id.)

The Sharbonos agreed with the Tomys’ intervention. Universal opposed the intervention, in part on the grounds that Gosselin adequately represented the Tomys’ interests. (CP 256, Ins. 15-17) The trial court did not accept Universal’s argument. On September 5, 2008, the court allowed the Tomys to intervene. The order, prepared and presented by Barcus, states:

THIS MATTER having come on regularly before the Court upon the motion of Clinton L. Tomy, *by and through his attorney of record, Ben F. Barcus* of the Law Offices of Ben F. Barcus & Associates, PLLC; the plaintiffs James and Deborah Sharbono, et al, *represented by and through their attorney of record, Timothy R. Gosselin* of The Gosselin Law Office; and Defendants Universal Underwriters, et al, represented by and through Dan’l W. Bridges of McGaughey, Bridges, Dunlap, and Philip A. Talmadge of Talmadge Fitzpatrick; the Court having reviewed the files and records herein, having considered argument of counsel, and being otherwise fully advised in the premises; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that Clinton L. Tomy individually and as Personal Representative of the Estate of Cynthia L. Tomy, deceased, and as Parent/Guardian of Nathan Tomy, Erin Tomy, and Christian Tomy, minor children, shall be and is hereby allowed to intervene in this action as a party to represent its interests as it relates to that judgment previously entered herein, and protection of their interests in said judgment;

(CP 58-59)(Emphasis added.)

Once allowed to intervene, the Tomys and the Sharbonos moved forward to execute on the part of the judgment affirmed by the Court of Appeals. Both agreed this part of the judgment belonged to the Tomys pursuant to their settlement agreement.

During this phase of the case, a disagreement between the Sharbonos and the Tomys arose. The May 20, 2005, judgment entered in this case contained two interest provisions. As part of the principle judgment amount set forth in paragraph 1 of the judgment, the judgment required Universal to pay the Tomy/Sharbono judgment and all interest that accrued on it. (CP 25, Ins. 2-7) In paragraph 7, the court awarded post-judgment interest on that principle judgment amount. (Id., Ins. 22-23) The dispute pertained to the paragraph 7 award. The Tomys and the Sharbonos agreed paragraphs 1 and 7 awarded separate amounts and the award stated in paragraph 1 should go to the Tomys. With regard to paragraph 7, however, the Sharbonos contended the interest awarded in paragraph 7 belonged to them while the

Tomyns contended it belonged to them. Ultimately, the trial court agreed with the Tomyns. (CP 63) Importantly, at no time during this dispute did the Tomyns seek Gosselin's disqualification. That would not come for another year.

Despite determined resistance from Universal and its very skilled lawyers, the Sharbonos and the Tomyns were resoundingly successful in their efforts to execute on the affirmed part of the judgment. Initially, the trial court ordered Ohio Casualty Insurance Company, the issuer of Universal's appeal bond, to pay the judgment. (CP 62-63) When Ohio Casualty failed, the court ordered Universal to post cash (nearly \$13 million) in lieu of bond. Then, in June, 2009, after Universal made the payment, the trial court ordered a part of that fund, \$4.893 million, to be paid directly to the Mr. Barcus and the Tomyns. (CP 70-71) The Tomyns received that payment, and possess it to this day. The payment corresponds to the value of the Tomyn/Sharbono consent judgment with interest through May 20, 2005, the date of the judgment in this action.

During the execution process, a second dispute arose between the Tomyns and the Sharbonos. At the same time the Tomyns were seeking to have a portion of the cash fund disbursed to them, Universal was appealing the earlier orders executing on the judgment. It was possible that if Universal was successful on those appeals, the money the Tomyns were seeking to take

from the fund may have to be repaid. The Sharbonos, still represented by Gosselin, contended that if the Tomyns received the money, the Tomyns should be the ones to repay it if Universal succeeded in its appeal. The Tomyns, still represented by Barcus, believed they should receive the money, but if the money had to be repaid the Sharbonos should have to repay it. The trial court agreed with the Sharbonos on this point. (CP 72, handwritten note.) Importantly, again the Tomyns did not seek Gosselin's disqualification during these proceedings.

Re-trial of the Sharbonos' personal damages was set for September, 2009. In addition, multiple appeals were pending which could affect additional amounts the Tomyns and the Sharbonos were entitled to receive. (See Dkt. Nos. 38425-6-II and 38596-1-II) On August 11, 2009, the parties attempted mediation. The mediation was intended to address all claims and recoveries, including the claims which underlay the earlier payment to the Tomyns. At that time, there was no dispute between the Tomyns and the Sharbonos that any amounts awarded in the upcoming trial would belong to the Sharbonos. Such an award compensated for the Sharbonos' personal damages and had not been assigned to the Tomyns.

During that mediation, Barcus represented the Tomyns and Gosselin represented the Sharbonos. The Tomyns and the Sharbonos occupied separate rooms. Barcus did not confer with the Sharbonos; Gosselin did not

confer with the Tomyns. Barcus and Gosselin, however, conferred with each other. The mediation was not successful.

On August 18, 2009, the Sharbonos and Universal participated in another mediation, this time without Barcus or the Tomyns. It was successful. Unlike the earlier one, this mediation addressed only that part of the lawsuit which the Sharbonos retained to themselves: their action for their personal damages.⁴ The agreement also prohibited the Sharbonos from settling any claims which might result in a recovery assigned to the Tomyns.

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.

(CP 19).

The Sharbono/Universal settlement explicitly respected those provisions. The settlement agreement, which was finalized on October 8, 2009, openly references the Tomyn/Sharbono settlement agreement (CP 111, ¶2), and states:

4. As stated previously, the settlement agreement between the Tomyns and the Sharbonos had specifically reserved some damage recoveries for the Sharbonos.

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.

(CP 19); see also *Sharbono I*, 139 Wn. App. at ¶ 62.

Pursuant to mediation, the Parties have agreed to settle The Sharbonos' Retained Claims, without impairing, releasing or affecting The Assigned Benefits. The Parties also intend and agree that neither this agreement in its entirety, nor any part thereof, shall be interpreted so as to give rise to or result in a breach of the Sharbonos' obligations to the Tomyns under The Tomyn Settlement.

(CP 112, ¶4)

After nearly ten years of fighting, in October, 2009, the Sharbonos received \$2.35 million in settlement for the damages that the jury in the first trial had awarded them \$4.5 million. They got that money only after the Tomyns first received \$4.893 million, the money they received in June, 2009. And, the Sharbonos got that money without impairing any claims that might benefit the Tomyns. One might think this was win/win.

Gosselin notified Barcus of the Sharbonos' settlement with Universal on August 21, 2009. (CP 76) The response was vitriolic. Without once showing the settlement of the Sharbonos' personal recoveries impaired the Tomyns' in any way,⁵ Barcus accused Gosselin and the Sharbonos of

5. The Tomyns have asserted that the settlement was an effort to undermine their claim to paragraph 7 post-judgment interest. The issue of who was entitled to that interest was on appeal at the time of the settlement. *See Sharbono II*. But the Sharbono/Universal settlement specifically provided:

THE PARTIES expressly agree this release does not apply to the calculation and award of pre- and post-judgment interest as respects the May 20, 2005 Judgment in this case, that is presently on appeal in the Washington Court of Appeals, Division Two, Case Number 38425-6-II. It is the understanding and agreement of THE PARTIES that the issues contained in that appeal shall continue to judicial resolution (if not settled by agreement). (cont.)

“drink[ing] Universal’s Kool-Aid ” and “selling their soul to the devil.” (CP 273) He threatened to sue Gosselin personally. (CP 404)

In addition to the vitriol, the Tomyns took three formal actions after learning of the settlement. On August 27, 2009, they filed a motion to compel disclosure of the settlement negotiations and the terms of the settlement. (CP 859-65) They did not seek Gosselin’s disqualification in that motion. (CP 168) Then, after waiting for the settlement to be finalized, on October 13, 2009, the Tomyns filed an ex parte Motion for Temporary Restraining Order, seeking to impound the \$2.35 million the Sharbonos had received in the settlement. In this motion, by way a declaration he personally signed, Barcus made horrible and outrageous accusations against Gosselin, claiming as a matter of fact that Gosselin breached fiduciary duties he owed to the Tomyns, he acted in complicity with Universal to harm the Tomyns, he deliberately violated at least two court orders, and for the first time, that he was the Tomyn’s attorney. (CP 13-15) Barcus presented this motion ex parte, off the record, to a judge who had no prior contact with this case. While the motion asked that Gosselin be ordered to show cause why he should not be held in contempt for his actions, it still did not seek Gosselin’s

(CP 112 at ¶6) The only rights the Sharbonos gave up in the settlement with regard to paragraph 7 was their right to that interest if they prevailed in the Court of Appeals. That was a right of minimal value: The trial court already awarded paragraph 7 interest to the Tomyns (CP 63), and the Tomyns themselves characterized the Sharbonos’ rights to paragraph 7 interest as “fanciful.” Brief of Appellant at 14.

disqualification. (CP 118-20)

Finally, on November 18, 2009, the Tomyns moved to disqualify Gosselin. They argued Gosselin should be disqualified on three grounds: (1) he was the Tomyn's attorney and had a conflict of interest serving the Sharbono's interest; (2) he was hired to represent the Tomyns' interests so they were third party beneficiaries to whom Gosselin owed a duty of loyalty; (3) the Sharbonos and the Tomyns shared a common interest which gave rise to a privilege which Gosselin could no longer honor since the Sharbonos' and the Tomyns' interests now conflicted. (CP 633-46) Gosselin argued (1) he could not have an attorney client relationship with the Tomyns because that relationship would be illegal and an obvious conflict with his obligations to the Sharbonos; (2) the circumstances for a common interest had not occurred and even if they had, the interest does not create a right to disqualification, but rather a privilege to protect communications; and, (3) a third party beneficiary relationship could not arise because it would divide Gosselin's loyalties between his clients the Sharbonos on one hand and the Tomyns on the other, and did not arise because he was hired only to represent the Sharbonos. (CP 692-704). The Sharbonos expressly testified they hired Gosselin to represent them, not the Tomyns. (CP 762-63)

The motion was heard and denied on December 22, 2009. The court rejected the Tomyns' argument that either an attorney-client relationship or

common interest existed between them and Gosselin. However, the court found that a third party beneficiary relationship existed between Gosselin and the Tomyns, but it only provided a basis for an action for damages, not disqualification. (RP 12-22-09 at 42-43)

The Sharbonos and Gosselin appealed the trial court's statement that a third party beneficiary relationship existed. The court dismissed that appeal on the basis that the court's statement was dicta and neither the Sharbonos nor Gosselin were aggrieved parties. In the trial court, the Tomyns moved for reconsideration which was denied. Then they appealed the denial of both motions.

RESPONSE ARGUMENT

A. Gosselin did not have an attorney client relationship with the Tomyns.

1. An attorney client relationship between Gosselin and the Tomyns would be illegal.

This is not a case where an attorney has voluntarily undertaken to represent two or more clients and a conflict later develops. There is no evidence Gosselin ever explicitly undertook representing the Tomyns. Instead, the Tomyns seek to force an attorney-client relationship by having the court impute one. They do this so then they can argue Gosselin violated the imputed relationship and should be disqualified. But their argument overlooks a critical fact: Gosselin was and is prohibited from representing

them because doing so would violate the Rules of Professional Conduct.

Thus, they are asking the court to impute an illegal relationship.

RPC 1.16(a) (1) states: “Except as stated in paragraph (c), a lawyer shall not represent a client . . . if : (1) the representation will result in violation of the Rules of Professional Conduct or other law.”

RPC 1.9 states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

These rules prohibit an attorney from representing clients with adverse interests. *In re Discipline of Carpenter*, 160 Wn.2d 16, 28, 155 P.3d 937 (2007); *State v. MacDonald*, 122 Wn. App. 804, 814, 95 P.3d 1248 (2004)

Adversity of interests may be actual, such as representing both sides to a contract. See *Halvorsen v. Halvorsen*, 3 Wn. App. 827, 479 P.2d 161 (1970)(attorney represents both parties to a property settlement). An actual

conflict of interest exists when an attorney owes duties to someone whose interests are adverse to those of the client. *State v. White*, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012, 917 P.2d 130 (1996).

A conflict of interest exists when the matters alleged to be in conflict are substantially related. *State v. Hunsaker*, 74 Wn. App. 38, 43-45, 873 P.2d 540 (1994). This "factual context" analysis is a three-prong inquiry:

First, the court reconstructs the scope of the facts involved in the former representation and projects the scope of the facts that will be involved in the second representation. Second, the court assumes that the lawyer obtained confidential client information about all facts within the scope of the former representation. Third, the court then determines whether any factual matter in the former representation is so similar to any material factual matter in the latter representation that a lawyer would consider it useful in advancing the interests of the client in the latter representation.

Hunsaker, 74 Wn. App. at 44, 873 P.2d 540 (quoting CHARLES W. WOLFRAM, *Modern Legal Ethics* § 7.4.3, at 370 (1986)).

State v. McDonald, *supra*, 122 Wn. App. at 813. Or, the conflict may be potential, such as where the representation of one individual jeopardizes confidences that the former client disclosed to the attorney. *In re Discipline of Egger*, 152 Wn.2d 393, 412, 98 P.3d 477 (2004); see *Kurbitz v. Kurbitz*, 77 Wn.2d 943, 468 P.2d 673 (1970)(fact that information of adverse impact

received or available has not been used as yet, or may never be used, does not obscure the attorney's obligation not to accept employment adverse to former client). In *State v. McDonald*, for example, an attorney sought to represent a man accused of raping the daughter of a woman whom the attorney had represented in divorce proceedings. Though the accused chose the attorney, the trial judge disqualified him. Citing RPC 1.9(a), the Court of Appeals agreed that the attorney's prior representation of the mother created a conflict of interest which disqualified him from representing the accused criminal. 122 Wn. App. at 812-14.

Here, the Tomyns and the Sharbonos have always had adverse interests, both actual and potential. Their adversity may be viewed in segments. The first segment occurred after Cynthia Tomy's death. During that time, the Tomyns sued the Sharbonos for personal injuries. Gosselin represented the Sharbonos' interest during that segment. During the course of that representation he learned confidences about, to name a few, their liability, their finances, actions they took to protect themselves and their family, and their goals and strategies for the litigation, and many other matters. He represented the Sharbonos through contentious, often acrimonious, and clearly adversarial settlement discussions with the Tomyns, discussing with the Sharbonos strategies for accomplishing their goals, how the agreement would apply, how future proceedings may occur, and many

other matters. During this time, Gosselin became privy to many, many confidential and privileged communications, which, while of clear interest to the Tomyns, the Sharbonos would not want shared with them.

The second segment occurred after settlement, as the Sharbonos sought to fulfill their obligations under the settlement agreement and pursue their personal claims against Universal. During this time, Gosselin both prosecuted the Sharbonos' claims against Universal and advised the Sharbonos of their rights and obligations under the settlement agreement. That advice was given and received without direct regard to the Tomyns' interests. Among the issues Gosselin advised the Sharbonos on were matters such as the extent of the obligation to the Tomyns under the settlement agreement, whether the settlement agreement would require the Tomyns to bear some of the enormous litigation costs, whether the settlement agreement obligated the Sharbonos to take particular actions in the prosecution of their claims, and how best to both maximize their recovery in the litigation and comply with the terms of the settlement agreement. During this segment, Mr. Gosselin again became privy to many, many confidential and privileged communications, which, while of clear interest to the Tomyns, the Sharbonos would not want shared with them, and which were not shared.

The third segment occurred after judgment. During this segment, Gosselin represented the Sharbonos in their attempt to collect on their efforts.

Those efforts included attempting to recover payment from Universal to have the judgment against them satisfied. Gosselin also represented them directly against the Tomyns, when the Tomyns sought to have paragraph 7 post-judgment interest awarded to them, and to prevent the Tomyns from receiving money from the court fund but requiring the Sharbonos to repay it if Universal's appeal was successful. Gosselin also represented them during mediation to assure that settlement fairly represented the Sharbonos' losses.

During all these segments, the Tomyns and the Sharbonos had many divergent interests which created both actual and potential conflicts of interest. During all these segments, the Sharbonos needed competent, independent legal advice regarding matters actually or potentially adverse to the Tomyns. Because of that, no attorney could represent both the Tomyns and the Sharbonos. Gosselin provided the advice with the Sharbonos', and only the Sharbonos', best interests in mind. And, during each of these segments Gosselin became privy to confidences that could harm the Sharbonos if shared with the Tomyns. These actual and potential conflicts barred Gosselin from ever representing both the Sharbonos and the Tomyns.

As the court in *State v. McDonald, supra*, recognized, courts may neither allow nor create an improper attorney-client relationship. Imposing an attorney-client relationship between Gosselin and the Tomyns would impose an illegal relationship.

2. The elements of an attorney client relationship between Gosselin and the Tomyns are not present.

Even if Gosselin could have represented the Tomyns and the Sharbonos at the same time, the Tomyns have failed to prove an attorney-client relationship ever existed between them.

“An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists.” *In the Matter of the Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). However, the belief of the client will control only if it “is reasonably formed based on the attending circumstances, including the attorney's words or actions.” *State v. Hansen*, 122 Wn.2d 712, 720, 862 P.2d 117 (1993) (quoting *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992)). The determination of whether an attorney-client relationship exists is a question of fact. *Bohn*, 119 Wn.2d at 363. The burden of proving the existence of the relationship and that the information the Dietzes sought fell within the privilege rested squarely with Doe. *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 501, 903 P.2d 496 (1995), *review denied*, 129 Wn.2d 1010, 917 P.2d 130 (1996).

Dietz v. Doe, 131 Wn.2d 835, 843, 935 P.2d 611 (1997). Simply benefitting from an attorney's efforts does not create an attorney client relationship. See *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992)(attorney-client relationship was not created between creditor and attorney for debtor who drafted loan documents).

The Tomyns have provided no evidence of attending circumstances which could justify a reasonable belief that despite their previous, directly

adversarial and contentious relationship, Gosselin suddenly transformed into their attorney. They do not have an agreement for Gosselin to represent them. They have not shown they ever paid any of Gosselin's fees. They have not shown they ever met with Mr. Gosselin for advise and direction, that Gosselin could contact them directly, or that Gosselin ever sought their permission for any action he took. They have not shown that in any court proceedings Gosselin ever represented himself as their attorney, or that they represented to the court he was their attorney. To the contrary, when, for example, Universal subpoenaed the Tomyns and their documents, Barcus appeared for them, specifically represented himself as their attorney, and indeed obtained an award of sanctions on their behalf. And, when the Tomyns sought to intervene, they represented that Barcus was their attorney and their involvement was needed to protect their interests

The Tomyns also have not shown that either they or the Sharbonos consented to Gosselin representing both interests. As noted above, at a minimum, RPC 1.9(a) requires written consent from the former client when an attorney wants to represent another person in a related matter. Here the former clients are the Sharbonos. The Tomyns cannot show that the Sharbonos consented to Gosselin representing the Tomyns because they did not. Indeed, the Sharbonos testified they hired Gosselin to represent their interest alone. (CP 762-63)

Nor have the Tomyns shown they actually believed Gosselin was their attorney. Before this court and in every proceeding up to this time, Barcus has represented himself as “the” attorney for the Tomyns. If the Tomyns believed Gosselin was their attorney, they would have asked him to move to quash the subpoena’s in October and November, 2003. Instead, they had Barcus do that. If the Tomyns believed Gosselin was their attorney, they would have moved to disqualify him in September, 2008, when Gosselin represented the Sharbonos in advocating that the Sharbonos and not the Tomyns should receive paragraph 7 interest. Or they would have moved to disqualify him in June, 2009, when Gosselin advocated in opposition to the Tomyns that if the \$4.9 million the Tomyns were taking from the court fund had to be repaid, the Tomyns should repay that fund, not the Sharbonos. They did not. They waited until December, 2009, to make their assertion that Gosselin was their lawyer.⁶

The Tomyns’ conduct is not consistent with a true belief that Gosselin

6. On appeal, the Tomyns contend they did not raise the issue earlier because Universal’s efforts at resisting payment of the judgment made “the conflict between the Sharbonos and the Tomyns secondary to the need to address the post-Mandate antics of their common foe, Universal.” *Brief of Appellant* at 14. In other words, they did not raise the perceived conflict earlier because they wanted Gosselin on their side during this part of the case. That does not explain why they did not raise the issue in June, 2009, after Universal had paid, and the Tomyns received, \$4.89 million. But even if it did, the court should not allow parties to sit on their rights until it is advantageous to assert. See *Buckley v. Snapper Power Equipment Co.*, 61 Wn. App. 932, 939, 813 P.2d 125 (1991)(A litigant “may not, after learning of grounds for disqualification, proceed with the trial until the court rules adversely to him and then claim the judge is disqualified.)

was their lawyer. Rather, their effort to have Gosselin disqualified is a late-realized, tactical maneuver designed to put the Sharbonos at a disadvantage by depriving them of the attorney with the best knowledge of the case, a willingness to fight on their behalf, and a record of success.

The Tomyns did not present any of the evidence needed to show they had a reasonable subjective belief that Gosselin was their attorney. For that reason, the trial court did not err in failing to find an attorney-client relationship between Gosselin and the Tomyns.

B. The Tomyns have not shown that the circumstances necessary for imposing a duty outside an attorney-client relationship are present.

In limited circumstances a duty may arise between an attorney and a third person despite the absence of an attorney-client relationship. *Bohn v. Cody*, 119 Wn.2d 357, 864, 832 P.2d 71 (1992).

Two theories provide the basis for this expanded liability. *Stangland*, at 680. First, an attorney may be held liable for negligence toward third party beneficiaries of an attorney/client relationship. *Stangland*, at 681; *Bowman v. John Doe*, 104 Wn.2d 181, 188, 704 P.2d 140 (1985). Second, an attorney may be held liable under a multifactor balancing test developed in California. This test involves analysis of the following six factors:

the extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the

injury; the policy of preventing future harm; and the extent to which the profession would be unduly burdened by a finding of liability. The inquiry under this multi-factor test has generally focused on whether the attorney's services were intended to affect the plaintiff.

(Citations omitted.) *Stangland*, at 680; see also *Bowman*, at 187-88.

Bohn, 119 Wn.2d at 365. Though two possible theories support this duty, the primary inquiry under both theories is the same: whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained. *Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994).

1. Gosselin could not owe a duty to the Tomyns because such a duty would create divided loyalties.

Regardless of the theories supporting a duty, one overriding principle guides application of the independent duty doctrine: It can never apply where doing so creates divided loyalties between the client and the non-client. The rule was stated clearly and unequivocally in *Mazon v. Krafchick*, 158 Wn.2d 440 at ¶14, 144 P.3d 1168 (2006).

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.

In *Mazon*, the court rejected the contention that in a personal injury action an associated attorney owed a duty to the retaining attorney which allowed the

retaining attorney to collect damages for fees lost because of the associated attorney's failures. The court reasoned that if it were to recognize an attorney's right to recover prospective fees from co-counsel, a variety of potential conflicts of interest that harm the client's interests may arise. *Id.*

Here, Gosselin could not owe a duty to the Tomyns without dividing loyalties. Gosselin had represented the Sharbonos, the Tomyns' adversaries, in conflicting adversarial proceedings. These included negotiation and helping draft the settlement agreement under which the Sharbonos continue to operate. Gosselin could not, at the same time, represent the interests of both sides to that agreement. In helping the Sharbonos meet their obligations under that agreement, even when his assistance benefitted the Tomyns, he had to owe a single duty of loyalty to the Sharbonos.

2. The Tomyns have not shown the circumstances creating a duty owed to them by Gosselin are present.

In 1879, the United States Supreme Court held that “[b]eyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party ...” *Savings Bank v. Ward*, 10 Otto 195, 100 U.S. 195, 200, 25 L.Ed. 621 (1879), *quoted in Bowman v. Doe*, 104 Wn.2d 181, 186, 704 P.2d 140 (1985). That rule has been relaxed. The change developed out of estate planning, where the third party was a legatee who was deprived of taking under a negligently drafted will. *Bowman*, 104 Wn.2d at 187. In

those cases, the court could conclude the client intended the attorney's services to provide the very benefit the third party lost as a result of the attorney's negligence. Washington follows this rationale.

The test for whether an attorney owes a duty to a third party is a multifactor balancing test with the following elements:

- (1) the extent to which the transaction was intended to benefit the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant's conduct and the injury;
- (5) the policy of preventing future harm; and
- (6) the extent to which the profession would be unduly burdened by a finding of liability.

Trask v. Butler, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994). The primary inquiry in determining whether a lawyer owes a duty to a third party is whether the third party was an intended beneficiary of the transaction to which the advice pertained. *Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994).

Without doubt, if Gosselin was successful presenting the Sharbonos' claims against Universal, the Tomyns could benefit. In fact, the Tomyns' already have: In June, 2009, they received a payment of nearly \$4.9 million

as a result of Gosselin's and the Sharbonos' efforts. That they did recover benefits and may recover more, however, is not enough to support a third party beneficiary relationship because, unlike the estate cases, there is no evidence the client (the Sharbonos) intended the attorney's (Gosselin's) services to provide the very benefit the third party (the Tomyns) lost as a result of the attorney's actions. At best, the Tomyns are incidental beneficiaries of Gosselin's representation of the Sharbonos, and incidental beneficiaries do not acquire rights as third party beneficiaries. See *Kim v. Moffet*, Dkt. No. 38426-4-II, Slip op. at 6 of 12, ___ Wn. App. ___, ___ P.3d ___ (June 29, 2010).

It is not sufficient that the performance of the promise may benefit a third person but that it must have been entered into for his benefit or at least such benefit must be the direct result of performance and so within the contemplation of the parties. The question whether a contract is made for the benefit of a third person is one of construction. The intention of the parties in this respect is determined by the terms of the contract as a whole construed in the light of the circumstances under which it was made. The requisite intent is not a desire or purpose to confer a benefit upon the third person nor a desire to advance his interests but an intent that the promisor shall assume a direct obligation to him.

Id.; accord, *Strait v. Kennedy*, 103 Wn. App. 626, 13 P.3d 671 (2000)(attorney did not owe duty to daughters of client for failing to complete client's divorce before client died thereby depriving daughters of share of client's estate).

Here, the Tomyns have provided no evidence regarding the Sharbonos' intent in hiring Gosselin. The only evidence they presented was their subjective beliefs. They presented no evidence of the terms of Gosselin's retention by the Sharbonos, let alone that the terms included an agreement or obligation that Gosselin would consider or represent the Tomyns' interests outside the context of helping the Sharbonos fulfill their contractual obligations. In fact, the evidence was to the contrary. The Tomyn/Sharbono settlement agreement did not guarantee a payment to the Tomyns. Rather, it obligated the Sharbonos to pursue claims against Universal. Only if those claims were successful, could the Tomyns get money. But success was not guaranteed, nor was it a condition of fulfilling the Sharbonos' obligations. The Sharbonos hired Gosselin to advise them on and help them fulfill their obligations. Both they and Gosselin testified that the Sharbonos hired Gosselin to represent the Sharbonos' interests alone to pursue the claims in good faith and in accordance with the settlement agreement. (CP 706-07, 762-63) Consistent with that, before this court and in every proceeding up to this time, Gosselin represented himself solely as the attorney for the Sharbonos.

None of the other *Trask* factors are present either. Harm to the Tomyns by any action Gosselin took was not foreseeable. At all times, the Tomyns were represented by their own attorney, who was fully capable of

protecting their interests, and was authorized by the settlement agreement to do so. There is no certainty the Tomyns suffered injury, and as a result, no connection between Gosselin's conduct and any injury. So far, the Tomyns have failed to articulate a single act by Gosselin that either injured them or that he performed wrongly or incorrectly. And the Tomyns have failed to show how they possibly could be harmed in the future.

The final *Trask* factor, the extent to which the profession would be burdened, weighs heavily in Gosselin's favor. *Trask v. Butler*, 123 Wn.2d 835, 843, 872 P.2d 1080 (1994). Finding an attorney-client relationship under the circumstances claimed here would create an extreme burden on Washington attorneys. The Tomyns and the Sharbonos are at opposite sides of a contract, and each had their own attorney. If a direct adversary's attorney can suddenly become the attorney for their client's opponent, how could an attorney possibly know to whom his loyalties are owed?

The trial court refused to disqualify Gosselin based on a duty he owned to the Tomyns. That decision was correct. In making that ruling, however, the court stated in dicta that a third party beneficiary relationship existed between Gosselin and the Tomyns which could give rise to an action for damages. That conclusion was incorrect. The Sharbonos ask this court to hold that the requisites for a third party beneficiary relationship did not exist between Gosselin and Tomyn, and affirm the court's decision not to

disqualify him on that basis.

3. If a third party beneficiary relationship existed between Gosselin and the Tomyns, the Tomyns have not shown that disqualification is appropriate.

A final problem with the Tomyns' theory – one they fail to address – is the scope of the duty they ask the court to recognize, and how that duty applies to give them the right to disqualify Gosselin over the Sharbonos' objections. They seem to suggest Gosselin's duty was to represent their interests with undivided loyalty. But that would place the interests of the third party beneficiary (the Tomyns) above those of the contracting parties (the Sharbonos), and require Gosselin to act with divided loyalties, which is prohibited. And, while the premise underlying their motion is that as a third party beneficiary they have the right to terminate Gosselin's representation of the Sharbonos, that puts the grantee of the beneficial interest in control of the grantor, i.e., the fox guarding the henhouse. The Tomyns' rule would allow the beneficiary of an estate to fire the attorney hired by the person having his or her will written while the grantor is alive. The grantor, not the grantee, is in charge of how the interest is fulfilled.

The Tomyns have not described a duty Gosselin owed to them which would give them a right to seek his disqualification. The trial court correctly refused to do so.

4. The authorities the Tomyns cite do not support their arguments.

The cases the Tomyns cite for the inadvertent creation of a duty to a non-client are readily distinguishable. They are exclusively cases involving unrepresented parties in non-adversarial proceedings. For example, in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992), the attorney's actions created a limited duty to an unrepresented party. *Bohn*, 119 Wn.2d at 367. Moreover, the *Bohn* court did not conclude the attorney's actions resulted in an attorney-client representation, but merely gave rise to a duty on the attorney's part to "advise [an] unrepresented party to seek independent counsel before the attorney discusses the transaction with that party." *Id.* Here, the Tomyns had their own attorney.

Karan v. Topliff, 110 Wn. App. 76, 338 P.3d 396 (2002), is of no more help. Again, the intended beneficiary in that case was an unrepresented minor in a non-adversarial representation. *Karan*, 80 Wn. App. at 85. Significant policy reasons favor Washington courts finding a duty in such cases to prevent harm to minors and other incompetent persons. "In matters involving the welfare of minors and other legally incompetent individuals, the courts assume a particular duty to protect the interests of the ward." *Karan*, 110 Wn. App. at 85 (quoting *Durham v. Moe*, 80 Wn. App. 88, 91, 906 P.2d 986 (1995)). The court concluded that its heightened duty to protect minors,

the purpose of a guardianship proceeding, and the proceeding's non-adversarial nature, warranted an extension of the duty to a non-client. *Karan*, 110 Wn. App. at 85; see also *Treadwell v. Wright*, 115 Wn. App. 238, 247, 61 P.3d 1214 (2003)(holding same under RCW 11.88.100). Even then, the *Karan* Court refused to create a bright-line rule that an attorney who undertakes to represent the guardian of an incompetent thereby automatically assumes a relationship with the ward. *Karan*, 110 Wn. App. at 83; *Treadwell* 115 Wn. App. at 247. Considering the adversarial nature of the relationship between the Tomyns and the Sharbonos, it is an entirely different matter to extend a duty to Gosselin here.

The more analogous case is *Trask v. Butler, supra*. In *Trask*, Butler an attorney, was hired to represent Laurel Slaninka, the personal representative of her father's estate and her mother's attorney-in-fact. During the course of his representation, the mother passed away and Butler represented Laurel in her capacity as personal representative of the mother's estate as well. Disputes arose between Laurel and her brother Russell. Russell successfully had Laurel removed as personal representative of their mother's estate. The trial judge determined Laurel had breached fiduciary duties to their mother's estate in asserting certain claims and selling certain properties. Russell was appointed personal representative and sued Butler for malpractice. Applying the multifactor balancing test, the court affirmed

dismissal of Russell's suit, stating:

After analyzing our modified multi-factor balancing test, we hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries. The multi-factor balancing test does not impose legal malpractice liability upon Butler to Russell under these facts for three reasons: (1) the estate and its beneficiaries are *incidental*, not intended, beneficiaries of the attorney-personal representative relationship; (2) the estate heirs may bring a direct cause of action against the personal representative for breach of fiduciary duty; and (3) the unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs unduly burdens the legal profession.

123 Wn.2d at 845 (emphasis in original).

C. The Common Interest Doctrine does not apply.

The Tomyns' final argument for disqualification is based on the "common interest rule." Under the common interest rule, the communications of parties engaged in a common prosecution or defense remain privileged under the attorney-client privilege. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 716, 985 P.2d 262 (1999). In other words, it is a basis for finding that certain communications are privileged and not subject to disclosure. In its simplest permutation, the common interest doctrine protects the attorney-client privilege between multiple parties where (1) a communication was made by separate parties in the course of a litigation involving their common interests or joint defense;

(2) the communication was designed to further that effort; and (3) the privilege has not been waived. *Avocent Redmond Corp. v. Rose Electronics, Inc. et al.*, 516 F.Supp.2d 1199, 1203 (W.D. Wash. 2007) (applying federal evidence standard); accord *Broyles v. Thurston Cty.*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008)(Washington evidence standard).

While the Sharbonos would be happy to have the common interest privilege apply, so that communications between the Tomyns and the Sharbonos remain privileged and not subject to disclosure – the Sharbonos have no interest in disclosing any communications – they disagree that common interest privilege applies as the Tomyns want. The Tomyns’ analysis fails to recognize two important limitations on the common interest rule which are fatal to their reliance upon it.

First, the common interest rule allows the assertion of a privilege to prevent disclosure of communications. It is not a basis for disqualification. Reduced to basics, the Tomyns claim they and the Sharbonos had a common interest, there is now a conflict, so they get to have the Sharbonos’ attorney disqualified. But, the rule does not allow one of the common interest holders to decide that the other participant must be disqualified. Such a result would be illogical, both because disqualification does not accomplish anything, and second because applying the rule gives one party to the privilege an advantage over the other. Ordinarily, the parties as well as the attorneys

possess the same knowledge about confidential communications. Disqualifying the attorney, while leaving the party in the litigation accomplishes nothing. Nor does disqualification prevent the attorney from disclosing the confidential information. Thus, disqualification does not prevent the party from using the communication.

Moreover, allowing one party, like the Tomyns, to seek disqualification of the other party's attorney wrongly allows the rule to be applied for that party's advantage. For example, the Tomyns claim the Sharbonos violated the doctrine by advocating against the Tomyns for the right to paragraph 7 interest. But the Tomyns also advocated against the Sharbonos. Both positions conflict, so if either violates the common interest doctrine, the other does also. Thus, if a conflict exists, it exists as to the Tomyns as well as the Sharbonos. For the court to apply the doctrine unilaterally simply for the benefit of one party is unfair.

Second, the privilege is not created simply because or whenever two parties have a common interest. See *United States v. Evans*, 113 F.3d 1457 (7th Cir., 1997). The privilege is an extension of the attorney-client privilege. “[T]he attorney-client privilege is in derogation of the search for truth and its scope must therefore not be expansively construed.” *Id.* The parties must demonstrate a mutual intent for the particular communications to remain privileged. In *Avocent Redmond Corp. v. Rose Electronics, Inc. et al.*,

supra, the federal district court denied a motion to apply the common interest privilege based on counsel's representation of the plaintiff's predecessor corporation in prior litigation. In its analysis, the *Avocent* court examined a number of objective factors that would demonstrate the mutual intent to engage in a common interest representation, such as: (1) the presence of a written agreement between the parties; (2) whether it was reasonable to believe the parties would have wanted to share confidential information; (3) whether the parties ever met jointly with their respective counsel; (4) whether litigation costs were shared, (5) and whether any effort was made to cooperate in the timing of motions or trial strategies. *Avocent Redmond Corp.*, 516 F.Supp.2d at 1203. The court concluded none of these factors was present between the two parties and no common interest had been created. *Id.* The court also noted that even if those factors were present, the party applying the rule "failed to identify any specific client confidences that were shared." *Id.*, at 1204. Even in *United States v. Evans*, 113 F.3d 1457 (7th Cir., 1997), which the Tomyns cite, the court refused to apply the common interest privilege.

To be sure, using the phrase in the vernacular, the Tomyns and the Sharbonos shared some "common interests." They both were parties to a settlement agreement. Like any other contract, both possibly could benefit when the agreement was fulfilled. But simply sharing a common interest is

not sufficient to allow invoking the common interest privilege. The Tomyns do not argue that any of the objective factors considered by the *Avacent* court to demonstrate a mutual intent to create privileged communications are present between them and the Sharbonos. The Tomyns cannot point to a written agreement demonstrating any desire by the Sharbonos to enter into an agreement with the Tomyns to maintain confidential communications. It is doubtful the Sharbonos would have wanted to share any representation with an adverse claim still pending against Cassandra Sharbono. The Sharbonos made no effort to coordinate their trial strategy against Universal with the Tomyns. Gosselin managed all motion and trial work without consulting the Tomyns or Barcus. There was no cost sharing between the parties. There is no objective basis to conclude any mutual desire ever existed to create a common interest privilege.

Furthermore, the position the Tomyns are maintaining now is contradicted by the representations Barcus made to the trial court more seven years ago. In 2003, when objecting to Universal's subpoena duces tecum, Barcus told the trial court that his materials related to the Tomyns are privileged "with the exception of documents received from the Sharbonos [sic] counsel." (CP 718) It is apparent from Barcus' objections to Universal's discovery efforts in this litigation that he did not believe he and Gosselin were sharing confidential information.

Gosselin should not be disqualified based on an alleged privilege neither the law nor the objective facts support, or the Tomyns' counsel believed existed before the motion to disqualify. The trial court correctly refused to disqualify Gosselin on the basis of the common interest rule.

D. The trial court correctly disregarded the declarations of John Strait and David Boerner.

In their effort to have Gosselin disqualified, the Tomyns submitted declarations from David Boerner (CP 657-78) and John Strait (CP 679-89). They expressed the opinion that because Gosselin had violated duties he owed to the Tomyns disqualifying him was the correct result. Mr. Boerner simply assumed Gosselin was the Tomyn's attorney, that confidential communications occurred between the Tomyns and Sharbonos, and a common strategy was pursued. No specific facts are identified as the basis for these conclusions. Mr. Boerner then states that the law "presumes" Mr. Gosselin has disclosed confidential communications, and therefore the law imposes the remedy of disqualification. These are, of course, simply legal conclusions. Mr. Strait's testimony, which the Tomyns submitted with their motion for reconsideration, suffers the same defects. In cursory fashion, with virtually no explanation, and without citation to a single legal authority, he offers legal conclusion after legal conclusion, opining on the legal obligations created by the settlement agreement, whether an attorney client relationship

arose between Gosselin and the Tomyns, whether third party beneficiary duties existed between Gosselin and the Tomyns, whether Gosselin violated legal duties owed to the Tomyns, and the appropriate remedy. Mr. Strait, more completely than Mr. Boerner, just tries to stand as the judge, telling the judge how the Tomyns' motion should be decided.

Experts are not to state opinions of law or mixed fact and law, such as whether X was negligent, guilty or innocent. Comment ER 704; *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002)(experts opinion on validity of physician's prescription in improper legal opinion); *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)(expert's opinion that propane tanks were DOT approved gives improper legal conclusion); *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 788, 732 P.2d 1008 (1987)(expert opinion that boathouse design and construction was negligent disregarded as improper legal conclusion); 5A K. Tegland, Wash. Prac., Evidence § 309, at 84 (2d ed. 1982).

It is the established and unquestioned rule that it is in the province of the court, and not the jury, to interpret a statute or ordinance and to determine whether it applies to the conduct of a party.... It is accordingly the general rule that a witness is not permitted to give his opinion on a question of domestic law or upon matters which involve questions of law.... As was said in *State v. Ballard*, 394 S.W.2d 336 (Mo.1965), one of the cornerstones of our system of jurisprudence is that questions of fact are to be determined by a jury, and that all matters of law are to be determined and declared by the court.

Everett v. Diamond, 30 Wn. App. 787, 792, 638 P.2d 605 (1981), quoting *Ball v. Smith*, 87 Wn.2d 717, 722-23, 556 P.2d 936 (1976). An affidavit is to be disregarded to the extent it contains legal conclusions. *Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985); *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 763, 551 P.2d 1038 (1976). Here, that is all Mr. Boerner and Mr. Strait offered. The trial court acted correctly and well within its discretion in disregarding their declarations.

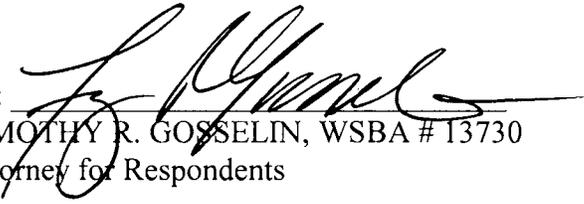
CONCLUSION

In prosecuting their claims against Universal, the Sharbonos were fulfilling their obligations to the Tomyns under the Tomyn/Sharbono settlement agreement. To meet their obligations, they had to have an attorney. In helping the Sharbonos fulfill their obligations, no attorney, Gosselin or anyone else, could possibly act ethically if he or she owed duties of loyalty to the Tomyns as well as the Sharbonos. The very fact that the Sharbonos were acting to fulfill their contractual obligation to the Tomyns created an obvious potential conflict of interest. At any moment, the Tomyns and the Sharbonos could disagree on what the settlement agreement required of either party. More specifically, at any moment the Tomyns and the Sharbonos could disagree that the way the Sharbonos were pursuing the claims against Universal fulfilled the Sharbonos' contractual obligations. The

Tomyns could demand a particular witness be called, or expert be hired, or piece of evidence be presented, and the Sharbonos could disagree. Any attorney prosecuting those claims would have to resolve that disagreement by siding with one over the other, making the potential conflict an actual conflict. That potential alone prevented one attorney from representing both parties.

The Tomyns are asking this court to tell the Sharbonos they cannot have the attorney they selected, because Gosselin represented both of them. To do this the court would have to ignore the most basic ethical obligation attorneys owe: they may not serve two masters and may not have divided loyalties. The trial court correctly refused to do that. This court should affirm that decision.

Dated this 6th day of October, 2010.

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

entitled proceeding, and competent to be a witness therein.

On the 6th day of October, 2010, I did place in the United States Mail, first class postage affixed, the following documents:

1. BRIEF OF RESPONDENTS

and this declaration directed to and to be delivered to:

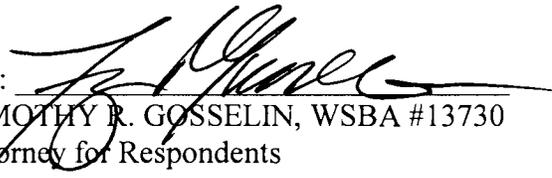
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Tacoma, WA 98402

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 6th day of October, 2010 at Tacoma, Washington.

By : 
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Attorney for Respondents

DECLARATION OF SERVICE

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