

FILED
COURT OF APPEALS
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No. 40245-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Respondents,

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,
a foreign insurer;

Respondent,

vs.

LEN VAN DE WEGE and "JANE DOE" VANDE 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,

Appellants/Intervenors.

BRIEF OF RESPONDENT
UNIVERSAL UNDERWRITERS INSURANCE COMPANY

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A. INTRODUCTION

Universal Underwriters Insurance Company (“Universal”) has received the Tomyns’ opening brief in this appeal, which arises from a private matter between the Sharbonos and the Tomyns relating to the Tomyns’ unsuccessful attempt to disqualify the Sharbonos’ counsel and the Sharbonos’ objections to language in the trial court order denying the requested disqualification. That conflict has nothing to do with Universal; however, Universal provides the following counterstatement of the facts to correct the Tomyns’ blatant misstatements of fact pertaining to Universal to avoid any implication that by not responding to the Tomyns’ blatant misstatements Universal somehow concedes they are accurate.

B. COUNTERSTATEMENT OF FACTS

This Court may strike portions of a brief and sanction a party for failing to comply with the Rules of Appellate Procedure. RAP 10.7; *Sheikh v. Choe*, 156 Wn.2d 441, 446-47, 128 P.3d 574 (2006). Here, the Court should strike the Tomyns’ statement of the facts because it overflows with improper arguments and contains long passages lacking any reference to the record. RAP 10.7; *Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995) (striking portions of a brief containing factual assertions not supported by the record).

RAP 10.3(a)(5)¹ requires a brief to contain a “fair statement of the facts and procedure relevant to the issues presented for review, without argument.” Despite this rule, the Tomyns’ statement of facts contains improper arguments. *See, e.g.*, Tomyn br. at 8 (“ . . . Universal . . . made substantial efforts to try to undermine that portion of the Judgment which had previously been affirmed . . . , allegedly pursuant to RAP 2.5 and CR 60[.]”); 14 (“At that time, the Sharbonos had begun to take the rather fanciful position that it could separate part of the interest generated of the principal . . . , and keep that interest as their own”) (“ . . . because of Universal’s behavior subsequent to the grant of [the motion to intervene], the conflict between the Sharbonos and the Tomyns was secondary to the need to address the post-Mandate antics of their common foe, Universal.”); n.3 (“ . . . the Sharbonos were trying to snatch victory from defeat, at the expense of the Tomyns.”); 14 (“Intervenors’ counsel viewed [Universal’s appeal efforts] as simply being part of a ‘divide and conquer’ strategy . . . an effort by Universal to place a wedge between the Sharbonos and the Tomyns . . . who were pursuing their mutual foe, Universal.”); 15 (characterizing the mediation between Universal and the Sharbonos as a “secret” mediation); 16 n.4 (“ . . . efforts had been made to

¹ RAP 10.3(b) requires the Tomyns to comply with the provisions of RAP 10.3(a).

undermine [the Tomyns'] positions and entitlements by way of this alleged, secret Settlement Agreement.”); 19 (“Instead of complying with the [trial court’s] directive to provide disclosure regarding the proposed settlement, Universal [appealed].”); 20 (“ . . . the Agreement . . . attempts to circumvent the obligation of the Sharbono/Tomyn Settlement Agreement.”); 21 (implying the Sharbonos were obligated to follow Universal’s directions). These arguments are *improper* in a statement of facts and are a far cry from the “fair recitation” required by RAP 10.3(a)(5).

Furthermore, there must be a reference to the record for each factual statement of the case. RAP 10.3(a)(5); RAP 10.4(f). Citations to the record are required to enable the Court to properly consider a case; sanctions may be imposed for violating the rules. *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992) (imposing sanctions against counsel who failed to properly cite to the record in the statement of the case). *See also, Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999) (imposing sanctions for counsel’s failure to comply with the rules). Here, long passages in the Tomyns’ statement of the facts lack *any* reference whatsoever to the record. It should be disregarded. RAP 10.7; *Nelson*,

127 Wn.2d at 124, 141. Based on the Tomyns' blatant disregard for the appellate rules, this Court should strike their statement of facts.

As is their habit, the Tomyns continue to mischaracterize the facts. For example, they claim Universal had "some success" in its first appeal. Tomyn br. at 6. Contrary to the Tomyns' spurious arguments regarding the alleged impropriety of Universal's actions on appeal, Universal succeeded in getting many of the trial court's key rulings supporting the underlying judgment reversed. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 395-400, 407-16, 161 P.3d 406 (2007), *review denied*, 163 Wn.2d 1055 (2008). Moreover, despite the Tomyns' efforts to dismiss its appeal, Universal's appeal in Cause No. 38425-6-II was still pending at the time the Tomyns filed their opening brief.²

The Tomyns also continue to object to the Commissioner's rulings granting discretionary review and denying the motion to consolidate this appeal with the appeal in Cause No. 40245-9-II. Tomyn br. at 6 n.1. The Court should keep in mind that the Tomyns never moved to modify those rulings, and the time to do so has passed.

² The Court recently issued its opinion in that case. *Sharbono v. Universal Underwriters Ins. Co.*, ___ Wn. App. ___, ___ P.3d ___ (2010) (Slip Op. at 1). There, the Court agreed with Universal that the trial court erred in calculating the post-judgment interest due on the underlying judgment. *Id.* at 3. It then vacated the amount of interest and remanded for recalculation of such interest. *Id.* But it did not agree with the Sharbonos that they were entitled to the post-judgment interest accruing on the judgment against Universal. *Id.* The Court affirmed the Tomyns as the recipients of that interest. *Id.*

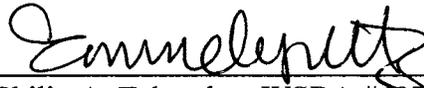
The Tomyns continue to complain about their “shock” in learning about the “secret” mediation between Universal and the Sharbonos. Tomyn br. at 15. Their dramatics are unwarranted. If the mediation had indeed been “secret” as they contend, then it is unlikely they would have been informed of it all. Instead, the Sharbonos’ counsel informed the Tomyns of the settlement and the striking of the scheduled trial as a courtesy. Nothing prevented the Sharbonos and Universal from mediating the unresolved issues between them without the Tomyns’ participation. And nothing prevented them from keeping their negotiations confidential because Washington’s Uniform Mediation Act (“UMA”), RCW 7.07 *et seq.*, provides a privilege against the disclosure of mediation communications.

C. CONCLUSION

The Tomyns stubbornly continue to argue about prior rulings from this Court that they never sought to modify. They also exaggerate the facts and fail to provide adequate citation to the record. The Court should strike the Tomyns’ statement of the facts where it fails to comply with the Rules of Appellate Procedure. RAP 10.7; *Nelson*, 127 Wn.2d at 141.

DATED this 25th day of August, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I emailed and deposited in the U. S. mail a true and accurate copy of the following document: Brief of Respondent, Universal Underwriters Insurance Company in Court of Appeals Cause No. 40245-9-II to the following:

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

DATED: August 25, 2010, at Tukwila, Washington.



Paula Chapler
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