

No. 41931-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JW

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

Appellants

vs.

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

Respondents

and

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

Respondents/Intervenors.

BRIEF OF RESPONDENT
UNIVERSAL UNDERWRITERS INSURANCE CO.

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A. INTRODUCTION

The Sharbonos' Assignments of Error do not assign error to the trial court's disbursement orders. The Tomyns did not challenge the disbursement orders when they were made. If the judgment against Universal is not fully satisfied, as the Sharbonos now claim in the alternative, then why did the Sharbonos fail to object at the time and fail to assign error to the disbursement here?

The Sharbonos' first two assignment of errors in this appeal pertain to a 1999 case, *Tomyn v. Sharbono*, and to a 1999 settlement agreement, to which Universal was not a party. The facts that the Sharbonos were obliged under their settlement agreement with the Tomyns to sue Universal, and that the Tomyns were to receive any "benefits payable under any liability insurance policy,"¹ do not change Universal's non-party status in that case. Whatever claim might remain between the Tomyns and the Sharbonos, it involves the settlement agreement those parties reached in the 1999 case, and does not involve Universal.

As to the Sharbonos' third assignment of error, the Sharbonos never explain why the judgment entered in this case, *Sharbono v. Universal*, is not fully satisfied, or what amount Universal still owes. Nor can they. As even the Sharbonos explain, Universal fully paid the Tomyns everything Universal was obligated to pay them under the May 20, 2005

¹ Appellants' Opening Brief at 4, quoting paragraphs 2.A. & B. "Assignment of Rights" in the Tomyn/Sharbono settlement agreement.

judgment in this case. And, Universal settled all remaining claims, which the Sharbonos retained, and received a full release.

B. COUNTERSTATEMENT OF THE CASE

Parts of the story the Sharbonos tell in their Statement of the Case are irrelevant to their Assignments of Error. These parts seem designed only to put Universal in a bad light. For example, the Sharbonos have a section called “Universal refuses to help the Sharbonos determine how much insurance they should have.” This has nothing to do with whether the trial court should have ordered the judgment entered in the 1999 case, *Tomyn v. Sharbono*, fully satisfied, which is what this appeal is about.² The Sharbonos then omit the mitigating fact that Universal offered to provide the Sharbonos with everything the Sharbonos submitted to Universal in their request for insurance, which offer the Sharbonos declined.³

The Sharbonos also say they “believed they should have had at least \$3 million,” but “[f]ollowing the accident, Universal told the Sharbonos they had \$1 million.”⁴ In *Sharbono v. Universal Underwriters*,

² See Sharbonos’ Assignments of Error 1, 2 and 3.

³ Universal offered to provide the Sharbonos all of the nonproprietary information in its underwriting file, which included everything the Sharbonos had submitted, but their then-counsel declined to review such documents. RP 1295-97, Exs. 10, 16, 19, 24 (Cause No. 33379-1-II,) *Sharbono v. Universal Underwriters*, 139 Wn.App. 383, 161 P.3d 406 (2007).

⁴ Appellants’ Opening Brief at 3.

139 Wn.App. 383, 161 P.3d 406 (2007), this Court affirmed that Universal's coverage was \$1 million, which Universal paid, when due.⁵

Under the heading "The Sharbonos successfully sue Universal," referring to this case filed in 2001, the Sharbonos say "[t]he jury awarded the Sharbonos \$4.5 million dollars in addition to Universal's obligation to pay the consent judgment."⁶ This court reversed the jury's award in *Sharbono v. Universal, supra*.

As to Universal's "obligation to pay the consent judgment," which, per the Sharbonos, was paragraph 1 of the May 20, 2005 judgment, the Sharbonos admit the obligation has been fully discharged. After accounting for a prior disbursement to the Tomyns, the Sharbonos say: "All parties agreed Universal owed the balance due under paragraph 1 of the May 20, 2005 judgment, and that the balance due was \$2,879,936.30. All parties agreed the money should go to the Tomyns by virtue of the [Tomyn/Sharbono] settlement agreement."

On March 4, 2011, the trial court ordered disbursement from the court registry for this sum, payable to the Tomyns. It also ordered that the balance of funds held the registry be disbursed to Universal.⁷ The Sharbonos objected to neither disbursement, and on appeal assign no error to them.

⁵ See Appellants' Opening Brief at 5, quoting that part of the Sharbono/Tomyn settlement agreement referring to the payment of Universal's \$1,000,000 as a "Condition Precedent" and stating: "There is no dispute the condition precedent money was paid."

⁶ *Id.* at 6.

⁷ CP 359-61; 362-64.

As the Sharbonos explain in their Opening Brief, under the terms of their settlement with the Tomyns, the Sharbonos “agreed to file a lawsuit against Universal, and to give certain benefits of their recovery from Universal, if any, to the Tomyns.”⁸ On March 4, 2011, Universal paid the balance due of those “certain benefits” to the Tomyns.⁹

“The Sharbonos retained their rights to other recoveries.”¹⁰ Those “retained rights” no longer exist. Per a settlement agreement between the Sharbonos and Universal, the Sharbonos gave Universal “a full and complete release from THE RETAINED CLAIMS to wit: all rights, claims, causes of action or awards against Universal that were brought or could have been brought in the action, whether known or unknown, in Pierce County Superior Court Cause Number, 01-2-07954-4, by the Sharbonos.”¹¹

C. ARGUMENT

Universal agrees with the Sharbonos’ central premise: the confessed judgment into which the Sharbonos entered with the Tomyns is fully satisfied because the Tomyns received everything due them under paragraphs 2. A. & B. of their agreement with the Sharbonos. That amount was, as the Sharbonos and Tomyns have argued, the subject matter of paragraphs 1 and 7 of the May 2005 judgment in this case.¹² If

⁸ Appellants’ Opening Brief at 4.

⁹ CP 359-61.

¹⁰ *Id.*

¹¹ Appendix A. *See also* Appellants’ Opening Brief at 9.

¹² Paragraph 7 awarded post judgment interest on the May 2005 judgment, including paragraph 1.

the Sharbonos breached their agreement with the Tomyns in some other way, that is between the Sharbonos and the Tomyns. The dispute does not involve Universal. But, the Sharbonos are incorrect to say that if the judgment against them in the 1999 case is not fully satisfied, then the judgment against Universal in this case is not fully satisfied either.

Universal would have no interest in this appeal but for the Sharbonos' statement in their conclusion that: "The trial court erred by relieving Universal from the obligations imposed by the Sharbono/Universal judgment without fully satisfying the Tomyn/Sharbono judgment. ... [It, the trial court] should not have relieved Universal of further obligations to the Sharbonos." The Sharbonos' Assignments of Error do not include this supposed error, nor did the Sharbonos assign error to the trial court's order returning to Universal all of its funds in the court registry—save those disbursed, with the Sharbonos' agreement—to the Tomyns. For this reason alone this Court should not un-do, for any reason, the full satisfaction of judgment entered in Universal's favor. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n. 4, 69 P.3d 895 (2003) ("It is well settled that a party's failure to assign error ... precludes appellate consideration of an alleged error."). Second, this particular conclusion of the Sharbonos is unsupportable.

Nowhere do the Sharbonos explain what sum Universal owes, or on what theory it might be owed. The Sharbonos also disregard the terms of their agreement with Universal, under which they granted Universal a

“full and complete release,” in exchange for a considerable amount of money.

Universal has no further obligations to the Sharbonos. Universal and the Sharbonos settled all claims the Sharbonos retained for themselves under their agreement with the Tomyns, which the Sharbonos concede on page 9 of their Opening Brief.

Nor do the Sharbonos dispute that Universal fully satisfied its obligation to the Tomyns, described in Paragraph 1 of the May 20, 2005 judgment: “Both [the Tomyns and Sharbonos] agreed this part of the judgment belonged to the Tomyns pursuant to their settlement agreement.”¹³

Universal strongly disagrees with the Sharbonos’ illogical and unsupported contention that, unless this Court instructs the trial court to order a full satisfaction of the Tomyn/Sharbono judgment, Universal’s obligations should be deemed only partially satisfied. Universal has no other obligations in this matter, regardless of the Tomyns’ supposed breach of contract claim that the Sharbonos owe them something more because the Sharbonos breached some other duty. If there is a valid dispute between the Sharbonos and the Tomyns over their settlement agreement in a case to which Universal was not party, the dispute is theirs and not Universal’s.

¹³ Sharbonos’ Opening Brief at p. 8.

D. CONCLUSION

Universal accepts the Sharbonos' primary contention on appeal. The Sharbonos should have a full satisfaction of the judgment to which they stipulated in 1999 because that judgment has been fully paid. Universal paid it to the Tomyns as the Sharbonos' assignee, and the Tomyns received every penny of the amount due, as reflected in the trial court's entry of a full satisfaction of judgment in Universal's favor, to which the Tomyns did not object. If the Tomyns contend the Sharbonos breached their agreement in some other way, it has nothing to do with Universal.

If Universal has paid the full amount due under paragraph 1 of the May 20, 2005 judgment to the Tomyns, which it has, and if Universal has settled all other claims between itself and the Sharbonos, which it has, then the alternative relief the Sharbonos seek against Universal in the conclusion of their brief cannot be granted, and the full satisfaction entered in Universal's favor should remain in effect.

DATED this 24th day of October 2011.

Respectfully submitted,



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APPENDIX

SETTLEMENT AGREEMENT

1. The Parties to this agreement are James and Deborah Sharbono and Cassandra (Sharbono) Barney (hereafter THE SHARBONOS) on one hand, and the Defendants in Pierce County Cause No. 01-2-07954-4 (hereafter UNIVERSAL) on the other. Collectively, THE SHARBONOS and UNIVERSAL will be referred to herein as THE PARTIES.

2. THE PARTIES make this settlement agreement with specific reference to the agreement entitled "Settlement Agreement (Including Covenants and Assignment of Rights)" which is attached hereto as Exhibit #1 and hereafter is referred to as THE SHARBONO/TOMYN SETTLEMENT. THE SHARBONO/TOMYN SETTLEMENT was entered into between THE SHARBONOS, referred to as "Defendants" therein, and THE TOMYNS, referred to therein as the Plaintiffs. The SHARBONO/TOMYN SETTLEMENT is dated March 30, 2001.

3. THE SHARBONO/TOMYN SETTLEMENT states in part that "the amount of insurance Universal provides is disputed. Universal contends ... that it provides \$1 million in insurance coverage. ... Defendants contend Universal is obligated to provide at least \$3 million in insurance coverage." It also states that "in an effort to settle all of plaintiffs' claims against defendants in a way that offers some protection of defendants' assets ... and preserves the ability to challenge any wrongful conduct by Universal ... the parties have agreed to settlement on the following terms and conditions."

The "Terms and Conditions" of the SHARBONO/TOMYN SETTLEMENT include the following:

1. Confession of Judgment: The defendants will comply with and take all steps needed to confess judgment ... in the amount of \$4,525,000. ...

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 ...

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.

The so-called "Assignment of Rights" under paragraphs 2.A. and 2.B. are hereinafter referred to as "THE ASSIGNED BENEFITS."

The SHARBONO/TOMYN SETTLEMENT further provides:

Except as set forth in paragraphs 2.A., 2.B., 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.

The rights, claims, causes of action, etc., referred to in this latter paragraph, are hereinafter referred to as "THE SHARBONOS' RETAINED CLAIMS." These claims are or were to have been the subject of the trial to be held following remand of this case from the Court of Appeals on or around September 21, 2009.

4. 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.

5. In exchange for the consideration described below in paragraph 7, THE PARTIES further agree that this agreement rightfully entitles UNIVERSAL to a full and complete release from THE RETAINED CLAIMS, to wit: all rights, claims, causes of action or awards against Universal that were brought, or could have been brought in the action, whether known or unknown, in Pierce County Superior Court Cause Number, 01-2-07954-4, by the Sharbonos, 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. This release does not release any claims supporting the award of \$3.275 million under Paragraph 1. of the May 20, 2005 Judgment, which is currently the subject of an appeal over the measure of interest due on that award. The aforementioned claim is not included in the RETAINED CLAIMS, and therefore is not presently released. The release extends to Universal, its employees, managers, carriers, attorneys, affiliates, subsidiaries, successors in interest, and Len VanDeWege (individually and his marital community comprised thereof).

6. 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). THE SHARBONOS will continue to prosecute their cross-appeal of the trial court's order allowing the Tomyns' to collect post-judgment interest in this case, consistent with THE SHARBONOS' briefing in the trial court and their notice of cross appeal, in a good faith effort to prevail.

However, and also in consideration of the payment described in paragraph 7 below, THE SHARBONOS promise that to the extent the cross-appeal results in the payment or award to THE

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SHARBONOS, THE SHARBONOS shall forego the collection of same. THE PARTIES further agree that any security posted to guarantee such payment can and shall be returned to Universal when the decision in said appeal becomes final.

7. The CONSIDERATION to be paid by Universal for the agreement, promise, and release provided by THE SHARBONOS as described in paragraphs 5. and 6., above, is the amount of \$2,350,000 (two-million three-hundred fifty-thousand dollars) payable to James and Deborah Sharbono and one dollar (\$1.00) to Cassandra (Sharbono) Barney.

8. In further consideration of the payments described above, THE SHARBONOS agree to save and hold UNIVERSAL harmless and indemnify UNIVERSAL, including the payment of all attorney's fees and costs of suit, from all claims, known and unknown, of any and all persons known and unknown, from any claim of damages arising out of the incident described above, *except any* claims asserted by the Tomyns, their heirs, attorneys and representatives. As of the date of this agreement, UNIVERSAL is unaware of any claims to which it does or will claim that this hold harmless/indemnification agreement applies.

9. At the immediately succeeding Friday following receipt of UNIVERSAL'S payment, counsel for THE SHARBONOS shall cause to be presented the original of a stipulation for and order of dismissal with prejudice and no costs awarded as attached hereto as Exhibit #2, dismissing all THE RETAINED CLAIMS which were or could have been asserted in Pierce County Superior Court Cause Number 01-2-07954-4 with the exception of the claims that support the ASSIGNED BENEFITS and the potential RETAINED CLAIM being asserted on appeal regarding the entitlement to interest under paragraph 7, which is currently pending resolution by Court of Appeals Cause Number 38425-6-II filed in Division Two.

10. By their signature on this agreement, THE SHARBONOS affirmatively represent that they have no agreements with THE TOMYNS which are in addition to the settlement agreement contained in Exhibit #1 attached hereto.

11. Severability. If any provision of this agreement is found to be in violation of law or public policy, that provision shall be severed and shall not affect the enforcement of the remaining terms provided the remaining terms are sufficient to constitute an exchange for valuable consideration.

12. Dispute Resolution. THE PARTIES agree that if a disagreement or dispute over the enforcement of this agreement shall arise, that it shall be resolved by retired Judge Michael Spearman of Judicial Dispute Resolution. His determination shall not be subject to appeal. THE PARTIES shall bear their own attorney's fees in such a proceeding and shall be jointly responsible for the cost of arbitration however the prevailing party shall be entitled to an award of the cost its arbitrator professional (JDR) fees.

13. This Agreement contains the entire agreement between THE PARTIES. The terms of this Agreement are contractual and not mere recitals.



14. The Parties state they have carefully read the agreement, know the contents thereof, have had the advice of counsel, and sign the same as their own free and voluntary act and deed.

15. Separate Execution. THE PARTIES' separate execution of this agreement shall be deemed valid.

CAUTION - READ BEFORE SIGNING

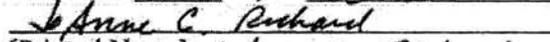
Dated this 8th day of October, 2009.


James Sharbono

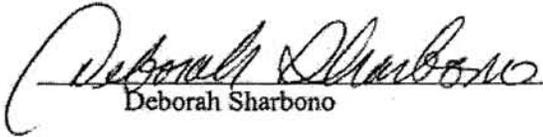
STATE OF WASHINGTON)
:ss.
County of KING)

On this date appeared before me James Sharbono, to me known to be the individual who signed the above and foregoing release and hold harmless agreement and who declared to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Dated this 9th day of October, 2009.


[Printed Name] Joanne C. Richard
NOTARY PUBLIC in and for the State of
Washington residing at: Seattle
My Commission Expires: 05/29/2012




Deborah Sharbono

STATE OF WASHINGTON)

:ss.

County of KING)

On this date appeared before me Deborah Sharbono, to me known to be the individual who signed the above and foregoing release and hold harmless agreement and who declared to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Dated this 5th day of October, 2009.

JoAnne C. Richard
[Printed Name] JoAnne C. Richard
NOTARY PUBLIC in and for the State of
Washington residing at: Seattle
My Commission Expires: 05/29/2012





true and correct copy of same upon counsel listed below in the manner indicated.


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