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

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS,

Respondent

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Appellant

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION.

In its response, Trinity Universal Insurance Co. of Kansas ("Trinity") makes clear that it considers litigation a game of "gotcha," and that Washington substantive law and default judgment rules are just tools for clever litigants to manipulate to obtain windfalls and then to insulate them from meaningful appellate review. Had Trinity simply sought to recover the money it actually paid, as a primary insurer, to defend and indemnify a claim against its insured, it would be in a stronger, although not unassailable, position. However, because Trinity sought the brass ring of treble damages, the default judgment is vulnerable and should be vacated.

Trinity reveals that its default judgment does, indeed, depend on a dramatic expansion of existing law: a holding that, *by operation of law*, an insured's extra-contractual statutory bad faith claims are transferred to its primary insurer, with no express agreement or payment of consideration, simply because the carrier complied with its legal obligation to provide a defense. If the bad faith claims owned by Trinity's insured were, in fact, worth *three times* what Trinity paid out of pocket, why would Washington law assign those claims to Trinity for nothing? Trinity cites no Washington or other case supporting such a radical and

insurer-friendly rule, and this Court should not recognize it, especially in the context of a default judgment.

Nor should this Court condone Trinity's unabashed gamesmanship designed to avoid meaningful appellate review. Given the Supreme Court's clear preference for resolving disputes on the merits, a party that deliberately waits a year after obtaining a default judgment, for no reason other than to gain a procedural advantage, should be denied that windfall, as well.

Ohio Casualty seeks no more than a remand so that it may defend, *on the merits*, Trinity's claims, an opportunity that it was denied through no fault of its own.

II. THE DEFAULT JUDGMENT IS VOID BECAUSE TRINITY OVERREACHED: RATHER THAN ASSERT ITS OWN CLAIMS, IT ASSERTED CLAIMS IT DID NOT OWN IN AN ATTEMPT TO RECOVER A WINDFALL IT DID NOT DESERVE.

Silently signaling its anxiety, Trinity does not respond to the assignments of error in the order they are raised, but instead waits sixteen pages before responding to Ohio Casualty's first issue: its lack of standing to assert extra-contractual statutory bad faith claims. When Trinity finally does respond, Trinity makes several key concessions and fails to cite evidence, authority or persuasive reasons supporting its effort to retain its treble-damages default windfall.

A. Trinity Admits it Obtained the Default Judgment Solely on its Insured's Extra-Contractual Statutory Claims.

Trinity does not dispute that its complaint alleged two very different types of causes of action: (1) subrogation and equitable contribution claims directly asserted against a co-insurer; and (2) extra-contractual statutory claims asserted indirectly against MBC's insurer, Ohio Casualty. Trinity also does not dispute that it did not seek default judgment based on its own equitable claims, but rather concedes that the default judgment, in its entirely, was based on IFCA and CPA statutory claims. Brief of Respondent at 20.

This simplifies appellate review: whether or not Trinity *could have* asserted its own claims against an alleged co-insurer is irrelevant; the judgment is based solely on Trinity's claim that it could assert an insured's IFCA and CPA claims. Therefore, if MBC had not assigned its claims to Trinity, or if those claims were not transferred to Trinity by operation of law, the default judgment should not have been entered. *Id.*

B. Trinity Cannot Assert IFCA or CPA Claims on its Own Behalf Because it is Not a First- or Third-party Claimant.

Perhaps recognizing the audacity of its broad conception of "equitable subrogation," Trinity at times appears to argue that it has standing, in its own right, to assert direct claims under the IFCA and the

CPA. The actual language and purpose of these statutes, which Trinity studiously avoids discussing, make clear that it does not.

The IFCA provides a civil cause of action for a "first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insured." RCW 48.30.015(1). The definition of the "first party claimant" who may bring suit is limited to those who are "asserting a right as a covered person to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by a policy or contract." RCW 48.30.015(4). Under Washington law, "covered person" is uniformly defined to mean the person entitled to benefits under an insurance policy.[1] Trinity is not, of course, a "covered person" under the Ohio Casualty policy and therefore cannot assert an IFCA claim on its own behalf.

Likewise, Trinity cannot assert a direct claim under the CPA. The sole basis for Trinity's CPA claim was that Ohio Casualty did not respond to two communications from Trinity within 10 days. CP 5-6. By its

[1] *See*, *e.g.*, RCW 48.41.030(5) ("'Covered person' means any individual resident of this state who is eligible to receive benefits from any member, or other health plan."); WAC 284-43-130(5) ("'Covered person' means an individual covered by a health plan including an enrollee, subscriber, policyholder, or beneficiary of a group plan."); See also RCW 48.22.030 (using "covered person" to refer to the insured seeking benefits under UIM provision of the policy and not referring to third-party claimants). This is consistent with Washington decisions, which have also uniformly held that a "covered person" is the person entitled to defense and indemnity under the policy, not third-parties seeking indemnity under the policy. *Rones v. Safeco Ins. Co. of America*, 119 Wn.2d 650, 652, 835 P.2d 1036, 1037 (1992) ("Because Carlson was the driver of Rones' car at the time of the accident, he was a "covered person" under the terms of the policy.").

express terms, however, WAC 284-30-360 only applies to communications with *claimants*, which are defined as first-party claimants (insureds) and third-party claimants (persons asserting claims against insureds), not other insurers. WAC 284-30-320(6), (14). Not being a "claimant," Trinity has no standing to assert a direct claim under the CPA for purported violations of insurance regulations codified in the WACs.

C. Trinity Did Not Obtain an Express Assignment of IFCA and CPA Claims from its Insured.

Although Trinity told the court below that it was asserting MBC's claims "as assignee," it never produced a written assignment or identified policy language assigning MBC's statutory claims to Trinity. On appeal, Trinity now largely abandons the claim that it obtained an actual, written assignment from MBC, arguing instead that its mere act of complying with its policy obligations automatically assigned MBC's extra-contractual statutory claims (and their treble damages remedies, of course) to Trinity.

Trinity makes passing reference to language in *Ohio Casualty's* policy and hints that its own policy contains the same language. Brief of Respondent at 21 n.3. To be clear: Trinity's policy was *not* part of the default judgment record, and it is *not* in the record on appeal. Trinity did not cite or rely on any policy language when it obtained the default

judgment. CR 1-7. However, even assuming that Trinity's policy language was the same as Ohio Casualty's policy, it provides Trinity no help.

The policy language Trinity now cites does *not* assign all claims the insured might have against an insurer or third party, let alone CPA and IFCA claims. Rather, the policy language is expressly limited to assisting a paying insurer to recover "all or part of *any payment we have made* under this Coverage Part." Brief of Respondent at 21 n.3 (emphasis added). This provision simply confirms a paying insurer's right to recover expenses paid; it does *not* assign extra-contractual statutory claims or permit an insurer to recover more than "payments ... made." *Id.*

D. Trinity's Claim that When an Insurer Complies with its Policy Obligations, its Insured's Statutory Claims are Automatically Assigned to the Insurer Has No Basis in Washington Law.

Lacking direct standing to bring IFCA and CPA claims, and lacking an express contractual assignments, Trinity makes an astonishing argument: that because it provided the defense it was required to provide, Washington law rewarded Trinity with a huge windfall: an automatic transfer to Trinity of the insured's statutory causes of action – extra-contractual claims, treble damages, attorney's fees, and all.

Trinity claims that by simply performing its contractual duties it now "owns the insured's bad faith, CPA, and IFCA rights against the non-paying insurer." Brief of Respondent at 20. Trinity argues that it took MBC's extra-contractual and statutory rights *by operation of law*:

> the substantive rights conveyed by operation of law – equitable subrogation – are the same as those conveyed by conventional subrogation; either way, the paying insurer "steps into the shoes" of the insured, entitled to assert the insured's legal rights against non-paying insurers.

Id. at 22. Trinity's unique argument, which it tries to wedge into the much narrower doctrine of "equitable subrogation," is baseless and, indeed, directly adverse to the interest of its insured.

Although Trinity now tries to disown its coverage obligations under its policy, Trinity never denied coverage. In fact, Trinity defended the claims against MBC without any reservation of rights and settled the claims within its policy limits. Trinity's unreserved defense and indemnification precludes it from now asserting that the claims against MBC were not covered by its policy.[2]

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[2] Absent a reservation of rights, an insurer cannot assert that a claim it is defending is not covered by the policy. *See, e.g., Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002) ("If the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel."); *Alaska Nat. Ins. Co. v. Bryan*, 125 Wn. App. 24, 38-39, 104 P.3d 1 (2004) (holding that insurer is bound by its representations of coverage in its reservation of rights letter because "the purpose of a reservation of rights letter is [] to identify the insurer's position

Trinity bases its argument on inapposite decisions where an excess carrier brought claims against a primary carrier.[3] Trinity also misleadingly cites *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*,[4] for its contention that subrogation includes assignment of statutory claims when, as explained below, that case only equated *contractual* subrogation with assignment, not the equitable subrogation that Trinity asserts.

Equitable subrogation does not equal assignment. "Subrogation is an equitable doctrine, the purpose of which is to provide for a proper *allocation* of payment responsibility."[5] Subrogation *allocates* payments *actually made* among parties based on their respective responsibility to pay. Subrogation is nothing more than a right of *reimbursement* – it is not a mechanism for bringing other claims or seeking additional damages beyond actual expenses paid:

> Subrogation has two features. The first is the right to reimbursement, and the second is the mechanism for the

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regarding coverage and serves to protect the parties by providing a conditions defense to the insure . . . .").

[3] Courts have long recognized that the rights of excess insurers against primary insurers are unique because the excess insurer takes the position of the insured with respect to a judgment exceeding limits. As the *First State* court explained, "the duty a primary insurer owes an excess insurer is identical to that owed the insured." *First State*, 94 Wn. App. at 610-11. Trinity did not allege in its complaint or in its motion for Default Judgment that it was an excess insurer. In fact, in its Complaint it alleged that the carriers were both primary. CP 2-3.

[4] 164 Wn.2d 411, 424, 191 P.3d 866, 875 (2008).

[5] *Community Ass'n Underwriters of Am. Inc. v. Kalles*, 164 Wn. App. 30, 34, 259 P.3d 1154, 1157 (2011) (emphasis added).

> enforcement of the right. The right to reimbursement, which is at issue here, may arise by operation of equity in law or contract.[6]

As this Court has recently explained, "[a]s an equitable remedy, subrogation is designed to avoid one person receiving an unearned windfall."[7] By the same token, subrogation is not a mechanism to *obtain* a windfall of more than what was actually paid. For example, an insurer cannot recover attorney fees incurred in bringing a subrogation action – only actual payments made on behalf of a third party.[8] Trinity ignores the language in *Bordeaux, Inc. v. American Safety Ins. Co.*,[9] where this Court limited a primary insurer's right of subrogation to precisely what it had paid because "[n]othing in the American Safety contracts gives it the right to subrogation for sums that it did not pay," and because the insurer could not assert "rights it did not clearly provide for in its policy." *Id.*

1. Trinity is not an excess carrier.

To support its novel theory, Trinity cites two cases where an excess insurer pursued claims against a primary insurer.[10] Again, this distracts from the real issue: does an insurer's payment of indemnity

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[6] *Kalles*, 164 Wn. App. at 34 (citing *Mahler,* 135 Wn.2d at 412, 957 P.2d 632).

[7] *First Am. Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund*, LLC, 161 Wn. App. 474, 494, 254 P.3d 835, 846-847 (2011).

[8] *Newcomer v. Masini*, 45 Wn. App. 284, 291, 724 P.2d 1122, 1127 (1986) ("The cases cited by Mr. Masini do not support his request for attorney fees because he advances a subrogation, not an indemnity claim.").

[9] 145 Wn. App. 687, 186 P.3d 1188 (2008), *review denied*, 165 Wn.2d 1035 (2009).

automatically transfer an insured's extra-contractual statutory claims to the insurer? In any case, the excess carrier decisions provide Trinity no help: excess insurance raises fundamentally different issues, and Trinity is not an excess carrier.

In Washington, as in many states, "an excess insurer possesses the same rights against the primary insurer as does the insured."[11] As the Court in *Truck Ins. Exchange of Farmers Ins. Group v. Century Indem. Co.*[12] explained, the purpose of permitting excess insurers to bring claims against primary carriers who refuse to settle claims is to further the broad policy of encouraging settlements:

> Other jurisdictions have noted application of equitable subrogation to excess carrier's claims against primary insurers furthers policies of encouraging reasonable settlements of lawsuits, preventing unfair distribution of losses among primary and excess insurers, preventing primary insurers from obstructing settlements in bad faith, and reducing the premiums paid for excess coverage.

Id. When a primary insurer refuses to settle, the excess carrier can assert claims against the primary insurer based on the insurer for its refusal to settle, but these cases do not hold that the excess carrier can bring extra-contractual statutory claims based on other issues or disputes, let alone to

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[10] *Truck Ins. Exchange of Farmers Ins. Group v. Century Indem. Co.*, 76 Wn. App. 527, 531, 887 P.2d 455, 458 (1995); *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 615, 971 P.2d 953 (1999).

[11] *Amazon.com Int'l, Inc. v. Am. Dynasty Surplus Lines Ins. Co.*, 120 Wn. App. 610, 620, 85 P.3d 974 (2004) (*citing First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 971 P.2d 953 (1999)).

[12] 76 Wn. App. 527, 531, 887 P.2d 455, 458 (1995).

obtain treble damages pursuant to IFCA for an indemnity payment it indisputably owed.

Of course, Trinity never claimed to be MBC's excess carrier, and so it cannot now claim the rights of an excess carrier. Before filing suit, Trinity claimed it was a "co-primary insurer" with Ohio Casualty and provided a defense as a primary carrier. Trinity's complaint alleged that "*both* its policy and MBC's (Ohio Casualty) policy provided insurance with respect to MBC's defense obligation" and that "[u]nder their respective policies, Ohio Casualty and Trinity *both* had obligations to defend MBC." Complaint ¶¶ 2.10, 8.1. Trinity sought to recover "equitable contribution for Ohio Casualty's *share* of the cost of Mr. Riley's defense." *Id.* ¶ 8.2 (emphasis added). Trinity's sudden affinity with excess insurers is an invention for this appeal.

Trinity cites no case holding that equitable subrogation provides *primary* carriers any equivalent right, and for good reason. Excess carriers have a limited right to assert the insured's claims because their rights are aligned with the insured's: both want the primary carrier to fulfill its duties of defense and settlement. As this Court's opinion in *First State Ins. Co.* explained:

> When there is no excess insurer, the insured becomes his own excess insurer, and his single primary insurer owes him a duty of good faith in protecting him from an excess judgment and personal

> liability. *If the insured purchases excess coverage, he in effect substitutes and excess insurer for himself. It follows that the excess insurer should assume the rights as well as the obligations of the insured in that position.*

94 Wn. App. at 611 (quoting *Valentine Aetna Ins. Co.*, 564 F.2d 292, 297-98 (9th Cir. 1977)) (emphasis in original).

Here, unlike an excess carrier, Trinity was not asserting any right that protected the interests of the insured. Rather, it was pursuing its own interests by trying to shift some or all of the cost to Ohio Casualty. Trinity in no way "stood in the shoes" of MBC or "fill[ed] a void wrongly created by [a] non-paying insurer." Brief of Respondent at 25 n.5. Trinity was a primary insurer and was therefore required to provide a defense regardless of Ohio Casualty's coverage position. Not so for an excess carrier, who "has no duty to defend until the primary insurer has exhausted its obligation." *Truck Ins. Exchange of Farmers Ins. Group,* 76 Wn. App. at 531.

The difference between excess and primary insurers becomes even clearer when one compares the damages Trinity claimed with the damages an excess carrier may recover. The excess carriers in *Truck* and *Kemper* were damaged in the exact same way that their insureds would have been if there had been no excess coverage: they incurred additional defense costs and exposure to damages above the primary carrier's coverage

limits. In that sense, an excess carrier is very much "in the shoes" of the insured.

In contrast, the damages that Trinity obtained by default were *not* the damages of an excess carrier, nor were they "damages" MBC suffered. MBC incurred no additional expenses, suffered no excess exposure, and was fully defended and indemnified at all times. Under Ohio Casualty's coverage position, MBC was *better off,* because it is better to have one primary and one excess carrier than to have two "co-primary" insurers.

Notably, Trinity cites no case – in Washington or elsewhere – holding that a primary carrier has standing to bring its insured's extra contractual claims without an express written assignment. It would make no sense to imply such a right, because the primary insurer's interest in shifting its expenses to another carrier does not align with the insured's interests in maximizing coverage.[13] At best, the primary carrier is simply

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[13] Giving such a right to a primary carrier would also run afoul of the selective tender rule, because it would place control of asserting the insured's rights in the hands of an insurer, rather than in the insured's own hands. As the Supreme Court explained:

> We agree with USF that this rule has sound policy underpinnings. Selective tender preserves the insured's right to invoke or not to invoke the terms of its insurance contracts. An insured may choose not to tender a claim to its insurer for a variety of reasons. Like a driver involved in a minor accident, an insured may choose not to tender in order to avoid a premium increase. The insured may also want to preserve its policy limits for other claims, or simply to safeguard its relationship with its insurer. Whatever its reasons, an insured has the prerogative not to tender to a particular insurer.

Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn. 2d 411, 422, 191 P.3d 866 (2008).

changing the allocation of defense costs between insurers; at worst (as here) the carrier would strip the insured of excess coverage in order to reduce the carrier's own expenses.

While a primary carrier may seek equitable contribution or subrogation to recover its actual out of pocket costs (Trinity chose not to do so when seeking this default) there is absolutely no policy reason to grant a primary carrier standing to pursue its insured's extra-contractual statutory claims, given that its interests are distinct and potentially directly adverse to its insured.

2. *Mutual of Enumclaw* does not support Trinity's argument that subrogation automatically conveys its insured's non-contractual claims.

Nor does *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*,[14] support Trinity's argument that subrogation equals assignment of an insured's extra-contractual claims to the insurer. The Court did discuss "equitable contribution" and "subrogation," in *Mutual of Enumclaw*, but not in a way that supports Trinity's argument.

The Court in *Mutual of Enumclaw* did not hold or even suggest that subrogation is "synonymous with 'assignment'" of extra-contractual statutory claims. In fact, the Court specifically noted the limits of a claim of equitable subrogation:

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[14] 164 Wn.2d 411, 424, 191 P.3d 866 (2008).

> Subrogation is 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*.[15]

Equitable subrogation, which the Court noted "arises by operation of law," is limited to losses covered by the policy. The Court distinguished equitable subrogation from *conventional* subrogation, which "can arise only by agreement;" it noted that conventional subrogation "is substantially the same" as an assignment, but the Court nowhere suggested that *equitable* subrogation was the same as assignment, let alone that it automatically conveyed an insured's non-contractual statutory claims.[16]

Equitable subrogation did not arise in *Mutual of Enumclaw* because the insurer received an *express* assignment from its insured and, unlike Trinity, was not relying on equitable subrogation as the basis for its lawsuit. The court noted the limited scope of its decision, cautioning that it applied only to "conventional [statutory] subrogation and not to the more common doctrine of equitable subrogation." *Id.* at 417.

In fact, *Mutual of Enumclaw* did not even concern subrogation or assignment under an insurance policy, but rather under an express assignment of claims as part of a settlement agreement:

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[15] 164 Wn.2d at 423 (emphasis added).

[16] *Id* at 424.

> None of the parties dispute that Dally's settlement agreement with MOE and CUIC dictates whether Dally assigned its rights to its USF policy.

Id. at fn. 9. Finally, the Court cautioned that a full assignment of rights would differ from a partial assignment, or no assignment:

> While we need not decide whether conventional [contractual] subrogation and assignment are equivalent in all respects, this court recognizes that an insurer *who receives full contractual assignment of an insured's rights* may bring a conventional subrogation claim to enforce those rights.

Id. at 424 (emphasis added).

Therefore, nothing in *Mutual of Enumclaw* suggests that Trinity has the right to assert its insured's statutory and extra-contractual claims, given the absence of a written assignment. Courts considering this issue have rejected similar arguments, as should this Court.[17]

[17] *See, e.g., American Guarantee & Liability Insurance Company v. United States Fidelity & Guarantee Company*, 693 F. Supp.2d 1038, 1047-48 (E.D. Mo. 2010) (rejecting claim by Zurich that "it is entitled to pursue its bad faith claim under principles of subrogation or through an assignment."). Washington law provides that certain types of claims are not assignable as a matter of public policy. *See, e.g., Kommavongsa v. Haskell*, 149 Wn.2d 288, 307-08, 67 P.3d 1068 (2003) (assignment of legal malpractice claim to adversaries in the same litigation that gave rise to the alleged malpractice barred). Assignment of an IFCA claim that by its terms is personal to the relationship between the insured and the insurer to another insurer is contrary to the stated rationale for IFCA in RCW 48. 30.015 – protection of insureds – and should not be permitted as a matter public policy in Washington, and certainly should not be *presumed* as a matter of law, as Trinity suggests.

E. Trinity's "Assignment by Operation of Law" Theory Would Strip Insureds of Their Rights and Impermissibly Give Those Rights to Insurers.

Trinity seeks to expand "equitable subrogation" to provide windfalls to primary carriers by claiming that it is protecting its insured "by filling a void wrongly created by the non-paying insurer." Brief of Respondent at 25. This is incorrect and misstates the record. MBC was not "wrongly denied coverage" or "denied a defense." *Id.* at 20, 43. Ohio Casualty appeared for and defended MBC; once it determined there was "other insurance" making its coverage excess, Ohio Casualty tendered the case to Trinity, which accepted the defense *without reservation of rights*. Ohio Casualty did not abandon its insured; it stood ready to provide excess coverage. Trinity's position that both policies were "co-primary," if accepted, would have stripped MBC of excess coverage. In pursuing its lawsuit against Ohio Casualty, Trinity was protecting *its own* interests; it was not advancing the interests of its insured.

Moreover, MBC did not suffer any "actual damages" at all.[18] Trinity has attempted to turn its own purported damages (a *potential* right of contribution against a second carrier) into something more by re-casting them as extra-contractual and statutory damages. Trinity's alleged IFCA damage can only be what the *insured* suffered because any damages

[18] *Ledcor Indus. Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 10, 206 P.3d 1255 (2009).

would be through the insured's assignment. *See* CP 5 (Complaint alleging only bad faith [IFCA] damages on MBC's behalf "under the principle of subrogation"). In fact, IFCA allows a "first party claimant [insured]" to sue for "actual damages sustained" by an insured – not damages that the assignee (Trinity) might have suffered independent of the assignment:

> (1) 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, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

RCW 48.30.015. Given Trinity's unreserved defense, Ohio's coverage position could *never* result in harm to MBC. MBC simply did not suffer any damages by Trinity defending and indemnifying it as primary carrier and Ohio Casualty providing excess coverage. Trinity therefore cannot establish IFCA damages. Nor can Trinity re-cast the $225,000 payments it made as IFCA damages because the insured did not pay, and was not liable for, that amount. Trinity's payments cannot, as a matter of law, constitute "actual damages" from the perspective of the insured.

The insured did not ask or authorize Trinity to pursue extra-contractual statutory claims, and Trinity surely intends to keep its treble-damages windfall. Trinity, in seeking to pursue MBC's extra-contractual

claims, has placed Trinity's interests ahead of its insured's, and there is no reason that Washington law should affirm this act of carrier self-interest.[19]

III. TRINITY'S MISREPRESENTATION TO THE COURT BELOW THAT IT WAS AN "ASSIGNEE" OF ITS INSURED WARRANTS VACATING THE DEFAULT JUDGMENT.

Trinity does not deny that it told the trial court it owned MBC's statutory claims "as assignee" of MBC. Trinity now claims that it really meant "as subrogee" of MBC but argues that the difference is immaterial because it claims "assignment" means "subrogation." But as explained in *Mutual of Enumclaw*, *see* above, equitable subrogation is *not* assignment, and Trinity's claim is premised on equitable, not contractual, subrogation.

The difference is significant: if Trinity had an actual assignment, its right to bring its insured's cause of action would have at least been grounded in some legal precedent. However, Trinity now explains that its

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[19] As an example of Ohio Casualty's bid to re-cast the arguments in this case, Trinity portrays Ohio Casualty's argument as whether Trinity is a real party in interest. It even goes so far as to cite an opinion written by one of Ohio Casualty's attorneys when he was on the Washington Supreme Court, *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 969 P.2d 10 (1998). Brief of Respondent at 29-30. The citation is not only inapposite on the issue on review, it was to a footnote in a concurring opinion, a real reach by .Trinity. Similarly, Trinity cites to a law review article written by that same attorney in its brief at 34. The citation misses the point. Ohio Casualty is not arguing that Trinity is not the "real party interest," but that the trial court lacked subject matter jurisdiction over the case for purposes of CR 60(b)(5) because Trinity lacked the right to apply to the trial court for the legal relief it received. Just like a court lacks subject matter jurisdiction if a court granted relief beyond that which a party sought in its complaint, *In Re Marriage of Lesley*, 112 Wn.2d 612, 772 P.2d 1013 (1989), a court lacks jurisdiction to grant a party relief to which it is not entitled by law, as was true for Trinity here. As the Washington Supreme Court has noted in a case that predates the scholarly article cited by Trinity, "standing is a jurisdictional issue that can be raised for the first time on appeal." *Int'l Ass'n of Firefighters Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213 n.3, 45 P.3d 186 (2002)

claim was, however, grounded in a completely undisclosed and novel theory that primary carriers automatically obtain, through "equitable subrogation," their insureds' extra-contractual statutory causes of action. The trial court had no notice of this novel theory, and Ohio Casualty of course had no opportunity to respond. This type of gamesmanship – like Trinity's manipulation of the one-year rule of Rule 60(b)(1) – is exactly why default judgments are disfavored, and why the Washington Supreme Court has repeatedly states its preference that parties "have 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 should vacate the default judgment so that the actual merits of Trinity's claims may be considered.

IV. THE UNCERTAINTY OF TRINITY'S ALLEGED DAMAGES WARRANTED A HEARING AND FINDINGS BEFORE DEFAULT JUDGMENT WAS ENTERED.

The Court Commissioner awarded damages where the amount claimed was not certain. This violated the CR 55(b). *In re Marriage of Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985). When amounts are uncertain, the trial court must hold a hearing and enter findings of fact and conclusions of law prior to entering an order of default and judgment. CR 55(b). As the Supreme Court has cautioned, "[o]ur 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).

In its complaint, Trinity claimed damages from alleged CPA violations "in an amount to be proven at trial." CP 5. Damages awardable pursuant to the CPA are limited to "damage to business or property." *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). There are no allegations in the complaint or motion for order of default and judgment that identify damage to Trinity's, or MBC's, business or property. Rather, Trinity asked the Court Commissioner to award the statutory maximum treble damages of $25,000. There is no statement of whether the damages claimed for alleged CPA violations were $1 or $24,999—or somewhere in between.

The same defect extends to Trinity's IFCA claims. Trinity's Complaint alleges that "the above conduct damaged MBC in an amount to be proven at trial." CP 6. But despite this complete absence of certainty, Trinity obtained a default that contained no finding to support the award.

Because the damages claimed were uncertain, the Commissioner was required to hold a hearing on damages and issue findings of fact and conclusions of law before entering default and judgment. It did not, a procedural misstep requiring the equitable result of vacating the judgment.

V. BECAUSE OHIO CASUALTY SHOWED EXCUSABLE NEGLECT AND A PRIMA FACIE DEFENSE, THE DEFAULT JUDGMENT SHOULD HAVE BEEN OVERTURNED UNDER RULE 60(B)(1).

Trinity does not contest that Ohio Casualty's failure to answer was due to excusable neglect. Instead it devotes eight pages to arguing the merits of its equitable contribution claim, insisting that Ohio Casualty was

a "co-insurer," not an excess carrier. Brief of Respondent at 37-43. But Ohio Casualty was not required to *conclusively prove* the merits of its defense in it motion to overturn the default judgment; it was only required to provide "substantial evidence supporting a **prima facia** defense" to liability or damages. *White v. Holm,* 73 Wn.2d 348, 352, 438 P.2d 581 (1968) (emphasis added); *see also Little*, 160 at 704.

Ohio Casualty's coverage position was not only colorable, it was clearly correct. It is undisputed that MBC qualified as an additional insured under the policy of insurance issued to Cascade by Trinity. Under the Ohio Casualty policy, the "other insurance" provision mandates that the Ohio Casualty policy becomes excess since MBC was being defended under Trinity's policy. CP 132 (Ex. M. to Sweet Decl.) As excess, Ohio Casualty's duties to defend and indemnify are not triggered until the limits of Trinity's policy are exhausted.

Trinity's policy provides that an additional insured (such as MBC) will be afforded coverage when the alleged injury is caused "in whole or in part by" Cascade. CP 138 (Ex. N to Sweet Decl.) It is undisputed that the injuries in the underlying case were alleged to have been caused, in part, by Cascade's conduct. Therefore, Trinity—not Ohio Casualty—was the primary carrier with the duty to defend and indemnify MBC. This

obligation is a complete defense to Trinity's breach of contract, equitable contribution, and subrogation claims.

And as explained above, Ohio Casualty also has complete defenses to Trinity's extra-contractual claims. Trinity alleges that Ohio Casualty breached its duty of good faith and violated the CPA and IFCA by: "unreasonably refusing to defend," "unreasonably refusing to participate in settlement negotiations on behalf of MBC," and by "failing to comply with the requirements of WAC 284-30-360(3)." CP 5-6. Because it was Trinity, not Ohio Casualty, that had the duty to defend and indemnify, Trinity's extra-contractual claims are without merit and must fail.

Even if Ohio Casualty's coverage determination was incorrect, 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, 78 P.3d 1274 (2003). Ohio Casualty's coverage position, with regard to the defense and indemnity of MBC, is based on a reasonable interpretation of the policy provisions.

Further, to establish a claim for bad faith, violations of the CPA and IFCA, Trinity must establish damages caused by the alleged conduct. Here, Trinity has no independent extra-contractual claims. To succeed on its claims against Ohio Casualty, Trinity must first establish that MBC assigned its claims to Trinity. As explained above, Trinity did not obtain

an assignment and cannot pursue extra-contractual claims on MBC's behalf. Even if it could meet the threshold requirement, it must present evidence that MBC was damaged by Ohio Casualty's alleged failure to defend, indemnify, and respond. *Id.* Trinity has not met this burden. *Ledcor Indus. v. Mutual of Enumclaw*, 150 Wn. App. 1, 206 P.3d 1255 (2009).[20] Regardless of whether Ohio Casualty's decision to deny coverage was correct, MBC was not injured by Ohio Casualty's alleged failure to defend or indemnify.

Trinity is unapologetic about its deliberate manipulation of the one-year rule in an effort to make overturning the default judgment more difficult. While Trinity relies on *Friebe v. Supancheck*, 98 Wn. App. 260, 992 P.2d 1014, 1017 (1999), in support of its tactical delay, *Friebe* predates both *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000), and *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007), cases which clearly signaled the Washington Supreme Court's lack of tolerance for legal maneuvers that seeks to prevent courts from reaching the merits of a dispute. Given the long-standing disfavor of default judgments, such brazen gamesmanship should not be rewarded with a procedural

[20] In *Ledcor*, the court concluded that Mutual of Enumclaw acted in bad faith by not providing a defense. But the court refused to award bad faith damages because Ledcor could not provide evidence of how it was damaged by that conduct because another insurer had defended Ledcor. *Id.* at 11. Because Trinity provided both a defense and indemnity to MBC, MBC suffered no actual damages from Ohio Casualty's purported failure to defend or indemnify.

advantage. *See, e.g., Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

VI. TRINITY IS NOT ENTITLED TO SUPPLEMENTAL ATTORNEY'S FEES OR FEES ON APPEAL.

Trinity does not dispute that, if it has no standing to bring CPA or IFCA claims, it cannot recover attorney's fees under those statutes. Brief of Respondent at 50. Nor does Trinity dispute that fees are not available under its "equitable contribution" claim. *Id.* Any claim that Trinity would be entitled to a fee award under "equitable subrogation," independent from its standing to assert causes of action that expressly provide for the recovery of fees, is without basis. The *only* legal theories that Trinity asserted when it obtained the default judgment were MBC's statutory claims under the CPA and the IFLA. Trinity did not pursue its equitable contribution claim. Trinity's fee claim therefore stands or falls on its right to bring CPA and IFLA claims.

CONCLUSION

Based on the foregoing reasons, and those set out in Ohio Casualty's opening brief, 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 9th day of July, 2012.

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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:

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DATED at Seattle, Washington this 9th day of July, 2012.

Jennifer Hickman