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

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TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS,

Respondent

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Appellant

BRIEF OF APPELLANT

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INTRODUCTION

Two insurance companies, appellant Ohio Casualty Insurance Co. ("Ohio Casualty") and respondent Trinity Universal Insurance Co. ("Trinity"), had a dispute over coverage for an underlying personal injury lawsuit. Trinity claimed Ohio Casualty and Trinity were co-primary insurers. Ohio Casualty claimed its coverage was excess to Trinity pursuant to the "other insurance" clause in Ohio Casualty's policy.

Trinity defended and settled the underlying lawsuit. Trinity then sued Ohio Casualty for subrogation, equitable contribution and insurer bad faith. When Ohio Casualty failed to answer, Trinity obtained a windfall default judgment for more than three times its total defense and settlement costs, based solely on statutory insurer bad faith claims – even though Trinity had not obtained an assignment of those claims from Ohio Casualty's insured.

Trinity used the default judgment procedure to turn a routine coverage dispute between insurance companies into a three-quarters-of-a-million-dollar windfall. It misused the *ex parte* default judgment procedure to expand its claims and avoid a hearing and findings. It twisted statutes that were enacted to protect ordinary citizens from abusive tactics by insurers into a tool to more than triple the largest possible damages award it could have hoped to recover at trial. Trinity alleged

claims it had no standing to allege, sought damages it was not entitled to recover and which were not, in fact, suffered by the insured, and then proudly "gamed" the procedural rules in an effort to increase its chances of holding on to an otherwise indefensible default judgment.

Default judgments are disfavored in the law, especially those that transgress the bounds of equity. The default order and judgment in this case should be vacated on multiple independent grounds: because Trinity lacked standing to assert the claims on which judgment was rendered; because the judgment was obtained through misrepresentation or other misconduct; because the trial court failed to conduct the required hearing or enter the required findings on damages; and because Ohio Casualty demonstrated prima facie defenses and its failure to answer was due to inadvertence, mistake, or - at most - excusable neglect.

ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by rendering the order of default and judgment dated July 14, 2010 against Ohio Casualty and in favor of Trinity.

2. The trial court erred by denying Ohio Casualty's Motion to Vacate in an order entered September 30, 2011.

3. The trial court erred by awarding supplemental attorney's fees to Trinity for opposing Ohio Casualty's motion to vacate the default judgment.

Issues Pertaining to Assignment of Error

1. Is the default order and judgment void due a lack of subject matter jurisdiction because Trinity lacked standing to bring statutory claims of insurer bad faith against Ohio Casualty, an alleged co-insurer? (Assignments of Error 1 and 2).

2. Was the default order and judgment obtained through the misrepresentation or misconduct of an adverse party? (Assignments of Error 1 and 2).

3. Were the damages alleged by Trinity uncertain and speculative and therefore an evidentiary hearing and judicial findings were required prior to entry of a default judgment? (Assignment of Error 2).

4. Was Ohio Casualty's failure to answer the complaint due to inadvertence or excusable neglect? (Assignment of Error 2).

5. Did Ohio Casualty demonstrate prima facie defenses to Trinity's claims? (Assignment of Error 2).

6. Did Trinity waive, or was it estopped from asserting, the one-year time limitation of CR 60(b)(1) due to its calculated and deliberate delay which Trinity admitted was due solely to its desire to gain a procedural advantage? (Assignment of Error 2).

7. Was the trial court's award of supplemental attorney's fee to Trinity for opposing Ohio Casualty's motion to vacate in error because that motion should not have been granted, and because Trinity had no legal right to recover fees under CPA IFCA or *Olympic Steamship*?

STATEMENT OF THE CASE

1. Introduction.

This is an appeal from the denial of a motion to vacate a default judgment rendered in an insurance coverage lawsuit brought by Trinity against Ohio Casualty. Trinity and Ohio Casualty agreed that Trinity owed primary insurance coverage for the defense and indemnification of a worksite personal injury lawsuit. Trinity contended, however, that Ohio Casualty was also a primary insurer for the claim, while Ohio Casualty contended that its coverage was excess to Trinity's.

Trinity settled the underlying worksite injury lawsuit for an amount well within its coverage limits. Trinity did not seek nor obtain an assignment of rights from the insured. Trinity then sued Ohio Casualty based on its theory that Ohio Casualty was a primary co-insurer with Trinity. When Ohio Casualty failed to answer because it did not receive notice of the lawsuit, Trinity obtained a default judgment for $764,270.96, more than three times what it had spent to defend and settle the underlying lawsuit. The default judgment was based entirely on alleged statutory insurer bad faith claims of Ohio Casualty's insured, MBC, that Trinity claimed it had standing to bring.

After obtaining the default judgment, Trinity deliberately waited a year and five days before demanding payment from Ohio Casualty, in a calculated effort to make overturning the judgment more difficult. Upon learning of the default judgment, Ohio Casualty promptly filed a motion to

vacate on multiple grounds, which was denied. Over Ohio Casualty's objections, the trial court awarded Trinity $32,400 in supplemental attorney's fees for opposing Ohio Casualty's motion to vacate, using a 1.5 multiplier "given the contingent nature of the fee." CR 588-89. Ohio Casualty timely appealed to this Court. CP 583, 590.

2. The Underlying Personal Injury Lawsuit and the Insurance Coverage Dispute Between Trinity and Ohio Casualty.

In September 2007, Philip Riley suffered a worksite injury at a construction site in Kitsap County, Washington. CP 79. At the time of his injury, Mr. Riley was employed by Cascade Construction Company, Inc. ("Cascade"), a subcontractor at the worksite. *Id.* In 2008, Mr. Riley sued the worksite's general contractor, Millennium Building Company, Inc. ("MBC"). *Id.* Upon service, MBC tendered the lawsuit to its insurer, Ohio Casualty and Ohio Casualty retained counsel to represent and defend MBC. *Id.*

Pursuant to the contract between MBC and Cascade, MBC had been named as an additional insured on Cascade's insurance policy, which was issued by Trinity. CP 79, 140. The defense of the lawsuit was therefore tendered to Trinity. CP 140. After an exchange of correspondence, Trinity agreed in January 2009 to take over the defense of the lawsuit without a reservation of rights. CP 79, 87. Trinity appointed

new counsel to represent MBC, who substituted for counsel previously appointed by Ohio Casualty. CP 79.

Although Trinity had accepted the tender of MBC's defense and indemnity without reservation of rights, in August 2009 Trinity attempted to tender the lawsuit back to Ohio Casualty. CP 107. Trinity contended that, "under the circumstances of the Millennium claim," the Trinity and Ohio Casualty polices "are co-primary, at least with respect to the defense obligation." *Id.*

Ohio Casualty declined the tender because the Ohio Casualty policy included an "other insurance" endorsement that made its coverage excess to Trinity's. CP 110. That is, Ohio Casualty's coverage came into play only after the defense and settlement costs exceeded Trinity's policy limits. *Id.* The relevant provision in the Ohio Casualty policy read:

> **4. Other Insurance**
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverage **A** or **B** of this Coverage Part, our obligations are limited as follows:
>
> **b. Excess Insurance**
>
> This insurance is excess over:
>
> (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations of the products and completed operations, for which you have been

> added as an additional insured by attachment of an endorsement.
>
> When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." ...
>
> When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:
>
> (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
>
> (2) The total of all deductible and self-insurance amounts under all that other insurance.
>
> We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

CP 110-11, 132.

Although Ohio Casualty disputed that its coverage was primary, it expressly agreed to "defend and indemnify Millennium on an excess basis as required under the policy terms." CP 79, 111.

Trinity continued to defend the *Riley* lawsuit and ultimately settled Mr. Riley's claims for $225,000 in January 2010. CP 79, 96, 104-05.

Trinity placed no conditions on the settlement and paid the full amount. CP 96, 103-05. MBC received a full and complete release of all claims. CP 105. Trinity claims it paid $20,432.69 in attorney's fees in defending the lawsuit, CP 20, so the total defense and settlement cost was $245,432.69, well within Trinity's primary coverage of $1,000,000 per occurrence. Trinity did not seek or obtain an assignment of the insured's rights against Ohio Casualty. CP 194.

The Trinity insurance policy therefore fully covered MBC's exposure in the *Riley* lawsuit. MBC was fully defended at all times. There is no evidence that MBC was required to pay any cost of defense or settlement or suffered any harm whatsoever from Ohio Casualty's position that its insurance coverage was excess rather than co-primary. The only evidence of "damage" from Ohio Casualty's coverage position was that Trinity paid the full cost of defense and settlement, rather than sharing that cost with Ohio Casualty.

3. Trinity's Lawsuit Against Ohio Casualty (this Lawsuit).

After finalizing the *Riley* settlement, Trinity served the Insurance Commissioner on May 12, 2010, with a summons and a complaint for "Subrogation, Equitable Contribution, and Insurer Bad Faith" brought in its name against Ohio Casualty. CP 27. Trinity did not provide notice of the lawsuit to Ohio Casualty's claims representative or its outside counsel,

although both were known to Trinity. CP 83. Trinity then waited two months, until July 14, 2010, before filing its complaint in court, and did so again without giving notice to Ohio Casualty. CP 1.

It is uncontested that Ohio Casualty did not receive actual notice of this lawsuit and, as a result, did not timely file an answer. Why this happened is a mystery and the superior court made no findings resolving this mystery.

Because Ohio Casualty is a foreign insurer, the Insurance Commissioner was its attorney for service of process. RCW 48.05.200(1). Upon receiving a summons and complaint, the Commissioner was required by statute to send or make available a copy of the summons and complaint to Ohio Casualty "by mail, electronic means or other means reasonably calculated to give notice" to the person designated by the insurer to receive notice. RCW 48.05.200(1) & (2). In this case, a Commissioner's Certificate of Service states that the Trinity summons and complaint were sent to Ohio Casualty in care of its registered agent, Corporation Service Company ("CSC"), on May 13, 2010. CP 302. The Commissioner's files include a return receipt "green card" with CSC's stamp dated May 17, 2010, but the card does not identify the contents of the envelop associated with the card. CP 304. The U.S. Postal Service tracks all registered mail delivered by article number, but the Postal

Service has no record of delivering the Trinity lawsuit to CSC. CP 376, 177. Moreover, while CSC carefully logs and inputs each document it receives on behalf of its customers in an electronic database, CSC has no record of having received the Trinity summons and complaint. CP 407-10. Ohio Casualty conducted a careful investigation and confirmed that neither CSC or any other entity, including Trinity and its counsel, delivered the summons and complaint to Ohio Casualty before the default judgment was taken.[1] CP 83-84.

4. The Default Judgment Against Ohio Casualty.

A week after filing its lawsuit, again without notifying Ohio Casualty or its counsel, Trinity filed an *ex parte* motion for order of default and default judgment. CP 17. The motion was granted and judgment entered the following day by a court commissioner in the *ex parte* department. CP 55.

Rather than simply seeking a portion of the defense and settlement costs it incurred in the *Riley* lawsuit based on its theory that Ohio Casualty

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[1] While it is possible that the Commissioner placed a copy of the correct summons and complaint into an envelope, correctly addressed it to CSC, and that CSC received the Trinity summons and complaint, there is no direct evidence that this happened. The facts are equally or more consistent with other possibilities: that an empty envelope was sent to CSC; that the contents were lost and an empty envelop was received; that only the green card was received by CSC; or that the wrong summons and complaint were sent and thus not logged by CSC as a suit against Ohio Casualty. The trial court made no findings to resolve these issues. CP 55.

was a "co-primary" insurer, Trinity sought and obtained a default judgment of $764,270.96 – more than three times the total of those costs – representing an enormous windfall to Trinity. CP 19-20. Trinity obtained this judgment by ignoring its subrogation and equitable contribution claims and by seeking judgment instead based solely on bad faith and other statutory claims it purported to bring in the shoes of Ohio Casualty's insured, MBC.

In its complaint, Trinity alleged that because it "defended and settled Mr. Riley's claim against MBC," it was "contractually and equitably entitled" to recover defense and settlement costs from Ohio Casualty "under the principle of subrogation." CP 4. Trinity also alleged that because "[u]nder their respective policies, Ohio Casualty and Trinity both had obligations to defend MBC from Mr. Riley's suit," Trinity was "entitled to equitable contribution for Ohio Casualty's share of the cost of Mr. Riley's defense." CP 6. These claims were consistent with Trinity's pre-suit claim that Ohio Casualty was a primary "co-insured," and that because Trinity had shouldered the full cost of defense and settlement, it was entitled to recover a share of the money it had paid to resolve the *Riley* lawsuit. CP 87.

However, Trinity's complaint also purported to allege "insurer bad faith" claims based on Ohio Casualty's contention that its coverage of

MBC was excess over Trinity's coverage of MBC. CP 5-6. Trinity claimed (without citing authority) that, "[a]s the insurer who defended and settled Mr. Riley's claim against MBC, Trinity is contractually and equitably entitled to assert MBC's claim for insurer bad faith against Ohio Casualty under the principle of subrogation." CP. 5.

Trinity alleged that Ohio Casualty, by taking the position that its coverage was excess to Trinity's coverage, "breached its duty of good faith and fair dealing." CP 5. Trinity also alleged that Ohio Casualty failed to "answer pertinent communications from a claimant within ten days," and therefore violated WAC 284-30-360(3), *id.*, even though the communications Ohio Casualty allegedly failed to answer were not from a first- or third-party claimant, but rather were from another insurance company, Trinity. Trinity claimed that these acts constituted violations of the Consumer Protection Act ("CPA"), RCW 19.86, and the Insurance Fair Conduct Act ("IFCA"), RCW 48.30.015. CP 5.

Based on its allegations, Trinity's complaint sought unspecified actual and treble damages under the CPA and IFCA. CP 5-7. While Trinity claimed it had standing to assert MBC's statutory claims, it failed to state how MBC was harmed in any way by Ohio Casualty's position that its coverage was excess to Trinity's coverage. CP 1-7.

In its *ex parte* motion for default judgment, Trinity relied entirely on the CPA and IFCA statutory claims to calculate the damages it sought. CP 19-20. Trinity cited the $20,432.69 it claimed to have paid in attorney's fees and then added the $225,000.00 paid to settle the *Riley* case. CP 20. It now claimed that "[t]his is an expense that should have been borne by Ohio Casualty *alone*, and Ohio Casualty skirted its obligations in bad faith." *Id.* (emphasis added).

Trinity failed to explain why, given its contention that Ohio Casualty was a "co-primary" insurer with Trinity, the defense and settlement costs suddenly were the responsibility of "Ohio Casualty alone." Nonetheless, Trinity then took its total defense and settlement costs, $245,432.69, and used that amount to calculate damages for what it alleged were *MBC*'s purported statutory claims, even though MBC had not incurred these costs, and in fact had suffered no damages at all!

Trinity's *ex parte* motion claimed Trinity was entitled to the statutory maximum of "treble damages up to $25,000" under the CPA and "unlimited treble damages" under the IFCA, which Trinity calculated as three times its total defense and settlement costs, or $736,298.07. Trinity totaled those two figures, threw in $2,972.89 in attorney's fees and costs for obtaining the default judgment, and sought a total judgment of $764,270.96. CP 20-21.

The trial court awarded the entire amount requested by Trinity in a judgment entered the next day, July 14, 2010. CP 55. It made no findings to resolve the issue of whether Ohio Casualty received notice of the Trinity lawsuit before default was taken, and it made no findings as to the amount of bad faith damages, if any, that MBC had suffered. *Id.*

5. Ohio Casualty's Motion to Vacate the Default Judgment.

After obtaining the judgment, Trinity sat quiet. It waited one year and five days before notifying Ohio Casualty of the judgment and demanding payment. CP 83. Trinity's delay was entirely tactical. Its trial counsel frankly admitted that Trinity delayed enforcing the default judgment solely in an effort to gain a procedural advantage. "[T]hat's what Trinity did. We're not hiding that. That's exactly what happened." RP 15-16.

Upon learning of the judgment, Ohio Casualty immediately investigated and promptly filed a motion to vacate the default order and set aside the judgment. CP 63. Ohio Casualty argued that the default judgment should be overturned on multiple grounds, including that (1) the trial court lacked subject matter jurisdiction over the claims on which judgment was granted and the judgment was therefore void; (2) the default order and judgment had been obtained through misrepresentation or other misconduct; (3) the alleged damages were uncertain and the trial court

failed to hold the required evidentiary hearing and enter the required findings; and (4) Ohio Casualty had stated prima facie defenses and its failure to answer was inadvertent and due to excusable neglect. CP 63-75. The trial court denied the motion to vacate by order dated September 30, 2011. CP 524. Ohio Casualty timely appealed to this court. CP 583.

SUMMARY OF ARGUMENT

Respondent Trinity Universal Insurance Co. of Kansas ("Trinity") fatally overreached when it obtained a treble damages default judgment against Ohio Casualty Insurance Co. ("Ohio Casualty"), an alleged co-insurer of a personal injury claim. The default judgment should be overturned and vacated, for multiple reasons.

First, the default judgment is void. Trinity, which alleged that Ohio Casualty had failed to contribute to the defense and settlement costs of the underlying lawsuit, sought and obtained a default judgment not on its own claims for subrogation and equitable contribution, but solely on statutory bad faith claims owned by Ohio Casualty's insured, MBC, not Trinity. Trinity did this so it could seek statutory treble damages and obtain a huge windfall over three times the amount it had paid in defense and settlement costs. Trinity had not, however, obtained an assignment of MBC's CPA and IFCA claims, so Trinity had no standing to allege those

claims, let alone obtain a default judgment based on them. Trinity's claim that it received an automatic assignment of CPA and IFCA claims by operation of law—simply because it provided a defense as required by its policy—is without basis in law. Trinity's lack of standing meant the trial court never obtained subject matter jurisdiction, rendering the default judgment void ab initio. The trial court should never have entered default judgment on the CPA and IFCA claims, and it should have vacated the judgment when it was challenged. This court should vacate the judgment as void.

Second, the default judgment was obtained through misrepresentation or misconduct, and therefore should be vacated under CR 60(b)(4). Trinity affirmatively, but falsely, represented to the trial court that it was an "assignee of Millennium," Ohio Casualty's insured. MBC had not, in fact, assigned any claims to Trinity. Trinity's false claim to be MBC's assignee was a material fact that led to the entry of the default judgment; indeed, it was the linchpin fact necessary for Trinity to claim it was permitted to assert MBC's CPA and IFCA claims. Ohio Casualty challenged the default judgment on this ground within a reasonable time, as permitted under CR 60(b)(4), and therefore the trial court erred in failing to vacate the default judgment. This court should do so and remand for proceedings on the merits.

Third, the trial court was required to hold a hearing and enter findings on damages, but failed to do so. Although Trinity claimed that its damages were for a "sum certain," in fact they were uncertain, requiring a hearing and findings under CR 55(b)(2) prior to default. Trinity's complaint alleged no "sum certain" of damages and sought a trial on what *portion* of defense and settlement costs Ohio Casualty owed. Trinity's *ex parte* motion for default judgment, however, claimed that damages could be readily calculated because it increased its demand to *all* of the defense costs. The trial court erred in entering default judgment because Trinity had expanded the damages it sought at the default judgment stage, which is impermissible, and because the trial court was required to hold a hearing and enter findings as to what damages – if any – Trinity had suffered. (MBC, of course, had suffered no damages at all because its defense costs had been fully met.)

Finally, the uncontested facts showed that Ohio Casualty's failure to answer Trinity's complaint was due entirely to mistake, inadvertence or excusable neglect. While Trinity did serve the Insurance Commissioner, the evidence was unclear if the Commissioner's effort to serve Ohio Casualty's agent was successful. Ohio Casualty's agent had no record of receiving service and no record of notifying Ohio Casualty, and the evidence from all sources was undisputed that Ohio Casualty never

received actual notice of the suit. On motion to vacate, Ohio Casualty proffered multiple prima facie defenses to Trinity's claims, warranting reversal of the default judgment. Trinity's effort to invoke the one-year rule to defeat this ground should have been rejected under the doctrines of waiver and equitable estoppel because Trinity's counsel admitted that the sole reason it waited one year and five days to notify Ohio Casualty of the default judgment was to gain a procedural advantage.

ARGUMENT

I. INTRODUCTION.

Default judgments are disfavored in Washington. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). The Supreme Court strongly prefers to give parties "their day in court and have controversies determined on the merits." *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007).

> This court has long favored resolution of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice.

Id. See also, e.g., Morris v. Palouse River and Coulee City R.R., Inc., 149 Wn. App. 366, 370, 203 P.3d 1069 (2009); *Housing Authority of Grant County v. Newbigging*, 105 Wn. App. 178, 185, 19 P.3d 1081 (2001) ("*Newbigging*").

The fundamental consideration in evaluating whether to vacate a default judgment is whether the default judgment is just and equitable. *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 122 P.3d 922 (2005), *review denied*, 157 Wn.2d 1018 (2006). The rule permitting a court to vacate a default judgment is equitable in nature and gives the trial court liberal discretion to preserve substantial rights and do justice between the parties. *Newbigging*, 105 Wn. App. at 192.

While the denial of a motion to vacate a default judgment is reviewed for abuse of discretion, a trial court abuses its discretion whenever its decision was manifestly unreasonable or based on untenable grounds or reasons. *Hwang v. McMahill*, 103 Wn. App. 945, 949-50, 15 P.3d 172 (2000). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 821-22, 225 P.3d 280 (2009).

In ruling on a motion to vacate a default judgment, the trial court must act "upon a sound legal and impartial discretion, not arbitrarily, capriciously or without regard to fixed principles, and, in particular cases, circumstances may be such as to leave no room for exercise of discretion." *Roth v. Nash*, 19 Wn.2d 731, 739, 144 P.2d 271 (1943). The court should

exercise its authority liberally and equitably to preserve the parties' substantive rights so that justice between the parties is fairly and judiciously done. *Shaw v. City of Des Moines*, 109 Wn. App. 896, 901, 37 P.3d 1255 (2002); *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 238, 974 P.2d 1275 (1999), *review denied*, 140 Wn.2d 2000).

The trial court has no discretion in determining whether a party has standing and whether there is jurisdiction; both are questions of law that are reviewed on appeal de novo. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364 (2009), *review denied*, 167 Wn.2d 1017 (2010) (whether plaintiff lacked standing and court therefore lacked subject matter jurisdiction is a question of law reviewed de novo on appeal); *In re Marriage of Wilson*, 117 Wn. App. 40, 45, 68 P.3d 1121 (2003) (motion to vacate a final order as void for lack of jurisdiction is reviewed de novo on appeal).

Moreover, because the law disfavors defaults and favors trials on the merits, "[a] decision *not* to set aside a default judgment is more likely to be reversed than a court's decision to set aside a default judgment." *Morris* 149 Wn. App. at 370 (emphasis added). *Accord*, *Griggs*, 92 Wn.2d at 582 ("Abuse of discretion is less likely to be found if the default judgment is set aside."); *Old Republic Nat. Title Ins. v. Law Office of*

Robert E. Brandt, PLLC, 142 Wn. App. 71, 74, 174 P.3d 133 (2007), *review denied*, 164 Wn.2d 1022 (2008) (where trial court ruling results in denial of a trial on the merits, an abuse of discretion will more easily be found). The overriding inquiry in considering whether a default judgment should be vacated is whether or not justice is being done. *Hwang*, 103 Wn. App. at 950.

For multiple reasons, the trial court erred in refusing to vacate the default judgment. That error should be remedied by this court in order to avoid perpetrating a substantial injustice.

II. THE DEFAULT JUDGMENT IS VOID BECAUSE THE COURT LACKED SUBJECT MATTER JURISDICTION OVER THE CLAIMS ON WHICH JUDGMENT WAS GRANTED.

A. Trinity Obtained the Default Judgment Solely on Statutory Bad Faith Claims for Which it Had No Standing to Bring.

1. Trinity alleged two very different types of causes of action: subrogation/equitable contribution and insurer bad faith.

Although it deliberately jumbled them in its effort to obtain as large a default judgment as possible, Trinity's complaint actually alleged two very different types of causes of action: (1) subrogation and equitable contribution claims seeking to force Ohio Casualty to reimburse some or all of the defense and settlement costs Trinity incurred in the *Riley* case;

and (2) insurer bad faith claims designed to protect parties covered by insurance policies from unscrupulous actions by their insurers.

Subrogation allows a party that has paid damages legally owed by another "to recoup those payments from the party responsible for the loss." *Cook v. USAA Cas. Ins. Co.*, 121 Wn. App. 844, 847, 90 P.3d 1154 (2004) (citations omitted). The Washington Supreme Court has defined subrogation in the insurance context as

> the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party *with respect to any loss covered by the policy.*

Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 423, 191 P.3d 866 (2008) (quoting Black's Law Dictionary 1467 (8th Ed. 2004)) (emphasis added). A subrogation claim, just as Trinity itself alleged, arises when and to the extent an insurer has paid a claim on behalf of an insured that another party also has a legal obligation to pay. *Id.* Similarly, a claim for "equitable contribution" may arise when one party has paid a claim in full, or a larger portion of that claim than it equitably owes, when another party is also liable. *See, e.g., Safeco Ins. Co. of Illinois v. Country Mutual Ins. Co.*, 165 Wn. App. 1, 267 P.3d 540 (2011). The amount of an equitable contribution claim is determined by the amount the party has

paid out, and is apportioned between the parties, each being responsible for a portion of the total. *Safeco Ins. Co.,* 267 P.3d at 544.

Statutory insurer bad faith claims are entirely different matters. These claims do not act to allocate or apportion coverage among or between insurance policies and carriers, the basis of the dispute between Trinity and Ohio Casualty. Rather, they exist to protect insured parties from harm caused to insured parties or injured claimants by a carriers' wrongful delay or denial of coverage. *See* RCW 48.30.015; WAC 284-30-360.

Trinity fundamentally confused and confounded these very different types of claims by illogically alleging that it was "entitled to assert MBC's claim for insurer bad faith against Ohio Casualty under the principle of subrogation." Trinity then took advantage of the *ex parte* nature of the default judgment proceeding and succeeded in using the inapplicable insurer bad faith statutes to more than treble the largest amount of changes it could have possibly hoped to recover on its own claim of subrogation or equitable contribution.

2. Trinity sought and obtained default judgment <u>solely</u> on statutory insurer bad faith claims.

There can be no question that the default judgment was based solely and exclusively on the statutory claims Trinity claimed to have the

right to assert on behalf of MBC, rather than Trinity's own subrogation/equitable contribution claims. The damages Trinity sought and was awarded were (1) the maximum treble statutory damages of $25,000 under the CPA, *see* RCW 19.86.090; (2) unlimited treble damages under the IFCA, *see* RCW 48.30.015(2); and (3) attorney's fees under the IFCA, *see* RCW 48.30.015(3). CP 19-20. Trinity did not seek to recover damages on its subrogation or equitable contribution claims, almost certainly because they were smaller and because Trinity could not have claimed that the equitable division of defense and settlement costs between primary co-insurers was "a sum certain" or "a sum which can by computation be made certain." *See* CR 55(b)(1).

By taking its total defense costs and applying them to the statutory damage provisions of the CPA and IFCA, Trinity was able in its *ex parte* default judgment motion to give the false impression that its claim for damages was "a sum certain" and therefore subject to determination without a hearing. CR 55(b)(1). In fact, its damages, if it could prove any, were equitable in nature and required factual determination and findings, *see* Section IV, below. Ohio Casualty's insured, MBC, had suffered no damages at all, given that it had been provided a defense at all times, its defense and settlement costs had been fully covered, and it had obtained a complete release of claims.

3. Trinity had no standing to bring statutory insurer bad faith claims.

Given that it is undisputed that Trinity obtained the default judgment based solely on MBC's alleged statutory bad faith claims, the question is how could Trinity possibly have had legal standing to assert those claims? It did not.

The Washington Supreme Court has made clear that bad faith claims accrue in favor of the party covered by an insurance policy, not third parties, and that "third party claimants may not sue an insurance company directly for alleged breach of duty of good faith under a liability policy." *Tank v. State Farm Fire & Casualty Co.*, 105 Wn.2d 381, 391, 715 P.2d 1133 (1986). In *Tank*, the Supreme Court rejected bad faith claims brought by third parties against an insurance company under the CPA grounded in alleged violations of regulations issued under RCW 48.30.010. The court made clear that

> Nothing in these regulations specifically gives third party claimants the right to enforce the rules. Moreover, we are not persuaded that it was the intent of the Insurance Commissioner in drafting these regulations to create a cause of action in third party claimants. The enforcement of these rules on behalf of third parties should be the province of the Insurance Commissioner, not individual third party claimants.

105 Wn.2d at 393. In *Tank*, the Supreme Court explicitly refused to follow jurisdictions, such as California, that recognize third-party bad faith

claims. *Id.* In the absence of a direct contractual obligation to a party under the insurance policy, no bad faith claim may be brought. 105 Wn.2d at 394-95.[2] Moreover, the language of the statute and regulation that Trinity invoked clearly do not provide Trinity standing to bring CPA or IFCA claims.

Trinity alleged a violation by Ohio Casualty of WAC 284-30-360(3) for failing to timely respond to a communication, but that regulation is limited to "pertinent communications from a *claimant*," not from another insurance carrier. The definition of "claimant" is specifically limited to first-party claimants (a person covered by an insurance policy) and third-party claimants (a person asserting a claim against a person covered by an insurance policy). *See* WAC 284-30-320(2), (6), (14). Trinity is neither.

Likewise, the IFCA provides a private civil cause of action to a "*first party claimant to a policy of insurance* who is unreasonably denied a claim for coverage or payment of benefits by an insurer." RCW 48.30.015(1). The IFCA does not provide a cause of action to an insurer trying to force another insurer to share the cost of defense. *Id.*

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[2] This view is not altered by *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 43–44, 204 P.3d 885 (2009), where the Supreme Court ruled that there is no adversarial exemption in the CPA.

Given that the statutory claims did not accrue to Trinity, the only way Trinity could have had standing to assert CPA and IFCA claims would have been by express assignment of those claims to it by MBC. However, Trinity never showed that MBC had made an assignment of any statutory claims by contract or other agreement. Trinity cited no language in its insurance policy and produced no other evidence – either at the default judgment stage or in response to the motion to vacate – proving that MBC assigned any claims to it, let alone CPA and IFCA claims. In fact, Trinity eventually admitted that MBC had never granted Trinity an assignment of any bad faith claims. CR 194.

In the absence of an assignment, non-parties to the insurance contract "are simply third parties with no right of action against [the insurer] for a claim of bad faith." *Planet Ins. Co. v. Wong*, 74 Wn. App. 905, 909-10, 877 P.2d 198, *review denied* 125 Wn.2d 1008 (1994) (in absence of assignment of bad faith claim, third party has "no standing to proceed against" an insurer). Claims by a paying insurer against a non-paying insurer are limited to the amount paid. Such claims arise from the insurer's

> own rights as an overpaying insurer, not the rights of the insured. Indeed, the right of equitable contribution belongs to each insurer individually. It is not based on any right of subrogation to the rights of the insured, and is not equivalent to standing in the shoes of the insured.

Safeco Ins. Co., 267 P.3d at 544 (citations omitted).

Trinity has suggested, vaguely, that MBC's statutory claims were somehow automatically assigned to it as a matter of law because Trinity had provided MBC a defense under its insurance policy. CP 194. But Trinity has never cited any case law, from Washington or elsewhere, supporting its theory of an "assignment by operation of law" of an insured's statutory CPA or IFCA claims to its insurer. There is no such authority, and it would be eminently bad law and policy to recognize an automatic assignment by operation of law of an insured's potentially valuable statutory claims to its carrier, without an express assignment or separate consideration paid. Bad faith claims exist to protect insureds, not to grant leverage for one carrier to use against another in determining primary and excess coverage.

Trinity's "automatic assignment" theory is not Washington law. For instance, in *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008), *review denied*, 165 Wn.2d 1035 (2009), the court rejected a carrier's attempt to claim "subrogation" rights that exceeded the amount of money it had actually paid on a claim. Although the carrier in *Bordeaux, Inc.*, (unlike here) relied on an express subrogation clause in its policy, that provision only assigned the insured's

rights to recover payments the carrier had actually made, and nothing more. *Id.* at 698. Because "[n]othing in the American Safety contracts gives it the right to subrogation for sums that it did not pay," the court declined "to give it rights it did not clearly provide for in its policy." *Id.*

Moreover, the "automatic assignment" rule Trinity urges, and that the trial court apparently adopted, would transfer an insured's potentially valuable statutory rights and claims to its insurer *for no consideration whatsoever*. An insured's statutory claims may include remedies different and broader than simply reimbursing the cost of defense and settlement, such as attorney's fees, other types of damages, and the statutory trebling Trinity so eagerly took advantage of in this case. Trinity was *already* legally obliged to defend and indemnify MBC under its insurance policy – why would Washington law transfer valuable CPA and IFCA claims to Trinity for free, simply because Trinity complied with its existing contractual duties? If Trinity is to be believed, Washington law *automatically* transferred to Trinity statutory CPA and IFCA claims worth at least a half-million dollars more than Trinity's own claims of subrogation and equitable contribution – for absolutely free. Not only does this make no sense, it is not Washington law. *Safeco Ins. Co.*, 267 P.3d at 544-45 (carrier not entitled to assert insured's right to recover

attorney's fees against another carrier in equitable contribution action, in the absent of an express assignment of those claims by the insured).

Because bad faith claims are owned by the insured under an insurance policy, not by an insurance company claiming co-insurance, and because Trinity never received an assignment of claims from MBC, Trinity had no legal standing to assert the statutory insurer bad faith claims against Ohio Casualty that were the sole basis of the default judgment. *Planet Ins. Co.*, 74 Wn. App. at 909-10.

B. Because a Plaintiff's Standing to Bring Claims is Necessary to Confer Subject Matter Jurisdiction, the Default Judgment is Void and Must Be Vacated.

An order of default and default judgment are void if the rendering court lacked subject matter jurisdiction over the claims or the power to grant the relief contained in the judgment. *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 330, 242 P.3d 27 (2010); *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938).

A plaintiff's standing to assert claims is an essential part of the court's subject matter jurisdiction. *E.g.*, *Int'l. Ass'n of Firefighters Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212, 45 P.3d 186 (2002) ("standing is a jurisdictional issue that can be raised for the first time on appeal"). A court's judicial power extends only to "cases and controversies," and when a plaintiff has no standing to assert a claim, there

is no case or controversy. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 938-39, 206 P.3d 364 (2009). "Where a judgment has been entered by a court which has not first secured jurisdiction, such judgment is void and of no effect." *Wiles v. Dept. of Labor & Indus. of State*, 34 Wn.2d 714, 723, 209 P.2d 462 (1949). *See also, John Hancock Mut. Life Ins. Co. v. Gooley*, 195 Wn. 357, 373, 83 P.2d 221 (1938) ("If the want of jurisdiction over either the subject-matter or the person appears by the record, or by any other admissible evidence, there is no doubt that the judgment is void.") (quoting Vol. 1 Freeman, *Judgments*, § 116).

A void default judgment may be vacated at any time. CR 60(b)(5); *Ellison v. Process Systems, Inc. Const. Co.*, 112 Wn. App. 636, 642, 50 P.3d (2002). Although Ohio Casualty raised Trinity's lack of standing and the court's lack of subject matter jurisdiction in its motion to vacate, CP 69-71, such error is so fundamental that "[w]hether a party has standing to sue and whether a court has subject matter jurisdiction to hear a claim ... may be raised for the first time on appeal." *Spokane Airports*, 149 Wn. App. at 939. Whether a plaintiff has standing to assert claims is a question of law that is reviewed on appeal de novo. *Id.* A motion to vacate a final order as void for lack of jurisdiction is also reviewed de novo. *In re Marriage of Wilson*, 117 Wn. App. at 45.

Whenever a default judgment grants relief that the trial court lacked jurisdiction to enter, that portion of the judgment is void. For example, in *Brickum Investment Co. v. Vernham Corp.*, 46 Wn. App. 517, 731 P.2d 533 (1987), the trial court entered a default judgment in an unlawful detainer action and then denied a motion to vacate. However, because the court's jurisdiction in an unlawful detainer action is limited to the issue of the defendant's right of possession, the court entering judgment must first determine if the defendant is in possession of the property; if not, the court lacks subject matter jurisdiction and must dismiss. 46 Wn. App. at 521-22. The Court of Appeals in *Brickum Investment Co.* vacated the default judgment because the lease showed that the defendant was not in possession of the property – and therefore the trial court lacked subject matter jurisdiction. *Id.* Although the plaintiff could still file suit to recover unpaid rent, the wrongful detainer default judgment was void. *Id.* at 523.

The same is true here: the trial court lacked subject matter jurisdiction over the CPA and IFCA claims that formed the basis of the default judgment, rendering the judgment void. While Trinity may have had legal standing to seek judgment on its direct claims against Ohio Casualty, it made a deliberate choice not to do so. Instead, Trinity sought to "ring the bell" by asserting statutory claims it had no standing to assert,

on behalf of a party that had suffered no damages, in order to seek treble damages and obtain an undeserved windfall. Trinity overreached. The result was a void judgment. This court therefore should reverse and vacate the judgment below. *Summers v. Dept. of Revenue for State of Wash.*, 104 Wn. App. 87, 90, 14 P.3d 902, *review denied*, 144 Wn.2d 1004 (2001) ("A void judgment must be vacated."); *In re marriage of Maxfield*, 47 Wn. App. 699, 703, 737 P.2d 671 (1986) (court has nondiscretionary duty to grant relief when default judgment is void).

III. THE DEFAULT ORDER AND JUDGMENT SHOULD BE VACATED BECAUSE IT RESULTED FROM MISREPRESENTATION AND/OR MISCONDUCT OF THE ADVERSE PARTY.

In stretching to get a treble damages windfall, Trinity overstepped and made affirmative misrepresentations to the trial court – misstatements that Ohio Casualty could rebut in the *ex parte* proceeding, and which directly caused the entry of a defective default judgment. In addition to failing to overturn the judgment as void, the trial court erred by failing to vacate the default judgment under CR 60(b)(4) because it had resulted from "misrepresentation or other misconduct of an adverse party."

As noted in detail in Section II above, Trinity lacked standing to assert CPA and IFCA claims; it could only purport to do so if such claims were assigned to it by the insured, MBC. Trinity affirmatively misrepresented that it was an assignee of MBC, even though it has never

produced an assignment of claims by MBC to it, let alone an assignment of CPA and IFCA statutory claims. Nonetheless, as an essential linchpin of its motion for default judgment, Trinity stated that "Trinity, *as assignee of Millennium*, engaged its attorneys in this case on a contingent fee basis." CP 20 (emphasis added). Nothing in the motion for default judgment, however, supported this assertion. CP 20-54.

Trinity failed to inform the trial court that MBC had not, in fact, assigned its CPA or IFCA claims to Trinity, a fact that Trinity eventually admitted, long after the default judgment was obtained. When pressed by Ohio Casualty's counsel to "forward me a copy of the signed assignment agreement from the insured that Trinity obtained," CP 162, Trinity's counsel produced nothing, claiming instead mysteriously that "[t]he assignment was automatic via the policy." *Id.* But Trinity's counsel never provided Ohio Casualty, let alone the court that entered the default judgment, any policy language that caused an "automatic" assignment of MBC's CPA and IFCA claims to Trinity – claims that Trinity valued at three quarters of a million dollars.

Trinity's statement to the trial court that it was an "assignee of Millennium" was factually false and resulted in an improper default judgment. Trinity opposed vacating the judgment on CR 60(b)(4) grounds, insisting it had not engaged in "fraud." RP 15. But Ohio

Casualty did not accuse Trinity or its counsel of fraud; the CR 60(b)(4) grounds are disjunctive – either fraud *or* misrepresentation *or* misconduct warrant reversal. Because the Rule lists "fraud" and "misrepresentation" as separate grounds for reversal, the Rule clearly does not require proof of a knowing misstatement with intent to defraud—a simple misrepresentation is enough, if it led to the entry of an improper default judgment. If Trinity's counsel intended to mislead the court with the statement that Trinity was an "assignee" of MBC, that would of course have been misconduct, but again that is not necessary to prove, given that the motion for default judgment contained a material, indeed critical, misrepresentation of fact.

The trial court therefore erred in failing to vacate the judgment pursuant to Rule 60(b)(4), and this court should reverse and enter an order vacating the default order and judgment.[3]

IV. Because the Alleged Damages Were Uncertain, the Court Erred in Entering Default Judgment Without Holding a Hearing and Making Findings.

Only when damages sought by default are "for a sum certain or for a sum which can by computation be made certain," may a court enter a default judgment without first making findings of fact and conclusions of

[3] Trinity's calculated delay of one year and five days before attempting to enforce the judgment has no impact on this ground for reversal – the one-year limitation does not apply to Rule 60(b)(4). *See* CR 60(b). Ohio Casualty simply had to bring its motion within a reasonable time after learning of the default judgment, and it did so.

law. CR 55(b)(1). When the amount of damages is uncertain, the court should conduct an evidentiary hearing and *must* make findings. CR 55(b)(2).

> This protects the integrity of the justice system because it allows the reviewing court (and others) to evaluate the factual and legal basis for the trial court's decision. Judges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role of the trial court when the amount of a default judgment is uncertain.

Little v. King, 160 Wn.2d 696, 706, 161 P.3d 345 (2007). *See also Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099, *review denied*, 150 Wn.2d 1020 (2003) ("Justice is not done if hurried defaults are allowed"). Unfortunately, in this case the court was more "passive bystander" than active supervisor in its hurry to enter judgment just one day after Trinity filed a fundamentally defective motion for default.

Trinity alleged no "sum certain" damages in its complaint. CP 1-7. Trinity admitted that it was MBC's primary insurer and complained only that Ohio Casualty had "refused to participate in the cost of defending MBC, and the expense of indemnifying MBC." CP 2. Trinity alleged only that Ohio Casualty's conduct caused damages "in an amount to be proven at trial" and sought to recover "Ohio Casualty's share of the cost of Mr. Riley's defense." CP 4-6. It did not allege a specific amount of damages or what it contended was Ohio Casualty's equitable "share" of

the defense and settlement costs. CP 1-7. Trinity's complaint sought to recover some *portion* of the total defense costs incurred, consistent with its theory that Ohio Casualty was a primary co-insurer along with Trinity itself and consistent with its presuit demands that Ohio Casualty share in the cost of defense and settlement. *Id.*

Trinity's position flipped when it filed its *ex parte* motion for default judgment, however. Now, with no defendant or defense counsel present, Trinity claimed that its damages could "be computed with precision in this case." And now, rather than seeking to recover "Ohio Casualty's *share* of the cost" of defense, Trinity claimed without explanation and in direct contradiction of its complaint that the *total* defense cost of $245,432.69 was "an expense that should have been borne by Ohio Casualty *alone* … ." CP 20 (emphasis added).

In truth, however, none of the damages Trinity sought were "for a sum certain." Under Trinity's "primary co-insurer" theory, the court needed to apportion defense costs between Trinity and Ohio Casualty before it could order Ohio Casualty to pay its pro rata "share" of those costs, an allocation that was not done in either Trinity's motion or the trial court's judgment. *See Safeco Ins. Co.*, 267 P.3d at 544.

Likewise, even assuming for sake of argument that Trinity had standing to bring MBC's bad faith claims, those claims also required a

preliminary determination of actual damages before Trinity could reach its statutory treble damages jackpot:

> Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the *actual damages sustained* ....

RCW 48.30.015 (emphasis added). Of course, there was no evidence that MBC had suffered any damages whatsoever, but even using the apples-and-oranges theory that Trinity's alleged equitable contribution claim could form the basis for a statutory bad faith treble damages award, a judicial determination of Ohio Casualty's equitable share of the *Riley* defense costs still needed to be made and supported by express findings before any trebling could take place – but it was not.

This reveals the fundamental inconsistency in Trinity's claim: the only way Trinity could pretend that the claimed damages were for "a sum certain," and thus avoid an evidentiary hearing, was to seek the entire cost of defense and settlement, which was wholly inconsistent with the legal theory alleged in its complaint. In doing so, Trinity circumvented two basic principles of Washington law.

First, the court must make findings of fact and conclusions of law absence of findings of fact and conclusions of law when damages sought on default judgment are uncertain. CR 54(b)(1). Second, a party seeking

a default judgment may not seek more or different damages than sought in its complaint.

> A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

CR 54(c). *See also* Karl B. Tegland, 4 Washington Practice at 13 ("The default judgment may not grant more or different relief from that requested in the complaint."). This principle exists to prevent exactly what happened here – a plaintiff who files a claim under one theory and then takes advantage of the *ex parte* default proceeding to change legal theories and increase the amount sought. *Id.* "[O]ne has a right to assume that relief granted on default will not exceed or substantially differ from that sought in the complaint, and may safely allow default to be taken in reliance on this assumption." *Id.*

The superior court therefore erred in entering the order of default without holding a hearing and making findings of fact and conclusions of law as to the amount of damages, and this court should vacate the order of default and remand for further proceedings. CR 55(c).

V. THE ORDER OF DEFAULT AND JUDGMENT SHOULD BE VACATED BECAUSE OHIO CASUALTY'S FAILURE TO ANSWER WAS DUE TO EXCUSABLE NEGLECT AND IT DEMONSTRATED PRIMA FACIE DEFENSES TO TRINITY'S CLAIMS.

The court below also erred in failing to set aside the order of default because Ohio Casualty demonstrated good cause to do so. If a

party in default establishes a reasonable excuse and a showing of good cause for its failure to appear and defend, an entry of default will be set aside pursuant to CR 55(c). *Johnston v. Medina Improvement Club, Inc.*, 10 Wn.2d 44, 116 P.2d 272 (1941). Likewise, a default judgment should be set aside if the defendant's failure to appear was due to mistake, inadvertence, surprise, excusable neglect and the defendant presents substantial evidence of a prima facie defense. CR 60(b)(1).

Ohio Casualty established grounds to overturn the default order and judgment because (a) its failure to appear was inadvertent as it was unaware of the lawsuit; and (b) it presented pima facie defenses to both liability and damages.

A. Mistake, Inadvertence and/or Excusable Neglect.

As noted in the Statement of the Case, it is undisputed that Ohio Casualty never received notice of the lawsuit until more than a year after the default judgment was entered. Either the Insurance Commissioner's service on CSC, Ohio Casualty's agent of service of process, was faulty or failed, or CSC itself failed to notify Ohio Casualty of the lawsuit. Either way, Ohio Casualty's failure to appear was wholly inadvertent. It immediately retained counsel upon learning of the suit and made an appearance seeking to overturn the default judgment and defend on the merits. A host of cases have long held that genuine misunderstandings or

failures of an agent, even an attorney, to give a party notice of a lawsuit or hearing constitutes mistake, inadvertence, or excusable neglect under Rule 60(b)(1).[4]

Further, Ohio Casualty demonstrated multiple grounds of defense to the merits of Trinity claims, especially as Trinity presented them in the *ex parte* motion for default.[5]

B. Defenses to Subrogation and Equitable Contribution Claims.

Ohio Casualty clearly stated prima facie defenses to Trinity's direct claims. Trinity admitted that MBC was a primary insured under its policy, and the Ohio Casualty policy's "other insurance" provision clearly established that Ohio Casualty's coverage was excess to Trinity's. Ohio Casualty's duty to defend and indemnify was not triggered until Trinity's policy limit of $1,000,000 was reached and it was uncontested that Trinity's total defense costs were far less than its policy limits. Trinity

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[4] *E.g., Barr v. MacGugan*, 119 Wn. App. 43, 47, 78 P.3d 660 (2003) (dismissal for failure to respond to discovery caused by attorney's severe depression); *Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999), *review denied*, 142 Wn.2d 1004 (2000) (genuine misunderstanding between an insured and his insurer as to who was responsible for answering the summons and complaint); *Kain v. Sylvester*, 62 Wn. 151, 152-53, 113 P. 573 (1911) (good faith but erroneous belief that attorney had been employed to defend action); *O'Toole v. Phoenix Ins. Co.*, 39 Wash. 688, 692-93, 82 P. 175 (1905) (abuse of discretion not to vacate default judgment caused by misunderstanding between counsel as to trial date).

[5] This requirements only applies to CR 60(b)(1) grounds; Ohio Casualty was not required to make any showing of a meritorious defense in order to vacate the default order and judgment as void. *Hancock (John) Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 374, 83 P. 221 (1938); *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 305, 971 P.2d 581 (1999).

thus had no right of subrogation against Ohio Casualty and no right for equitable contribution, because Ohio Casualty's excess insurance obligations had not been triggered.

Further, even if Ohio Casualty was deemed to be a primary co-insurer with Trinity, Ohio Casualty was entitled to a trial to determine the equities and the amount of its purported equitable contribution. To state a prima facie defense, a party need to establish that defense with certainty, only that it has presented substantial evidence of a defense, and the trial court must take the evidence and reasonable inferences in the light most favorable to the movant when evaluating those defenses. *Pfaff v. State Farm Mut. Auto Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000). Ohio Casualty did so.

C. Defenses to Insurer Bad Faith Claims.

As shown in Section II above, Trinity lacked standing to bring bad faith claims against Ohio Casualty because any such claims accrued to the benefit of Ohio Casualty's insured, MBC, not Trinity, and because Trinity admitted MBC had not assigned its claims to Trinity. Even assuming, for sake of argument, that Trinity did have standing to assert CPA and IFCA claims, Ohio Casualty presented multiple defenses on the merits.

First, an insurer's reasonable conduct or reasonable interpretation of coverage is a complete defense to claims of bad faith and violations of

the CPA. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003). Ohio Casualty's coverage position was correct, but at a minimum it was based on a reasonable interpretation of the policy provisions at issue, so no bad faith claim could be maintained. *Id.*

Second, to establish a claim for violations of the CPA and IFCA, Trinity must establish damages proximately caused by the alleged improper conduct. *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 276, 961 P.2d 93 (1998) (citing *Safeco Ins. Co. of Am. v. Butler,* 118 Wn.2d 383, 389, 823 P.2d 499 (1992) ("As an element of every bad faith or CPA Action . . . an insured must establish it was harmed by the insurer's bad faith.")). Here, there was no evidence of damages. MBC, the party whose claims Trinity purported to assert, suffered no damages attributable to Ohio Casualty's conduct. MBC was fully defended at all times, first by Ohio Casualty and then by Trinity. It paid no defense or settlement costs, obtained a complete release, and suffered no exposure from a failure to settle within policy limits. MBC simply suffered no harm whatsoever. Even when an insurer does engage in bad faith conduct, the insured must still demonstrate damages proximately caused by the conduct. For instance, in *Ledcor Indus. (USA), Inc. v. Mutual of Enumclaw*, 150 Wn. App. 1, 206 P.3d 1255, *review denied*, 167 Wn.2d 1007 (2009), the court found bad faith conduct from an insurer's failure to

accept the tender of a defense for 14 months, but refused to allow an award bad faith damages because the insured failed to prove how the alleged damages were proximately caused by the insurer's delay. 150 Wn. App. at 11-13; *see also, Werlinger v. Clarendon Nat. Ins. Co*, 129 Wn. App. 804, 120 P.3d 593 (2005), *review denied*, 157 Wn.2d 1004 (2006) (insured did not suffer harm under CPA where he claimed protection of bankruptcy).

The same is true here: given the presence of a primary insurer who provided full coverage, MBC simply suffered no harm from Ohio Casualty's reasonable position that its insurance policy provided excess, rather than primary, coverage. The dispute between Trinity and Ohio Casualty simply did not damage MBC in any way, and Ohio Casualty could have defeated the CPA and IFCA claims on that ground as well.

D. Trinity's Conduct Waived and/or Estopped it From Asserting the One-Year Bar in Rule 60(b)(1).

In seeking to keep its windfall from being lost because the uncontested evidence showed Ohio Casualty's failure to answer was due to mistake, inadvertence or excusable neglect, Trinity asserted the one-year limitation for bringing motions to vacate on CR 60(b)(1), (2) and (3) grounds. Because of its calculated use of delay as a litigation tactic,

however, Trinity should have been barred from raising this time limitation, based on well-established principles of waiver and equitable estoppel.

After obtaining the default judgment and order *ex parte*, Trinity deliberately waited a year and five days before taking any action. Ohio Casualty is solvent; there was no legitimate reason to delay collecting the judgment, if Trinity had in fact truly believed the judgment was legally defensible. Instead, Trinity's counsel proudly admitted he was running out the clock to gain a procedural advantage – "that's what [we] did. We're not hiding that. That's exactly what happened." RP 15-16.

The Washington Supreme Court severely frowns on gamesmanship that detracts from the timely and fair adjudication of disputes and the "long favored resolution of cases on their merits." *Morin*, 160 Wn.2d at 749. It recognizes two related doctrines – waiver and equitable estoppel – that limit a party's ability to use litigation delay as a procedural tool. Both apply here to deny Trinity any benefit from its deliberate delay.

In *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000), the court explicitly recognized that the common law doctrine of waiver could deny a party a procedural advantage it might otherwise enjoy under the Civil Rules, if its conduct in the litigation was marked by deliberate, tactical delay. The court reasoned:

> We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1(1). If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised.

141 Wn.2d at 39.

In *Lybbert*, the court held that a defendant had waived the affirmative defense of insufficiency of process, although technically timely pled under the rules, because the defendant had deliberately "waited until after the statute of limitations expired to file its answer and for the first time assert the defense." *Id.* at 42. The court refused to allow such tactics and found the defense waived to "underscore[] the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants." *Id.* at 40.

Similarly, the doctrine of equitable estoppel prevents a litigant from benefiting by taking actions inconsistent with a claim asserted, when another party reasonably relied on those actions and suffered some injury from that reliance. *Lybbert*, 141 Wn.2d at 35; *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). In *Lybbert*, the court held that the defendant's calculated delay to run out the statute of limitations was inconsistent with asserting the defense of insufficient service of process, and that the plaintiff was harmed because the error had

become incurable due to the expiration of limitations. 141 Wn.2d at 36. It held that equitable estoppel did not apply only because the plaintiff was aware of the facts showing that service was ineffective, and thus did not justifiably rely on defense counsel's calculated delay. *Id.*

Here, both doctrines should deny Trinity any benefit from its calculated delay. Trinity's delay in taking any action to enforce the default judgment was purely tactical and was directly contrary to the policy discouraging a "'trial by ambush' style of advocacy, which has little place in our present-day adversarial system … ." *Lybbert*, 141 Wn.2d at 40. Unlike the plaintiff in *Lybbert*, Ohio Casualty was *not* aware of the default judgment. It did not sleep on its rights; its "delay" in filing a motion to vacate was grounded entirely in its reasonable reliance on Trinity's silence for a year and five days after the entry of judgment. Only one party – Trinity – had knowledge of the underlying facts, making estoppel appropriate. *Id.* at 35.

This is not to say that Ohio Casualty was relieved of its substantive burden in overturning the default judgment; it was still required to show (as it did) entitlement to relief under CR 60(b)(1). The equitable principles that apply so strongly in default proceedings, however, should have denied Trinity a tactical advantage from its calculated gamesmanship, a manipulation of the rules that provided no benefit to the

litigants or to the litigation process, and which was inimical to the Supreme Court's overriding mandate that parties "have their day in court and have controversies determined on the merits." *Morin*, 160 Wn.2d at 749.

VI. THE TRIAL COURT'S AWARD OF SUPPLEMENTAL ATTORNEY'S FEES SHOULD BE VACATED.

Finally, the trial court's award of supplemental attorney's fee to Trinity in the amount of $32,400 (reflecting a 1.5 contingent fee multiplier) should be vacated. CR 588-90. Because the trial court erred in denying the motion to vacate the default judgment, as shown in Sections II-V, above, the award to Trinity for opposing that motion likewise should be vacated. In addition, the award was independently erroneous because Trinity had no legal grounds to receive a fee award. The trial court cited three grounds for the award, none of which apply. CP 589. As explained in Section II above, Trinity had no standing to bring CPA or IFCA claims, and therefore had no basis for receiving an award of fees under those statues. Likewise, because Trinity did not receive an assignment of any bad faith claims from Ohio Casualty's insured, or establish any right to recover more than it had paid out in settlement costs, it was not entitled to an award of fees under the *Olympic Steamship* doctrine. This was the precise holding in *Safeco Ins. Co. of Illinois v. Country Mutual Ins. Co.*,

165 Wn. App. 1, 267 P.3d 540 (2011), where the court of appeals rejected a bid by an insurance carrier to receive attorney's fees under *Olympic Steamship* because the carrier had failed to show that it had received an express assignment of those rights from the insured. *Safeco Ins. Co.*, 267 P.3d at 544-45. Just as it had done with its quest for treble damages, Trinity overreached in its demand for attorney's fees. The order awarding supplemental attorney's fees should be vacated.

CONCLUSION

Based on the foregoing reasons, the Court of Appeals should vacate the trial court's Order of Default and Judgment, vacate its award of supplemental attorney's fees, and remand the case for proceedings on the merits.

DATED this 23rd day of February, 2012.

WILSON SMITH COCHRAN DICKERSON

By ______________________

Alfred E. Donohue, WSBA #32774
Attorneys for Appellants

Philip A. Talmadge, WSBA #6973
TALMADGE/FITZPATRICK
Attorneys for Appellants

APPENDIX

1. Plaintiff's Complaint for Subrogation, Equitable Contribution, and Insurer Bad Faith. CP 1.

2. Plaintiff's Motion for Order of Default and Default Judgment. CP 17.

3. Order of Default and Judgment. CP 55.

4. Order Awarding Supplemental Attorney's Fees. CR 588.

CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the attached document as follows:

HAND DELIVERED:

Brent W. Beecher
Hackett Beecher & Hart
1601 5th Ave., Ste. 2200
Seattle, WA 98101-1651

Court of Appeals of the State of Washington, Division I
One Union Square
600 University St.
Seattle, WA

DATED at Seattle, Washington this 23rd day of February, 2012.

Jennifer Hickman

APPENDIX

1. Plaintiff's Complaint for Subrogation, Equitable Contribution, and Insurer Bad Faith. CP 1.

2. Plaintiff's Motion for Order of Default and Default Judgment. CP 17.

3. Order of Default and Judgment. CP 55.

Appendix 1

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CASE NUMBER: 10-2-24692-4 SEA

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SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

9 TRINITY UNIVERSAL INSURANCE COMPANY of KANSAS,
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Plaintiff,
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12 v.
13 THE OHIO CASUALTY INSURANCE COMPANY,
14
Defendant.
15

NO.

PLAINTIFF'S COMPLAINT FOR SUBROGATION, EQITABLE CONTRIBUTION, AND INSURER BAD FAITH

16 **I. PARTIES**

17 1.1 Plaintiff Trinity Universal Insurance Company of Kansas ("Trinity") is a foreign
18 insurance company authorized to do business in the State of Washington.
19 1.2 On Information and belief, Defendant The Ohio Casualty Insurance Company
20 ("Ohio Casualty") is a foreign insurance company authorized to do business in the State of
21 Washington.
22
23 **II. FACTS COMMON TO ALL CLAIMS**

24 2.1 In 2007, Trinity was an insurer of Cascade Construction Company ("Cascade").
25
26

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2.2 Cascade was a subcontractor involved in the construction of a Rite Aid located in Kingston, WA.

2.3 Cascade had been hired by Millennium Building Co., ("MBC"), the general contractor managing the project.

2.4 Ohio Casualty insured MBC at all times relevant to this Complaint.

2.5 On September 25, 2007, one of Cascade Construction Co.'s employees, Philip Riley, was injured while working as a mason tender. He fell approximately forty feet from a scaffold at the Rite Aid construction site.

2.6 MBC tendered to its insurer, Ohio Casualty, after receiving a notice of representation from Mr. Riley's attorney, with a request to retain relevant documentation. Ohio Casualty accepted that tender, and appointed an attorney to represent MBC.

2.7 In May 2008, Ohio Casualty Group then purported to tender, on behalf of its insured, the potential claim to Cascade's insurer, Trinity. Ohio Casualty claimed that MBC was an "additional insured" under the Trinity policy issued to MBC's subcontractor, Cascade.

2.8 On or about November 8, 2008, after Mr. Riley filed suit against MBC, Trinity formally accepted MBC's tender of the claim. Ohio Casualty then unilaterally withdrew its defense of MBC, and refused at all times thereafter to participate in the cost of defending MBC, and the expense of indemnifying MBC.

2.9 Mr. Riley's Complaint triggered Ohio Casualty's duty to defend.

2.10 After a review of MBC's policy with Ohio Casualty, Trinity determined that both its policy and MBC's (Ohio Casualty) policy provided insurance with respect to MBC's defense

obligation. Trinity retendered defense and indemnification of Mr. Riley's claim to Ohio Casualty, first in August of 2009, again in October 2009, and finally in December 2009. In accordance with RCW 48.30.015, Trinity also copied the Washington insurance commissioner on its December 2009 letter to Ohio Casualty.

2.11 In its letters of October 2009 and January 2010, Ohio Casualty took the position that its coverage of the claim was excess to Trinity's.

2.12 In January 2010, MBC and Trinity settled Mr. Riley's claim against it. Trinity is funding the settlement. While Ohio Casualty was invited to attend the mediation that precipitated settlement, Ohio Casualty refused to do so.

III. THE POLICIES

3.1 Trinity issued a commercial package policy to Cascade under policy number CAP 0013030. That policy included Form CG 20 33 07 04, under which:

> **Section II – Who is An Insured** is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.
>
> A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.

3.2 MBC's policy with Ohio Casualty provided coverage for MBC's liability for "bodily injury" or "property damage" occurring at the Rite Aid Construction site. In abandoning

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MBC's defense, Ohio Casualty relied only on following language from the "other insurance" condition in its policy:

> "*this insurance is primary except when paragraph B. below applies.* Paragraph b.1. (b), states:
>
> *"any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement."*
>
> *"When this insurance is excess, we will have no duty to under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit."*

IV. BREACH OF CONTRACT

4.1 As the insurer who defended and settled Mr. Riley's claim against MBC, Trinity is contractually and equitably entitled to assert MBC's claim for defense and indemnification against Ohio Casualty under the principle of subrogation.

4.2 Because Mr. Riley's Complaint against MBC did not specify the cause of the accident, Ohio Casualty is not entitled to rely on its "Other Insurance" exclusion to deny a defense; Ohio Casualty had a duty to defend MBC.

4.3 By withdrawing from MBC's defense, and refusing to contribute to the ongoing cost of that defense, Ohio Casualty breached its contractual duty to defend MBC.

4.4 By refusing to participate in settlement negotiations or to contribute to Mr. Riley's settlement, Ohio Casualty breached its contractual duty to indemnify MBC.

4.5 The above conduct damaged MBC and Trinity in an amount to be proven at trial.

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V. INSURER BAD FAITH

5.1 As the insurer who defended and settled Mr. Riley's claim against MBC, Trinity is contractually and equitably entitled to assert MBC's claim for insurer bad faith against Ohio Casualty under the principle of subrogation.

5.2 On MBC's behalf, Trinity complied with the notice requirements of RCW 48.30.015(8).

5.3 By unreasonably refusing to defend MBC, Ohio Casualty breached its duty of good faith and fair dealing.

5.4 By unreasonably refusing to participate in settlement negotiations on behalf of MBC, Ohio Casualty breached its duty of good faith and fair dealing.

5.5 By failing to comply with the requirements of WAC 284-30-360(3), as described below, Ohio Casualty breached its duty of good faith and fair dealing.

5.6 The above conduct damaged MBC in an amount to be proven at trial.

5.7 The above conduct constitutes a violation of RCW 48.30.015.

VI. VIOLATION OF THE WASHINGTON ADMINISTRATIVE CODE

6.1 Under WAC 284-30-360(3), an insurer must answer pertinent communications from a claimant within ten days.

6.2 Trinity sent such a communication to Ohio Casualty on October 10, 2009.

6.3 Ohio Casualty did not respond until October 30, 2009.

6.4 Trinity sent another such communication to Ohio Casualty on December 28, 2009.

6.5 Ohio Casualty did not respond under January 25, 2010.

6.6 The above conduct constitutes a violation of WAC 284-30-360(3).

VII. VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT

7.1 Violation of WAC 284-30-360 is a per se violation of the Washington Consumer Protection Act, RCW 19.86. The conduct alleged in paragraphs 6.1-6.4 constitutes a violation of the CPA. Said conduct damaged MBC and Trinity in an amount to be proven at trial.

7.2 An insurer's breach of its duty of good faith is a per se violation of the CPA. The conduct alleged in 5.1-5.6 constitutes a per se violation of the CPA. Said conduct damaged MBC or Trinity in an amount to be proven at trial.

VIII. EQUITABLE CONTRIBUTION

8.1 Under their respective policies, Ohio Casualty and Trinity both had obligations to defend MBC from Mr. Riley's suit. Ohio Casualty did not do so.

8.2 Trinity is entitled to equitable contribution for Ohio Casualty's share of the cost of Mr. Riley's defense.

XI. PRAYER FOR RELIEF

Based upon the foregoing allegations, Plaintiff prays that the Court grant it the following relief:

A. An order that Ohio Casualty is estopped from asserting coverage defenses to its obligation to fund MBC's settlement with Mr. Riley.

B. An award of damages for breach of its duty to defend MBC.

C. An award of damages for breach of its duty to indemnify MBC.

D. Treble damages pursuant to RCW 48.30.015.

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E. An award of treble damages for each violation of the Washington Consumer Protection act, pursuant to RCW 19.86.090.

F. An award of attorney fees and costs under the *Olympic Steamship* case and the statutes referenced above.

G. Any other relief the Court finds just and equitable.

DATED THIS 10th day of May, 2010.

s/ Brent W. Beecher, WSBA #31095
Hackett Beecher & Hart
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Telephone: (206) 624-2200
Fax: (206) 624-1767
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Attorneys for Plaintiff

Appendix 2

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CASE NUMBER: 10-2-24692-4 SEA

The Honorable Joan DuBuque
Trial: December 19, 2011

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS, Plaintiff, v. THE OHIO CASUALTY INSURANCE COMPANY, Defendant.	NO. 10-2-24692-4 SEA PLAINTIFF'S MOTION FOR ORDER OF DEFAULT AND DEFAULT JUDGMENT

I. Relief Requested

COMES NOW the plaintiff, Trinity Universal Insurance Company of Kansas ("Trinity"), and hereby moves the Court for an Order of Default and Default Judgment against defendant The Ohio Casualty Insurance Company.

II. Facts

This motion is based on the files and pleadings herein and on the facts recounted in the Declarations of Brent W. Beecher and Mark Richards.

III. Evidence Relied Upon

The plaintiff relies upon the documents on file with the Court, as well as the declarations of Mark Richards and Brent W. Beecher, and exhibits thereto.

IV. Issues

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Should the Court enter an Order of Default and Default Judgment against the defendant insurance company that has neither appeared nor answered in the time permitted by law?

V. Authority & Argument

An Order of Default and Default Judgment are proper were a defendant has been properly served with a Summons and Complaint, but failed to answer or appear within the time provided by law. CR 55. In the case of a defendant who is a foreign insurance company, service of process is made, pursuant to RCW 48.05.210, by serving duplicate copies of the Summons and Complaint (along with ten dollars), on the Washington Office of the Insurance Commissioner. The foreign insurer then has 40 days to Answer. *Id.*

In this case, the plaintiff Trinity has complied with all requirements of RCW 48.05.210; the Insurance Commissioner's Certificate of Service is attached as Exhibit B to the Declaration of Brent Beecher. That Certificate certifies that Service of Process took place on May 12, 2010. Ohio Casualty's 40 days in which to Answer expired on June 22, 2010.

CR 55 requires a statement of why venue is correctly placed in King County. As a general matter, RCW 4.12.025 provides that a foreign corporate defendant may be sued in any county in which it does business.[1] Ohio Casualty solicits business in King County through its agents, one example of which is HUB International Northwest, LLC. *Beecher Dec. Exs. D,E,F.*

[1] An action may be brought in any county in which the defendant resides, or, if there be more than one defendant, where some one of the defendants resides at the time of the commencement of the action. For the purpose of this section, the residence of a corporation defendant shall be deemed to be in any county where the corporation: (a) Transacts business; (b) has an office for the transaction of business; (c) transacted business at the time the cause of action arose; or (d) where any person resides upon whom process may be served upon the corporation.

RCW 4.12.025

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Additionally, RCW 48.05.220 specifies that in suits "upon an insurance contract," an insurer will be sued in the county where the cause of action arose. Although the lawsuit against Millennium was brought in Kitsap County, Millennium bought its Ohio Casualty policy from HUB International Northwest, LLC, located in King County. *Beecher Dec. Exs. D,E,F*. In the case of *Pratt v. Niagara Fire Ins. Co. of New York*, 113 Wash. 347, 194 P. 411 (1920), the court ruled that the county in which the insured purchased its coverage was an appropriate venue for a suit against the insurer under the predecessor of RCW 48.05.220. Additionally, in *Murray v. Aetna Cas. & Sur. Co.*, 61 Wash. 2d 618, 379 P.2d 731 (1963), the court held that RCW 48.05.220 did not apply to bad faith extra-contractual claims in any event; those are precisely the kind of claims brought by Trinity in the present suit. This would leave the general venue statute, RCW 4.12.025, as the applicable choice. In either case, venue in King County is proper.

Amount of Judgment

The proper amount of the default judgment against Ohio Casualty can be computed with precision in this case, and pursuant to CR 55(b)(1) the Court need not enter Findings and Conclusions to support the judgment.

> (1) *When Amount Certain*. When the claim against a party, whose default has been entered under section (a), is for a sum certain or for a sum which can by computation be made certain, the court upon motion and affidavit of the amount due shall enter judgment for that amount and costs against the party in default, if he is not an infant or incompetent person. . . . Findings of fact and conclusions of law are not necessary under this subsection even though reasonable attorney fees are requested and allowed.

In this case, as described in the Complaint, both Trinity and Ohio Casualty insured Millennium Building Company ("Millennium") under liability policies. When Millennium was sued by the employee of one of its subcontractors for a personal injury, Trinity defended and

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indemnified Millennium. Ohio Casualty refused to accept coverage, and did not share in the cost of defending or indemnifying Millennium. Trinity paid $20,432.69 in attorney fees providing a defense to Millennium. *Richards Dec.* Trinity then paid $225,000.00 in indemnity on Millennium's behalf to settle the claims against it. *Id.* This is an out-of-pocket expense of $245,432.69. This is an expense that should have been borne by Ohio Casualty alone, and Ohio Casualty skirted its obligations in bad faith.

Trinity has also asserted Consumer Protection Act ("CPA") violations and Insurance Fair Claims Act Violations ("IFCA") (RCW 19.86 and RCW 48.30, respectively). The CPA provides treble damages up to $25,000.00. RCW 19.86.090. The IFCA allows for unlimited treble damages. RCW 48.30.015(2). The IFCA damages are thus $736,298.07. The sum of the IFCA and CPA damages is $761,298.07[2].

Finally, RCW 48.30.015 also provides for attorney fees and costs of suit in favor of the party suing the recalcitrant insurer. *See also Olympic S.S. Co., Inc. v. Centennial Ins. Co.,* 117 Wash. 2d 37, 811 P.2d 673 (1991). Trinity, as assignee of Millennium, engaged its attorneys in this case on a contingent fee basis. *Beecher Dec.* The undersigned Partner spent 8.5 hours in preparation of this suit and Motion, and an Associate at the firm spent 3.3 hours. *Beecher Dec. Ex. B.* At the reasonable rates of $250 / hour and $180 / hour for Partner and Associate time, respectively, the lodestar fee award should be $2,719.00. Additionally, the plaintiff incurred $253.89 in recoverable costs (*id.*) for total of $2,972.89

The total judgment amount is **$764,270.96.**

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[2] For an example of a case in which a Washington Federal District Court applied the nearly identical FRCP 55 to enter treble CPA damages as a component of a default judgment, *see Francis v. J.C. Penney Corp., Inc.*, C09-5061-FDB, 2010 WL 715535 (W.D. Wash. Feb. 24, 2010) (Courtesy Copy attached).

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1
2 DATED THIS 13th day of July 2010.
3
HACKETT, BEECHER & HART
4
s/ ____________________
5 Brent W. Beecher, WSBA #31095
Attorneys for Plaintiff
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Appendix 3

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EXP07

The Honorable Joan DuBuque
Trial: December 19, 2011

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS, Plaintiff, v. THE OHIO CASUALTY INSURANCE COMPANY, Defendant.	NO. 10-2-24692-4 SEA ORDER OF DEFAULT AND JUDGMENT

JUDGMENT SUMMARY

JUDGMENT CREDITOR:	Trinity Universal Insurance Company of Kansas
Attorney for Creditor:	Brent W. Beecher HACKETT, BEECHER & HART 1601 - 5th Avenue, Suite 2200 Seattle, WA 98101-1651
Attorney Fees and Costs	$2,972.89
Judgment Principal:	$761,298.07
Total Judgment	$764,270.96
JUDGMENT DEBTOR(S)	The Ohio Casualty Insurance Company
Attorney for Debtors:	N/A

1
2 THE COURT having reviewed the Motion for Order of Default and the Declarations of
3 Brent W. Beecher and Mark Richards in support thereof, the records and pleadings filed herein,
4 and being fully advised that the defendant was properly served, and it appearing that plaintiff is
5 entitled to and Order of Default and Default Judgment, it is hereby
6
7 ORDERED AND ADJUDGED that defendant The Ohio Casualty Insurance Company is
8 in default and the plaintiff is granted judgment against defendant The Ohio Casualty Insurance
9 Company in the principal amount of $761,298.07 and fees and costs in the amount of $2,972.89
10 for a total judgment of $764,270.96. This judgment shall bear interest at the tort rate of 2.23%
11 per annum until satisfied.

12 DATED THIS 14 day of July, 2010.

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15 JUDGE / COURT COMMISSIONER

16 Presented by:

17 HACKETT, BEECHER & HART

18 s/

19 Brent W. Beecher, WSBA #31095
Attorneys for Plaintiff

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Appendix 4

1 The Honorable Joan DuBuque

FILED
KING COUNTY, WASHINGTON

OCT 21 2011

SUPERIOR COURT CLERK
THERESA GRAHAM
DEPUTY

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS, Plaintiff, v. THE OHIO CASUALTY INSURANCE COMPANY, Defendant.	NO. 10-2-24692-4 SEA ORDER AWARDING SUPPLEMENTAL ATTORNEY FEES

This matter came before the Court on the Trinity Universal Insurance Company of Kansas' ("Trinity's") motion for an order awarding supplemental attorney fees. The motion was made pursuant to *Olympic Steamship,* RCW 19.86.090 ("the CPA") and RCW 48.30.015 (the "IFCA"). The Court considered the pleadings filed in this action, particularly the Motion for Supplemental Award of Attorney Fees, the Response of Defendant, if any, and the Reply of Plaintiff, if any, and the following additional evidence: The Fee Declaration of Brent Beecher.

Based on the evidence presented and the written argument of counsel, the Court makes the following findings of fact:

1. $300 per hour is a reasonable rate for Brent Beecher's time in this matter;

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2. It was reasonable and necessary for plaintiff's counsel to spend 71.2 hours on this matter subsequent to the entry of Default Judgment;

3. A lodestar multiplier of 1.5 is appropriate in this case, given the contingent nature of the fee;

Additionally, the Court makes the following conclusions of law:

1. Trinity is entitled to its attorney fees for opposing Ohio Casualty's Motion to Vacate under the *Olympic Steamship* doctrine;

2. Trinity is entitled to its attorney fees for opposing Ohio Casualty's Motion to Vacate under the CPA;

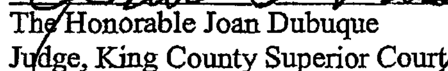
3. Trinity is entitled to its attorney fees for opposing Ohio Casualty's Motion to Vacate under the IFCA.

Based on the above findings of fact and conclusions of law, It Is Hereby Ordered:

1. Plaintiff's Motion for Supplemental Award of Fees is GRANTED;

2. Plaintiff is awarded attorney fees, against Defendant, for 71.2 hours of work at the rate of $300 per hour, subtotaling: $21,360.00. Additionally, the Court applied a reasonable multiplier of 1.5, for a total fee award of $ 32,0400.

DONE IN OPEN COURT this 21 day of October 2011.



The Honorable Joan Dubuque
Judge, King County Superior Court

Presented By:

s/ *Brent W. Beecher*, WSBA #31095
Attorneys for Defendants
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