NO. 67832-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE OHIO CASUALTY INSURANCE COMPANY,

Appellant,

v.

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

		PAGE
I.	Summary of Review	1
II.	Restatement of the Case	1
III.	Authority and Argument	4
	A. Standard of Review	4
	B. Ohio Casualty May Not Rely on CR 60(b)(1)	6
	1. There is nothing improper about waiting a year to execute on a default judgment	8
	2. The Court should not consider the waiver and estoppel issues, raised for the first time on appeal.	10
	3. Neither waiver not estoppel bar Trinity for asserting the one-year limit applicable to CR 60(b)(1).	11
	a. Waiver is inapplicable.	11
	b. Estoppel is not applicable.	15
	C. CR 60(b)(5) in inapplicable because the judgment is not void.	16
	1. Trinity has the right to assert bad faith claims via Subrogation.	17
	a. Trinity is subrogated to the rights of its insured, MBC.	18
	b. The Nature of Subrogation - it is not Contribution.	18
	c. A paying, subrogated insurer that has fully	

protected the insured owns the insured's bad faith, CPA and IFCA rights against the non-paying insurer that wrongly denied coverage. 20

2. A subrogated insurer is a real party in interest to assert the subrogated claim. 27
3. Even in Trinity "should have" included the insured's name on the caption as the nominal plaintiff, not doing so does not implicate jurisdiction and does not render the judgment void. 30

D. The trial court did not abuse its discretion in refusing to vacate the Judgment under CR 60(b)(4) – "Fraud, misrepresentation,or other misconduct of an adverse party." 35

E. Ohio's CR 60(b)(1) Arguments are untimely. But they are also unpersuasive. 36

1. Unmeritorious Defenses. 36

a. Ohio had a duty to defend and indemnify MBC. 37

b. Trinity had a right to assert bad faith / CPA / IFCA claims. 43

c. Ohio's coverage position was both wrong and unreasonable. 43

d. Ohio's incorrect denial caused harm. 44

e. No hearing on damages was required. 45

2. Inexcusable Neglect. 48

F. The trial court properly awarded fees to Trinity in this action. 49

G. Fees on appeal. 50

IV. Conclusion. 50

TABLE OF AUTHORITIES

Page

Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.,
36 Wn. App. 280, 673 P.2d 634 (1983)____________________ 9,10

Allstate Ins. Co. v. Bowen,
121 Wn. App. 879, 91 P.3d 897 (2004)____________________ 40

Am. Best Food, Inc. v. Alea London, Ltd.,
168 Wn. 2d 398, 229 P.3d 693 (2010)____________________ 39, 40

Bergren v. Adams County,
8 Wn.App. 853, 509 P.2d 661 (1973)____________________ 8, 36

Bjurstrom v. Campbell,
27 Wn. App. 449, 618 P.2d 533, 534 (1980)________________ 47

Bordeaux, Inc. v. Am. Safety Ins. Co.,
145 Wn. App. 687, 186 P.3d 1188 (2008)________________ 25, 26

Brickum Investment Co. v. *Vernham Corp.*,
46 Wn. App. 517, 731 P.2d 533 (1987)____________________ 35

Carle v. Earth Stove, Inc.,
35 Wn. App. 904, 670 P.2d 1086 (1983)____________________ 28

Cole v. Harveyland, LLC,
163 Wn. App. 199, 258 P.3d 70 (2011)____________________ 31

DiBlasi v. City of Seattle,
136 Wn.2d 865, 969 P.2d 10 (1998)____________________ 29

Doe v. Fife Mun. Court,
74 Wn. App. 444, 874 P.2d 182 (1994)____________________ 33

First State Ins. Co. v. Kemper Nat. Ins. Co.,
94 Wn. App. 602, 971 P.2d 953 (1999)____________________ 23

Friebe v. Supancheck,
98 Wn. App. 260, 992 P.2d 1014, 1017 (1999)______________ 7, 9

Hwang v. McMahill,
103 Wn. App. 945, 15 P.3d 172 (2000)____________________ 6

Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports,
146 Wn.2d 207, 45 P.3d 186 (2002)______________________ 30

J-U-B Engineers, Inc. v. Routsen,
69 Wn. App. 148, 848 P.2d 733 (1993)___________________ 46

Kaye v. Lowe's HIW, Inc.,
158 Wn. App. 320, 242 P.3d 27 (2010)___________________ 21

Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.,
150 Wn. App. 1, 206 P.3d 1255 (2009)___________________ 44, 46

Lee v. Western Processing Co., Inc.,
35 Wn. App. 466, 667 P.2d 638 (1983)___________________ 7

Little v. King, 160 Wn.2d 696, 161 P.3d 345 (2007)__________ 47

Lybbert v. Grant County, State of Wash.,
141 Wn.2d 29, 1 P.3d 1124 (2000)______________11, 12, 13, 14, 15

Marley v. Dep't of Labor & Indus. of State,
125 Wn.2d 533, 886 P.2d 189 (1994)____________________ 16, 32

Millers Cas. Ins. Co., of Texas v. Briggs,
100 Wn.2d 9, 665 P.2d 887, 890 (1983)__________________ 25

Mut. of Enumclaw Ins. Co. v. USF Ins. Co.,
164 Wn.2d 411, 191 P.3d 866 (2008)_________________18, 29, 36

Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.,
78 Wn. App. 707, 899 P.2d 6 (1995)_____________________ 33

Olympic Steamship,
117 Wn.2d 37, 811 P.2d 673 (1991)__________________36, 49, 50

Plese-Graham, LLC v. Loshbaugh,
164 Wn. App. 530, 269 P.3d 1038 (2011)_________________ 33

Prudential Prop. & Cas. Ins. Co. v. Lawrence,
45 Wn. App. 111, 724 P.2d 418 (1986)____________________ 42

Safeco Ins. Co. of Illinois v. Country Mutual Ins. Co.,
165 Wn. App. 1, 267 P.3d 540 (2011)____________________ 49

Seattle-First Nat. Bank v. Shoreline Concrete Co.,
91 Wn.2d 230, 588 P.2d 1308 (1978)____________________ 39

State v. Cardenas,
146 Wn.2d 400, 47 P.3d 127 (2002)____________________ 33

Tank v. *State Farm Fire & Casualty Co.*,
105 Wn.2d 381, 715 P.2d 1133 (1986)____________________ 20

Thomas v. Green, 32 Wn.App. 29, 645 P.2d 732 (1982)__________ 47

TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 165 P.3d 1271 (2007)__5, 21, 42, 49

Triplett v. Dairyland Ins. Co.,
12 Wn. App. 912, 532 P.2d 1177 (1975)__________________ 29

Truck Ins. Exch. of Farmers Ins. Group v. Century Indem. Co., 76 Wn. App. 527, 887 P.2d
455, 458 (1995)________________________________20, 22, 25, 27

Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.,
160 Wn. App. 912, 250 P.3d 121, 130 (2011)_______________ 50

U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc.,
104 Wn. App. 823, 16 P.3d 1278 (2001)___________________ 44

Werlinger v. Warner,
126 Wn. App. 342, 109 P.3d 22 (2005)____________________ 45

Williams v. Leone & Keeble, Inc.,
171 Wn.2d 726, 254 P.3d 818 (2011)______________________ 32

Woo v. Fireman's Fund Ins. Co.,
161 Wn.2d 43, 164 P.3d 454 (2007)______________________ 32

Young v. Clark,
149 Wn.2d 130, 134, 65 P.3d 1192 (2003) 32

United States District Court

Mid-Continent Cas. Co. v. Titan Const. Corp.,
2009 WL 2391527 (W.D.Wash.) 50

United States Supreme Court

United States v. Aetna Cas. & Sur. Co.,
338 U.S. 366, 70 S. Ct. 207, 215, 94 L. Ed. 171 (1949) 28

Ninth Circuit Court of Appeals

Nordstrom, Inc. v. Chubb & Son, Inc.,
54 F.3d 1424 (9th Cir. 1995) 46

Foreign Citations

National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc., 71 Cal. App.4th 35, 89 Cal.Rptr.3d 473, 487 (2009) 21

Other Citations

3A Wash. Prac., Rules Practice CR 17 (5th ed.) 28

3A Lewis H. Orland, et al., *Wash. Practice:* CR 17 (1992) 29

Karl B. Tegland, 4 Washington Practice at 13 47

Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U. L. Rev. 695 (1999) 34

RAP 18.1 50

RAP 2.5(a) 31

RCW 48.05.200 4, 13

RCW 48.30.015 4

RCW 52.31.010 39

Wash. Const. art. 4, § 6 42

I. Summary of the Argument

Ohio's appeal lacks merit. It urges that the trial court should have vacated a default judgment under CR 60(b)(1) after more than one year had passed, despite controlling authority that this is impermissible. The only basis on which it claims it is "entitled" to make this argument is that Trinity is equitably prevented from relying on that one-year limitation period because Trinity waited on purpose. This position, too, has been squarely rejected by Washington courts, which have held there is nothing improper about doing exactly that. The only other basis Ohio advances as a reason the judgment should be vacated is that it is "void" because Trinity was not entitled to assert its insured's common law and statutory bad faith causes of action in its position as subrogee. But this argument, too, has been directly rebuffed by on point authority holding that a paying, subrogated insurer is entitled to assert the insured's common law and statutory bad faith rights against a non-paying insurer. There is no colorable interpretation of the law under which this Court should reverse the trial court's refusal to vacate the default judgment.

II. Restatement of the Case

As described in Trinity's Complaint, Trinity insured Cascade Construction Co. ("Cascade"), a siding subcontractor building a Rite Aid in Kingston, Washington. CP 1-7. During construction, one of Cascade's

employees, Mr. Riley, was injured when he fell off scaffolding. Riley sued the general contractor, Millennium Building Co., Inc. ("MBC"), alleging that his injuries were the result of various negligent acts of *MBC* (ie, *not* Cascade). *Id.*, CP 107-108. MBC tendered to its insurer, Ohio Casualty, which initially agreed to defend. Ohio Casualty – purporting to act on behalf of its insured, MBC - then tendered MBC's defense to Trinity. CP 140-141. MBC was an additional insured under the policy Trinity issued to Cascade, and had a narrow slice of coverage from Trinity *only* for liability resulting from Cascade's "Acts or Omissions." CP 138.

Even though the Complaint alleged *only* acts and omissions of MBC, not Cascade, Trinity read the Complaint broadly (consistent with Washington law) and realized it was "conceivable" that some act or omission of Cascade could have played a role in the injury. CP 107-108. Thus Trinity accepted the tender, and agreed to share defense expenses with Ohio Casualty. CP 90. To Trinity's surprise, Ohio Casualty then abandoned its insured, and refused to participate in defense expenses. CP 110-111. Ohio Casualty contended that its insurance was "excess", and thus it had no duty to defend, because MBC was covered as an additional insured by Trinity. *Id.* Trinity repeatedly explained to Ohio Casualty that because the Complaint alleged only negligence (acts or omissions) of MBC, not Cascade, it was most probable that MBC did *not* have

additional insured coverage under the Trinity policy, in which case Ohio Casualty's policy was primary, not excess. CP 87, 107, 113. Trinity reminded Ohio Casualty that if it is even factually or legally *conceivable* that there might be a liability covered by Ohio Casualty's policy, Ohio Casualty was obligated to defend. CP 113. Ohio Casualty ignored that argument then, as it did at the trial court level and *continues* to do on appeal. Below it claimed, "It is undisputed that the injuries in the underlying case were alleged to have been caused, in part, by Cascade's conduct." CP 74. This statement was made up, and remains absolutely false. Now it claims that Trinity "admitted" that its policy covered MBC's liability, which is equally untrue. The merits of this claim are addressed in more detail below.

As alleged in the Complaint, Trinity had a contractual assignment of rights from MBC to recover any amounts paid under the policy if the insured had a right to recover that amount from a third party. CP 4. Even absent that contractual right, however, Trinity claimed equitable subgrogation to its insured's rights. *Id.* Standing in its insured's shoes, Trinity demanded that Ohio Casualty rejoin MBC's defense. Ohio refused. Standing in its insured's shoes, Trinity demanded that Ohio participate in the mediation between Riley and MBC. CP 115. Ohio refused, missing WAC deadlines in responding. CP 119. Standing alone, Trinity did what

insurance companies *are supposed to do* where there is any ambiguity regarding a defense tender: it defended MBC and when Ohio refused to show up at mediation, protected the insured by paying to settle the claims against it. CP 96. This payment completely protected MBC, and entirely discharged all of its alleged liability. CP 105. Ohio has *never* produced any evidence that any act or omission of Trinity's insured, Cascade, caused MBC's liability.

Asserting its insured's right to payment under RCW 48.30.015 (the Insurance Fair Conduct Act, or "IFCA")), thus qualifying as a "first party claimant" by statutory definition, Trinity gave Ohio notice that it was going to bring suit against Ohio unless Ohio agreed to assume its obligation to take care of its insured. CP 113. Ohio refused. Trinity then did *exactly what it promised it would*, and served Ohio with a Summons and Complaint by service on the Insurance Commissioner, precisely as prescribed by statute on May 12, 2010. RCW 48.05.200. CP 299-304. Just as it was supposed to, the Insurance Commissioner forwarded the process to Ohio's designated agent for service, Corporation Services, and received proof of delivery with Corporation Services' "received" stamp from May. CP 304. When Ohio failed to appear or answer by July, Trinity moved for an Order of Default and Default Judgment, requesting the cost of defending and indemnifying MBC, and treble damages under the

Insurance Fair Conduct Act and Consumer Protection Act. CP 17-21. This Motion was granted. CP 55-56. Trinity did absolutely nothing to "lull" Ohio into thinking it was not going to sue. Just the opposite, Trinity told Ohio that it *was* going to file suit in the IFCA letter. CP 113. Trinity has never disputed that it waited for a year to collect the judgment because it would be harder to set the default aside under CR 60 at that point.

Ohio brought a Motion to Vacate, which was opposed by Trinity, and denied by the trial court. CP 524. Ohio's appeal followed.

III. Authority and Argument

A. Standard of Review

There is no doubt that the judicial system prefers to resolve disputes on their merits rather than by default. However, if that were the only concern, there would be a rule that every default judgment could be vacated on motion of the defaulted party. That is not the rule.

> We also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules. As our Supreme Court recently noted, litigation is inherently formal. All parties are burdened by formal time limits and procedures.
>
> *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 199-200, 165 P.3d 1271 (2007) (*citations omitted)*

Our courts' policy of disfavoring default judgments is constrained

by applicable court rules, namely CR 60(b). Additionally, in ruling on a motion to vacate, the trial court is accorded broad discretion. "Resolution of a motion to vacate a default judgment is addressed to the sound discretion of the trial court. We will not disturb the trial court's disposition unless it clearly appears that the court abused its discretion or its exercise of discretion was manifestly unreasonable or based on untenable grounds or reasons." *Hwang v. McMahill*, 103 Wn. App. 945, 949-50, 15 P.3d 172 (2000). Trinity does not dispute this standard of review is inapplicable to the question of whether a judgment is "void" under CR 60(b)(5). As will be shown below, the trial court was well within its discretion in denying Ohio's motion to vacate, and the judgment is not void.

B. Ohio Casualty may not rely on CR 60(b)(1).

When applicable, CR 60(b)(1) gives the trial discretion to relieve a party from a final judgment on the basis of:

> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

CR 60(b) also provides that a motion to vacate, "shall be made within a reasonable time ***and for reasons (1), (2) or (3) not more than 1 year after the judgment***, order, or proceeding was entered or taken." *(emphasis added)*. While a Superior Court often has authority to

enlarge the time limitations in the Court Rules, CR 60(b) is a specifically designated exception to this rule: The Court "may not extend the time for taking any action under rule[] 60(b)." CR 6. In the case of *Friebe v. Supancheck*, 98 Wn.App. 260, 267, 992 P.2d 1014 (1999), this Court noted that the defendant's failure to appear and subsequent default judgment "may be attributed only to mistake, inadvertence, or excusable neglect under CR 60(b)(1), and relief under that section is precluded due to the one-year time limit." The court in *Lee v. Western Processing Co., Inc.*, 35 Wn.App. 466, 468-469, 667 P.2d 638 (1983) agreed:

> A motion to vacate a default judgment under CR 60(b)(1) must be brought within 1 year after the judgment was entered. . . Lee waited for the 1-year period to elapse before obtaining a writ of garnishment on January 19, 1981, thus denying Western the opportunity to base its motion on CR 60(b)(1).

In the case at bar, the Judgment against Ohio Casualty was entered on July 14, 2010. Ohio Casualty did not file its Motion to Vacate until August 24, 2011 – over one year later. Accordingly, Ohio Casualty is not entitled to vacate the judgment for any of the grounds provided in CR 60(b)(1): mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment. Ohio Casualty understands this perfectly, which explains the fact that much of its brief is a herculean effort to mask the fact that it seeks CR 60(b)(1) relief that is time barred.

For example, without even referring to CR 60(b)(1), the insurer asserts its "excusable neglect" and "meritorious defense" arguments, as though they were free-floating justifications for vacating a default judgment; they *are not*. "Excusable neglect" and a "meritorious defense" relate *only* to a Motion to Vacate based on CR 60(b)(1), which is not available to Ohio Casualty in the case. *Bergren v. Adams County,* 8 Wn.App. 853, 855, 509 P.2d 661 (1973).

Ohio attempts to solve this problem by arguing that Trinity is barred by the doctrines of wavier and estoppel from asserting the one-year time limit of CR 60(b)(1), but it does so without so much as acknowledging that its "meritorious defense" and "excusable neglect" arguments are irrelevant *unless and until* the Court were to rule in Ohio's favor on the "estoppel" and "wavier" arguments. The Court should not lose sight of the fact that *absent* waiver or estoppel, the one-year limitation on asserting a CR 60(b)(1) basis for vacating the Judgment in this case renders the "excusable neglect" and "meritorious defense" arguments without application. As will be discussed below, Trinity is fully entitled to rely on the one-year limit on the assertion of CR 60(b)(1).

1. There is nothing improper about waiting a year to execute on a default judgment.

Trinity has *never* hidden the fact that it waited one year to enforce

its Judgment because doing so makes that Judgment more difficult to vacate. Ohio Casualty's rhetorical flourishes ("calculated use of delay", "gamesmanship", "proudly admitted") cannot change the fact that Washington Courts (including this one) have firmly established that waiting a year to enforce a default judgment for *exactly* this reason is a legitimate tactic in our adversarial system. *Friebe v. Supancheck*, 98 Wn. App. 260, 267, 992 P.2d 1014, 1017 (1999). "The Supanchecks suggest that the Friebes attempted a "legal sleight-of-hand" in waiting over one year to collect on the default judgment. But waiting more than a year to execute a judgment is not characterized as unfair or deceptive." *Id.* *Accord*. *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wn. App. 280, 285-86, 673 P.2d 634 (1983): "Although Allison's counsel used the civil rules to her advantage, e.g., in waiting more than a year to execute the judgment, we decline to characterize such action as unfair or deceptive."

Below, Ohio Casualty cast this argument in different terms, not asserting either waiver or estoppel; it argued that Trinity's "failure" to inform its adversary of the Judgment within the first year constituted and "misconduct." CP 72. Acting well within its discretion, the trial court rejected this argument. Ohio's failure to argue that the trial court abused its discretion in making this determination should end this issue on its own.

It is not surprising that Ohio Casualty rebranded this argument on appeal, having hit the double hurdles of contrary caselaw directly on point and the trial court's discretionary rejection of its theory. Ohio Casualty simply jettisons this approach and constructs an *entirely new one on appeal*. This new approach, based on waiver and estoppel, is presented as entirely outside the confines of the court rule governing the vacation of judgments. To the extent that this argument a mere makeover of its unsuccessful "unfair and deceptive conduct" argument below, the Court should reject it based on *Supanchek, Allisons*, and the trial court's unchallenged, discretionary determination. Conversely, if Ohio Casualty Replies that there is really something "new" about these arguments, the Court should reject them for two reasons: 1) Ohio is not permitted to argue a theory it never presented to the trial court; and 2) Neither waiver nor estoppel apply to prevent Trinity from asserting the one-year limitation in this case. Each is addressed below.

2. The Court should not consider the waiver and estoppel issues, raised for the first time on appeal.

At no time did Ohio Casualty suggest to the trial court that Trinity had waived, or was estopped from asserting, the one-year limitation on CR 60(b)(1) assertions. "A ground for vacating a judgment under CR 60(b) will not be considered for the first time on appeal." *Allison v. Boondock's,*

Sundecker's & Greenthumb's, Inc., 36 Wn.App. at 284 (citation omitted). The trial court certainly did find that there was no misconduct in waiting a year to enforce the judgment, but it was not given an opportunity to reject the specific legal theories of waiver and estoppel by name. Ohio cannot show that the trial court manifestly abused its discretion by refusing to vacate based on an argument that was never presented.

3. Neither waiver nor estoppel bar Trinity from asserting the one-year limit applicable to CR 60(b)(1).

a. Waiver is inapplicable.

As a point of departure, no court in Washington or anywhere else has *ever* found that a plaintiff intentionally waiting a year to execute on a default judgment waived its right to assert the one-year limit on the defaulted defendant's assertion of CR 60(b)(1). This is so even though the issue of fairness has been asserted in this context on various occasions in Washington, as described above.

In support of its "waiver" theory, Ohio cites is *Lybbert v. Grant County, State of Wash*., 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000), which sets out the nature of this type of implied waiver:

> Under the doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous

> behavior. It can also occur if the defendant's counsel has been dilatory in asserting the defense.
>
> *Id. (citation omitted).*

An examination of the facts and the holding of *Lybbert* demonstrates that this type of waiver has absolutely no relevance to the case at bar. In *Lybbert*, the plaintiff sued Grant County for personal injury shortly before the statute of limitations ran, but failed to correctly serve the County pursuant to the statute. Without filing an Answer, the County, appeared and began defending the case as though service had been proper; this included issuing discovery and agreeing to participate in mediation. *Id*. The plaintiff served interrogatories on the County inquiring as to whether the County would assert any defects in service of process. The County failed to answer them for months. Then, after the statute of limitations would have barred re-filing the suit and correcting the service of process error, the County filed an Answer asserting improper service, and responded to the plaintiff's interrogatories by insisting on that defense. The County was granted summary judgment on that basis. On appeal, the plaintiff asserted that the County was barred from asserting the defective service defense because of waiver and estoppel.

With respect to waiver, the *Lybbert* court noted that the County had violated court rules by failing to Answer, and by delaying its responses to the plaintiff's discovery requests regarding process. The court

noted that it was precisely this dilatory conduct that deprived the plaintiff of its right to fix the service issue within the limitations period. Accordingly, the court ruled that the belatedly asserted defense was inconsistent with the County's previous litigation conduct, and that the County's attorneys were dilatory in asserting the defense; these two conclusions supported a finding of implied waiver.

The differences between *Lybbert* and the case at bar are many and obvious. Neither of the two touchstones of *Lybbert* waiver applies in this case. The first is whether Trinity's assertion of the one-year limitation on the availability of CR 60(b)(1) is inconsistent with Trinity's previous behavior. Unlike the County in *Lybbert*, which led the plaintiff along by engaging it in discovery and settlement discussions as though nothing were wrong, Trinity did absolutely nothing to lull Ohio Casualty into complacency on whether it could wait more than a year to move to vacate the default. Just the opposite. Trinity warned Ohio that it would bring suit in its IFCA letter. Trinity then properly served Ohio with a Summons and Complaint, which, in compliance with RCW 48.05.200, warned Ohio that a default judgment could be entered against it *without notice* unless it appeared and Answered within 40 days of service. CP 15-16. Unlike the County's active appearance and participation in the *Lybbert* litigation, Trinity did *nothing* inconsistent with its assertion of the one-year limit on

CR 60(b)(1). Because there was no previous, inconsistent behavior, there is no *Lybbert* waiver on this basis.

The second indicia of *Lybbert* wavier is whether "defendant's counsel has been dilatory in asserting the defense." Even presuming there is equivalence between a defendant's assertion of a defense and a plaintiff's simply not coaching a defendant that *its* right to vacate a judgment could be limited if it did not act in time (a stretch in itself), Trinity was in no way dilatory. Unlike the County in *Lybbert*, Trinity did not secure for itself an advantage by ignoring deadlines in the court rules for filing pleadings and serving discovery responses. The County had an *obligation* to assert those defenses if it intended to rely upon them. In contrast, here, the obligation to move to vacate the Judgment based on CR 60(b)(1) within one year was Ohio's. A party simply cannot be "dilatory" in performing an act which it has no obligation to perform. And our courts have repeatedly held that a plaintiff holding a default judgment has *no* obligation to counsel its adversary that the judgment's anniversary is approaching. To require that the default judgment be enforced within one year in order to preserve the defendant's potential claims under CR 60(b)(1), (2), and (3) would create a burden on the plaintiff that the Civil Rules do not impose. Even if the Court were to consider the issue of *Lybbert* waiver, raised for the first time on appeal, it is inapplicable to the

facts of this case.

b. Estoppel is not applicable.

As is the case with waiver, no court in Washington or elsewhere has ever applied estoppel to prevent a plaintiff with a default judgment from asserting the one-year limit on CR 60(b)(1). And the version of estoppel described in *Lybbert* is just as inapplicable as *Lybbert* waiver. The elements of equitable estoppel, as defined by the *Lybbert* court, are: (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Lybbert v. Grant County, State of Wash.*, 141 Wn.2d at 35. In *Lybbert*, the court found that equitable estoppel did *not* apply. Based on the facts of that case, the court ruled that two of the elements were met; 1) the County's litigation conduct during the nine months the case was pending was inconsistent with its later assertion of defective service, and 2) a dismissal would be injurious to the plaintiff because of the statute of limitations if the County were allowed to assert defective service. *Id.* However, the court determined that the third element – reasonable reliance – could not be found where the statute describing the proper method of service was equally available to both parties.

Again, the case at bar is not similar to *Lybbert,* and *Lybbert* estoppel is not appropriate here. Unlike *Lybbert*, *none* of the elements are present here. Trinity made no "admission, statement or act" inconsistent with its subsequent reliance on the one-year limitation on CR 60(b)(1). Second, no rule requires a plaintiff to give a defaulted defendant notice of a default judgment. The Summons itself warns the defendant that a default judgment can be entered *without notice* if the defendant fails to Answer. Therefore, Ohio could not have reasonably relied on Trinity to give it notice it was not entitled to. The Court should keep in mind that *even Ohio* is not suggesting that Trinity was required to notify it when judgment was entered; Ohio contends that it was reasonably relying on Trinity to give it notice, not required by law or court rule, of the judgment at some unspecified time between the time at which it was entered and one year later. There was no such reliance, and if there had been, it would not have been reasonable. Finally, there can be no injury to Ohio flowing from "allowing" Trinity to "repudiate" a prior act, statement or admission, when there is nothing for Trinity to repudiate. This case does not satisfy *all* of the required elements of equitable estoppel; it satisfies *none* of them.

C. CR 60(b)(5) in inapplicable because the judgment is not void.

There are only two types of defects which can lead to a void judgment. In the case of *Marley v. Dep't of Labor & Indus. of State*, 125

Wn. 2d 533, 541, 886 P.2d 189 (1994), the Washington Supreme Court ruled that "a court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim." In the case at bar, Trinity served Ohio Casualty exactly as is prescribed by statute, and Ohio Casualty makes no argument that the trial court lacked personal jurisdiction over it. The *only* issue presented by Ohio with respect to whether the judgment is "void" under CR 60(b)(5) is whether the trial court had subject matter jurisdiction over this case. As will be shown below, there was no lack of subject matter jurisdiction.

In making its "void for lack of subject matter jurisdiction" claim, Ohio strenuously argues that Trinity had no standing to assert bad faith, CPA or IFCA claims against it. This claim incorporates three sub-claims, each of which is worth unpacking. First, does a paying subrogated insurer have the right to assert the insured's bad faith, CPA and IFCA claims against the non-paying insurer? (Yes). Second, may a paying insurer bring the insured's claims in its own name, as the real party in interest? (Yes). Third, even if the paying insurer is not the real party in interest, could this sort of defect be the kind that deprives a court of subject matter jurisdiction, voiding any judgment it renders? (No). Trinity will separately address each of these issues below.

1. Trinity has the right to assert bad faith claims via subrogation.

a. Trinity is subrogated to the rights of its insured, MBC.

Ohio Casualty badly misconstrues the nature of subrogation, and from that misconstruction flows its assertion that there was a defect in Trinity's "standing" to assert the claims it did. In its brief, Ohio attempts to pigeonhole subrogation by treating it as if it were a cause of action – one with its own elements and measure of damages. But subrogation is not, itself, a cause of action; it is simply a mechanism of *conveying* a right. Under most circumstances, the term itself is synonymous with "assignment." *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn. 2d 411, 424, 191 P.3d 866 (2008).

b. The Nature of Subrogation - it is not Contribution.

In order to get traction asserting its "standing" argument, Ohio Casualty conflates the legal doctrines of subrogation and contribution, treating them as a single "cause of action." Nowhere in its brief does Ohio make any distinction between these two concepts, but that distinction is absolutely critical with respect to Trinity's right to assert bad faith, CPA and IFCA claims in the case at bar. In *Mutual of Enumclaw,* the Supreme Court explained how each of these principles operates:

> **Equitable contribution** refers to the right of one party to recover from another party for a common liability. In the context of insurance law, contribution allows an insurer to recover from another insurer where both are independently obligated to indemnify or defend the same loss. Importantly,

> contribution is a right of the insurer and is independent of the rights of the insured. The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other. Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden. . .
>
> **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. Subrogation has two distinct types: conventional subrogation, which arises by contract, and equitable subrogation, which arises by operation of law.
>
> Because conventional subrogation can arise only by agreement, some jurisdictions have found it to be synonymous with assignment. An insurer entitled to subrogation "stands in the shoes" of the insured and is entitled to the same rights and subject to the same defenses as the insured. The effect of assignment under Washington law is substantially the same: "An assignee steps into the shoes of the assignor, and has all of the rights of the assignor."
> *Id. at* 419-23 (emphasis added, citations omitted)

As was the case in *Mutual of Enumclaw,* Trinity alleged, in the alternative, subrogation to the insured's rights (both conventional and equitable), and its own right of contribution. If Trinity had *only* asserted equitable *contribution*, Ohio would be right that Trinity would not be entitled to assert the insured's bad faith, CPA and IFCA claim, because contribution is the right of the insurer and is "independent of the rights of

the insured[1]." Thus, as noted by Ohio, in a pure claim for equitable contribution, the paying insurer is a "[t]hird party claimant[] [that] 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). Trinity did not, however, assert only contribution; it also asserted the insured's rights through subrogation, and it was upon these rights that the Judgment was properly granted.

> c. *A paying, subrogated insurer that has fully protected the insured owns the insured's bad faith, CPA and IFCA rights against the non-paying insurer that wrongly denied coverage.*

While contribution is a right of action available to the insurer directly, in its status as insurer, subrogation is an animal of an entirely different stripe. In the case at bar, Trinity alleged it was both contractually (conventionally) and equitably subrogated to MBC's rights against Ohio. On appeal, for the first time, Ohio challenges whether Trinity *even had* a right to contractual subrogation. This argument is irrelevant (because Trinity also alleged, and was entitled to, equitable subrogation to the same effect[2]), and distasteful (because Ohio has had a copy of the entire Trinity

[1] This would, however, be at most an error of law, not a jurisdiction-depriving circumstance. More on this topic below.

[2] "Equitable subrogation is a legal fiction whereby a person who pays a debt for which another is primarily responsible is subrogated to the rights and remedies of the other." *Truck Ins. Exch. of Farmers Ins. Group v. Century Indem. Co.*, 76 Wn. App. 527, 530,

policy containing the subrogation provisions since at least November 2008. CP 421.) Trinity asserted that it had a contractual right to subrogation pursuant to the terms of the policy in its Complaint. CP 4. Ohio's failure to Answer was an admission of this fact. *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 326, 242 P.3d 27 (2010). As the party moving to vacate a default judgment, it was *Ohio*'s burden to present evidence of defenses. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 202, 165 P.3d 1271 (2007). This Ohio could easily have done, had there been any such *actual* absence of a subrogation provision in the policy. Instead, at the trial court, Ohio challenged *only* whether Trinity had a contractual assignment of bad faith, CPA and IFCA claims, not a contractual assignment of the insured's right to recover defense and indemnity expenses[3]. Of course, this was a challenge Trinity could have easily overcome if Ohio had made it.

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887 P.2d 455 (1995). "When the requirements for equitable subrogation are satisfied, actual assignment of the cause of action from the insured to the insurer is unnecessary. The subrogee has a right to subrogation that is independent of his or her contractual rights." *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.*, 171 Cal.App.4th 35, 55, 89 Cal.Rptr.3d 473, 487 (2009)

[3] Ohio assured the trial court that it could "presume" the Trinity policy contained this "common" subrogation provision:

> If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

Expected to be designated CP 602.

Ohio is a good guesser. Or really, a good "rememberer", since it presumably read the copy of the policy Trinity provided to it. CP 87.

Happily, nothing in this appeal turns on Ohio's new allegation, because 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 claims against non-paying insurers[4]. The real argument is not whether Trinity had a contractual right to subrogation (it did), but whether that right was stripped of the corresponding common law and statutory duty of good faith on the part of Ohio, effectively relieving Ohio of this duty simply because someone other than the insured was "standing in the insured's shoes" requesting payments to which the insured was entitled. Differently stated, is a non-paying insurer immune from bad faith claims just because the person seeking covered defense and indemnity expenses is the insured's assignee / subrogee? Ohio demands exactly such immunity, representing to the Court that there is ***no authority*** for the proposition that statutory bad faith claims can transfer by operation of law in the context of subrogation. *Brief of Appellant at 28.*

This bold claim is simply incorrect. This feature of subrogation is not exotic; it is well-established in Washington. *Truck Ins. Exch. of*

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[4] *Truck Ins. v. Century Indem.*, 76 Wn. App. 527.

Farmers Ins. Group v. Century Indem. Co., 76 Wn. App. 527, 530, 887 P.2d 455 (1995). In that case, the court held that the excess insurer, which was equitably subrogated to this insured's rights ***(there was no formal assignment)*** was entitled to assert the insured's bad faith claims against the primary carrier. The court rejected the defendant's contention that the excess carrier was prohibited from bringing bad faith claims because it was a "third party", noting that the rights which had been subrogated were those *of the insured*, and the excess carrier was standing in the insured's shoes. *Id.*

Subsequently, Division I of this Court expanded this ruling. *First State Ins. Co. v. Kemper Nat. Ins. Co.*, 94 Wn. App. 602, 615, 971 P.2d 953 (1999). In *First State*, the insured was Great Western, which owned property on which Powell was accidentally electrocuted. Powell sued Great Western, which tendered to its primary insurer, Lumberman's Mutual, which accepted and appointed defense counsel. Great Western also had an excess policy with First State. The policy limits were $1 million and $5 million, respectively. The jury awarded Powell $2 million. Lumberman's tendered its million to First State, and First State paid the rest. Believing that the defense had been dramatically mishandled by Lumberman's, First State subsequently sued Lumberman's for bad faith, negligence, misrepresentation, and violation of the CPA. One of

Lumberman's defenses was that First State had no right to assert the CPA claim; the trial court agreed with Lumberman's, dismissing the CPA claim on that basis. This Court reversed, holding that First State's position as the equitable subrogee (again there was ***no express assignment of the insured's rights***) entitled First State to assert the insured's causes of action against Lumberman's, *including* the CPA claim.

> **Because the insurance company is standing in the shoes of the insured consumer, it logically follows that it may pursue the rights of its insured. . .** A majority of cases from other jurisdictions hold as we do that, under the doctrine of equitable subrogation, the duty a primary insurer owes an excess insurer is identical to that owed the insured.
>
> As the equitable subrogee to Great Western's rights, First State may proceed with its claim that Lumbermens' failure to settle with the Powells violated the CPA.
> *Id at* 609-12 (*emphasis added, citations omitted*)

First State completely undoes the most basic foundational element of Ohio's position in this appeal – that statutory bad faith claims cannot be transferred by operation of law. *First State* confirms the legal basis for Trinity's assertion that it was "entitled to assert MBC's claim for insurer bad faith against Ohio Casualty under the principle of subrogation." Ohio simply overlooks or chooses to ignore the nature of subrogation under Washington law.

Similarly, Ohio assertions that "Claims by a paying insurer against

a non-paying insurer are limited to the amount paid." *Brief of Appellant at 27.* That statement is categorically inconsistent with this Court's ruling in *First State* that the "paying insurer" was entitled to assert CPA treble damages against the "non-paying insurer," *and* was entitled to do so *without* an express assignment of rights from the insured. There is not any basis for the Court to overrule established precedent[5].

In an attempt to silently side-step these holdings, Ohio cites the case of *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 689, 186 P.3d 1188 (2008). *Bordeau* is not on point. In *Bordeaux*, the insured condominium developer (Bordeaux) was sued for construction defects. American Safety accepted Bordeaux's tender of defense, but when it came time to settle with the homeowners association, the insurer insisted that Bordeaux first contribute its $100,000 self-insured retention. Bordeaux did so, and American Safety then contributed an additional $318,000. In the

[5] Ohio may argue that the fact that the paying insurers in *Truck* and *First State* were excess insurers, whereas Trinity was the additional insurer and Ohio was the primary insurer. If it does, this is a distinction without a difference. Under the facts of this case, Trinity was equitably subrogated to Millennium's claims against Ohio, as the term "equitably subrogated" is used in both *Truck* and *State Farm*. The status of excess insurer as equitable subrogee is simply a subset of equitable subrogation in general. *Millers Cas. Ins. Co., of Texas v. Briggs*, 100 Wn.2d 9, 13-14, 665 P.2d 887, 890 (1983). Here, Trinity meets this requirement. *Truck Ins. Exch. of Farmers Ins. Group v. Century Indem. Co.*, 76 Wn. App. 527, 530-31, 887 P.2d 455, 458 (1995). Most importantly, Trinity played the same role as the paying insurers in those cases; it stepped in to protect the insured by filling a void wrongly created by the non-paying insurer, and is consequently entitled to step into the insured's shoes to recover. The fact that the insurer that actually paid the bill on behalf of the insured was not an "excess" insurer does not result in a watered down version of subrogation.

meantime, Bordeaux had successfully recovered a small sum from the subcontractors who were responsible for the property damage. American Safety claimed that *it* was entitled to first-dollar priority to the subcontractor recovery (which Bordeaux held in trust, pending the outcome of the coverage lawsuit). That is to say, American Safety asserted that its position of equitable subrogee trumped the insured's right to recover the first $100,000 – the insured's self-insured retention[6].

This Court agreed with Bordeaux, that the first $100,000 of the subcontractor money belonged to the insured under the "made whole" doctrine. *Id.* The "made whole" doctrine holds that the insured is entitled to be made whole from downstream recovery *before* the insurer recovers its payment. Thus in that context, this Court stated, "Nothing in the American Safety contracts gives it the right to subrogation for sums that it did not pay, such as the SIRs. In fact, the subrogation provision clearly only allows American Safety to recover payments it actually made." *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. at 696.

Ohio seizes on this quote for the proposition that a paying insurer is not entitled to assert a statutory damages multiplier against a non-paying insurer under the theory of subrogation, because the paying insurer is

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[6] The Opinion in *Bordeaux* does not specify how much money was available in the subcontractor recovery trust fund, but it was not enough to reimburse both the insurer and the insured, or this argument would never have taken place.

allegedly allowed to recover only "payments it actually made." Even a cursory reading of *Bordeaux* reveals that it was addressing *only* the issue of whether an insurer was entitled push ahead of its insured in line, such that its subrogation interest trumped the insured's right to reimbursement. This is not that case. *Bordeaux* does not speak at all to the issue of whether an equitably subrogated paying insurer who has *entirely* protected the insured has the right to assert the insured's causes of action for bad faith, CPA and IFCA damages against a non-paying insurer. That issue was raised and settled in *First State*, and is not subject to reasonable dispute. The Court should reject Ohio's position that Trinity had no right to assert bad faith, CPA and IFCA[7] claims.

2. *A subrogated insurer is a real party in interest to assert the subrogated claim.*

Trinity showed above that a fully subrogated, paying insurer has the right to assert its insured's bad faith, CPA and IFCA claims against a non-paying co-insurer. The issue presented by Ohio is not "standing" in the "right to challenge a statute" sort of sense; it a question of "real party

[7] The IFCA, which took effect in 2007, was obviously not at issue in either *First State* or *Truck*. There is no basis to treat the IFCA any differently from the CPA for purposes of determining whether the statutory rights transfer along with the entitlement to payment under the non-paying insurer's policy. Either the paying insurer is "standing in the shoes" of the insured, or it is not. Clearly, this Court has held that it is.

in interest" under CR 17[8]. *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 908, 670 P.2d 1086 (1983). In *Carle*, Foremost, the insurer, brought suit in the name of its insured, as subrogee, against a third party. The defendant moved to make Foremost a party under CR 17. The court ruled that once an insurer has paid even a part of the insured's claim, both the insured *and* the subrogated insurer are real parties in interest, and each may bring the action in its own name; the other may be joined as appropriate on the defendant's motion. *Id.* The court found that the insurer should be added as a real party in interest if it "is found to be the moving force and to have exercised substantial control of this action. . ." *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 908, 670 P.2d 1086 (1983). In coming to this conclusion, *Carle* relied on the United States Supreme Court case of *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 380-81, 70 S. Ct. 207, 215, 94 L. Ed. 171 (1949). There, the court ruled that where a subrogated insurer had entirely protected the insured, it was *mandatory* for the insurer to bring suit in its own name: "If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." *Id.* (citation omitted). Under the holding of

[8] CR 17 states that every action shall be prosecuted in the name of the real party in interest. In contrast, "Standing to sue is a separate doctrine and is most commonly used to determine whether a party may raise a constitutional challenge to some governmental action." 3A Wash. Prac., Rules Practice CR 17 (5th ed.)

Carle, Trinity is the "moving force" exercising "substantial control" over this action (as is its right), and is a real party in interest.

Whether it is mandatory or optional to bring suit in its own name, a fully subrogated insurer is a real party in interest. *Triplett v. Dairyland Ins. Co.*, 12 Wn. App. 912, 914-15, 532 P.2d 1177 (1975) (holding that a fully subrogated insurer is the real party in interest, and has the right to bring suit in its own name against other carrier under CR 17). This is exactly what the insurer actually did in *Mut. of Enumclaw Ins. Co. v. USF Ins.*, *Bordeaux*, and *First State*. In any event, doing so is both legally correct, and commonplace[9].

The fact that a fully subrogated insurer is a real party in interest was specifically noted by opposing counsel, Justice Talmadge, when writing his concurring opinion in *DiBlasi v. City of Seattle*, 136 Wn. 2d 865, 887, 969 P.2d 10 (1998). There, the DiBlasis were the insureds who had been fully compensated by the insurer, Safeco. Although the DiBlasis were the nominal plaintiffs against the third party defendant, Justice Talmadge noted, "The DiBlasis are not the real parties in interest in this

[9] Some courts have held that the insured *also* can be a real party in interest, where the subrogated insurer sues in the insured's name (or, in the case of partial subrogation, at least partly on its own behalf). This is not contrary to Trinity's position; there can be more than one "real party in interest" in any particular case: "General doctrine recognizes that there may be more than one real party in interest." 3A Lewis H. Orland, et al., *Wash. Practice:* CR 17, at 425 (1992). The context of subrogation is one where more than one party could be denominated "plaintiff."

case. Ms. DiBlasi denied having any claims. Safeco appears to be a subrogee, although it did not so identify itself in the complaint." The same logic compels the result that Trinity is the real party in interest here.

> 3. *Even if Trinity "should have" included the insured's name on the caption as the nominal plaintiff, not doing so does not implicate jurisdiction and does not render the judgment void.*

The final step in Ohio's flawed logic regarding "standing" is its proposition that the alleged "defect" in this case was more than a legal error; Ohio contends it cut to the very heart of the Court's jurisdiction. This is an example of the "law of the hammer": when all one has is a hammer, everything looks like a nail. It should be of no surprise that the post-one-year availability of CR 60(b)(5) to Ohio has produced an argument that the Judgment is "void" for lack of jurisdiction. Characterizing supposed legal errors as "jurisdictional" to circumvent the finality of a judgment is nothing new, nor is latching on to casual comments in judicial opinions that suggest that one rule or another touches on the court's "jurisdiction." For example, in the case at bar, Ohio cites a footnote in *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn. 2d 207, 45 P.3d 186 (2002):

> Although Airport raised the standing issue as an affirmative defense in its answer to Union's complaint, it failed to assert it on summary judgment. The Court of Appeals, however, correctly observed that standing is a jurisdictional issue that

can be raised for the first time on appeal.

Id. at, 212 fn.3

On this basis, Ohio concludes that Trinity's alleged lack of "standing" deprived the Court of subject matter jurisdiction, thus rendering the Judgment void. The use of precisely this type of "jurisdictional" authority was denounced in this Court's very recent opinion in *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 208-09, 258 P.3d 70 (2011). In that case, Harveyland attempted to assert a statutory defense, for the first time on appeal, to a statutory discrimination claim. The defense appeared conclusive – Harveyland had fewer than eight employees, and therefore did not meet the definition of a suable "employer" under the act. Harveyland did exactly what Ohio does here, citing a "jurisdictional" footnote in another case suggesting that the failure to meet a definition contained in a statutory cause of action could be raised for the first time on appeal because it went to "jurisdiction." This Court rejected that notion in a strongly worded opinion. It held that because the Court has authority to review a new issue on appeal under a variety of circumstances (RAP 2.5(a)), such casual "drive-by jurisdictional rulings" are not precedential. *Id.*

The Court noted that the United States Supreme Court, as well as Washington's, have urged great caution with respect to the use of

"jurisdictional" language, the latter cautioning, "If the phrase [subject matter jurisdiction] is to maintain its rightfully sweeping definition, it must not be reduced to signifying that a court has acted without error." *Id.* This Court expressed its frustration that despite an apparent sensitivity to the issue, the problem still occasionally crops up in undesirable places:

> *Despite these cautionary rulings, the terminology of subject matter jurisdiction continues to pop up outside its boundaries like a jurisprudential form of tansy ragwort. This case provides us with one more opportunity to stamp it out.*
>
> *Id.* at 208. (emphasis added)

The Court then proceeded to a properly rigorous discussion of "subject matter jurisdiction." The touchstone for determining whether the Court has subject matter jurisdiction is the type of controversy. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 254 P.3d 818 (2011). The very broad subject matter jurisdiction of the superior court is defined by the state constitution, not by statutes. Wash. Const. art. 4, § 6; *Young v. Clark,* 149 Wn.2d 130, 134, 65 P.3d 1192 (2003); *Williams v. Leone & Keeble, Inc.*, 171 Wash.2d 726, 254 P.3d 818, 821 (2011)." "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Marley,* 125 Wn.2d at 539. Washington State Superior Courts undoubtedly have jurisdiction over torts (bad faith) and statutory torts (CPA and IFCA).

Wash. Const. art. 4, § 6. There is no doubt that the Superior Court had subject matter jurisdiction in the case at bar[10].

Indeed, rather than depriving the Court of power to act, such alleged CR 17 "real party in interest" defects are waived if not timely asserted. Where one party is nothing more that a "conduit" to the legal right of action of another, any error in properly identifying the "real party in interest" as the "proper" plaintiff is waived if the defendant fails to object promptly. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). *Accord Plese-Graham, LLC v. Loshbaugh,* 164 Wn. App. 530, 538, 269 P.3d 1038 (2011) (real party in interest requirement can be waived). Other cases agree: "If the issue of standing is not raised to the trial court, it may not be considered on appeal." *State v. Cardenas*, 146 Wn.2d 400, 404–05, 47 P.3d 127 (2002) (citing *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), overruled on other grounds by Tyler Pipe Indus., Inc. v. Dep't of Revenue, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987)).

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[10] *Accord Doe v. Fife Mun. Court*, 74 Wn. App. 444, 449-50, 874 P.2d 182 (1994). "There are many rights belonging to litigants-rights which a court may not properly deny, and yet if denied, they do not render the judgment void. Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith."

Academic commentary concurs. While a sitting member of the Supreme Court, Justice Talmadge penned a law review article regarding the limits of judicial power. In that article, he discussed "standing" as a requirement for Washington courts' exercise of subject matter jurisdiction:

> In federal courts, standing is a requirement for subject matter jurisdiction. In Washington, however, the parties may waive the question of standing by not submitting it to the trial court. If standing were a question of subject matter jurisdiction in Washington, the parties could not waive it and an appellate court could hear it anytime or decide it sua sponte.
>
> Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 Seattle U. L. Rev. 695, 718-19 (1999).

Finally, the Court should be mindful of the reported decisions in which equitably subrogated insurers *actually* asserted the insured's rights, including statutory remedies, in their own names. A ruling that these insurers failed to invoke the courts' subject matter jurisdiction would void the judgments in those cases as surely as it would void the Judgment in this one. As Ohio correctly notes, a truly "void" judgment can be set aside at any time. In this case, Trinity had the right to assert the claims it did. But in any event, a novel promotion of the issue whether a subgrogated insurer can be a "real party in interest" to "jurisdictional status" would be the wrong result in this case, and unnecessarily threaten the finality of judgments in other cases. The Judgment is not void; the trial court

properly rejected this CR 60(b)(5) argument. This Court should affirm[11].

D. The trial court did not abuse its discretion in refusing to vacate the Judgment under CR 60(b)(4) – "Fraud, misrepresentation, or other misconduct of an adverse party."

Ohio's second argument under CR 60(b) is that the trial court erred in refusing to vacate the Judgment because of "misrepresentation or other misconduct" by Trinity in obtaining the default judgment. This is the *only* other basis for vacation argued by Ohio that would not be subject to the one-year limitations period. Ohio alleges that Trinity's assertion, in its Motion for Default Judgment, that it was acting as MBC's assignee in this action was a "misrepresentation" to the trial court. The trial court's rejection of Ohio's CR 60(b)(4) argument will not be disturbed absent a manifest abuse of discretion. Ohio points to none.

Trinity was explicit in its Motion for Default Judgment that Trinity defended and indemnified MBC where those expenses should have been borne by Ohio, and that Ohio abandoned its insured without justification. CP 20. Those facts alone are sufficient to support a judgment on the basis of equitable subrogation, and misrepresented *nothing*. Ohio focuses its

[11] Ohio cites *Brickum Investment Co. v. Vernham Corp.*, 46 Wn. App. 517, 731 P.2d 533 (1987) as an example of the trial court lacking subject matter jurisdiction. *Brickum* is not on point. It addresses the limitations on the superior court's specialized statutory jurisdiction over unlawful detainer claims. In the case at bar, the superior court was acting within its general, constitutional jurisdiction, not its expedited, statutorily created unlawful detainer jurisdiction.

attention on the word "assignment" in the *Olympic Steamship* fee section of the brief, calling this particular word the "lynchpin" of the entire Motion. There was nothing improper about using the word "assignment", which our Supreme Court has ruled is synonymous (in this context) with conventional subrogation (*Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d at 423). Regardless of whether Trinity was equitably or conventionally subrogated (it was both), it is absurd to suggest that the use of the word "assignee" instead of the word "subrogee" was a "misrepresentation" by Trinity that would merit vacating the judgment. Ohio would have been free to (incorrectly) challenge Trinity's position as subrogee (or "assignee") on the merits, but its suggestion that this amounts to "misconduct" or a "misrepresentation" presses the boundaries of responsible argument. The Court should reject this new CR 60(b)(4) argument, as did the trial court well within its sound discretion.

E. Ohio's CR 60(b)(1) Arguments are untimely. But they are also unpersuasive.

1. Unmeritorious Defenses

Whether Ohio has a meritorious defense would be relevant only under CR 60(b)(1). *Bergren v. Adams County,* 8 Wn.App. 853, 855, 509 P.2d 661 (1973). Because more than one year elapsed, the relative merit of Ohio's defenses is not properly at issue. *Id.* Nevertheless, Ohio's defenses

are not meritorious. They are the following: 1) Ohio had no obligation to the insured because its policy was "excess"; 2) Trinity was not entitled to assert bad faith / CPA / IFCA claims (again); 3) Ohio's coverage position, even if wrong, was reasonable; 4) the insured suffered no harm; and 5) A hearing on damages was "mandatory" but did not take place. Each is addressed below.

a. Ohio had a duty to defend and indemnify MBC.

It is surprising that Ohio *continues* to assert that its policy was excess in this case, and that it had no duty to defend or indemnify its own insured, MBC. Ohio is incorrect. Ohio was the direct insurer of the defendant MBC in the underlying case, and Trinity insured the subcontractor by whom Mr. Riley was employed, Cascade. Ohio's "excess" argument is based on this language in its policy:

> **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, 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 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."

In a nutshell, Ohio's policy was excess in the context of this claim *only* if Trinity's policy was "available" to MBC, *covering the actual*

liability of MBC to Mr. Riley. Only once Ohio's insurance "is excess" does the second paragraph become operative, relieving Ohio of its duty to defend; Ohio is not exculpated just because another insurer is defending. Thus, the question of whether Ohio had a duty to defend devolves entirely into whether Trinity's policy covered Millenium's ultimate liability to Mr. Riley. Ohio's argument that the fact that Trinity actually provided MBC a defense *makes* Ohio's policy excess is flawed; Trinity's policy either covered MBC's *actual* liability to Mr. Riley (in which case the Ohio is excess) or it does not (in which case Ohio is primary). The scope of Trinity's additional insured endorsement is therefore highly relevant:

> **A. 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 . . .
>
> CP 138.

There is no dispute that Cascade was required to name MBC as an additional insured with respect to this project. However, this endorsement would only provide MBC coverage if Mr. Riley's injuries were caused, in

whole on in part, by *Cascade's* acts or omissions[12]. Because of the Industrial Insurance Act (RCW 52.31.010) Mr. Riley was barred from suing Trinity's insured, Cascade; the only claims he was allowed to make were against MBC[13]. As Trinity correctly alleged, the complaint against MBC did not specify what caused the accident. CP 1-7. Trinity's policy could only provide coverage if the accident were "caused, in whole or in part" by *Cascade's* acts or omissions. As Trinity alleged, on the face of the complaint, there was no basis to suspect that it was. CP 4.

In Washington, however, the duty to defend is triggered if it is "conceivable" that there is any factual scenario, consistent with the complaint, under which the claimant *could* establish liability within the scope of the policy. *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn. 2d 398, 229 P.3d 693 (2010). In deciding whether to accept or deny a tender of defense, an insurer may consider *only* the contents of the complaint and the contents of its policy. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn. 2d 43, 164 P.3d 454 (2007). In contrast, the duty to indemnify only requires the insurer to pay for *established* liability that *actually* comes within the scope

[12] Note that this endorsement applies to injuries "caused" by the named insured. This is a considerably narrower scope than other common endorsements that cover the additional insured for liability "arising out of the named insured's operations."

[13] "In effect, the Act 'immunizes', from judicial jurisdiction, all tort actions which are premised upon the 'fault' of the employer vis-a-vis the employee." *Seattle-First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn. 2d 230, 242, 588 P.2d 1308 (1978)

of the policy, which is determined by the outcome of the litigation. *Am. Best Food, Supra.* The duty to defend is distinct from, and much broader than, the duty to indemnify. *Id.* at 404. It is not uncommon for an insurer to have a duty to defend but not to indemnify. *See, eg. Allstate Ins. Co. v. Bowen,* 121 Wn. App. 879, 881, 91 P.3d 897 (2004).

Here, although the complaint was silent as to the cause of the accident, and named *MBC alone*, Trinity could not categorically rule out the possibility that Mr. Riley *could* show some unstated fact that something that Cascade did was in some way a cause of his injury. When Ohio "tendered" MBC's claim to Trinity, Trinity scrupulously followed Washington law, resolved this major factual doubt in favor of the insured, erred on the side of protecting the insured, and provided a defense.

Conversely, in order relieve itself of its duty to defend, Ohio would have to show that it was *"inconceivable"* that its policy was primary; to do so, it would have to show that it was "*inconceivable*" that Cascade was *not* the cause of Mr. Riley's injury. Ohio's excess provision could only be triggered if Trinity's policy covered MBC's actual liability for Mr. Riley's damages. And that would only have been the case if, during the course of the underlying lawsuit, Mr. Riley had established that MBC were liable for something caused by Cascade. Whereas Trinity took the factual leap of faith required by our courts and provided a defense, even though the

complaint did not appear to allege a covered liability, Ohio did the opposite. It read the complaint alleging causes of action against MBC *only*, and refused to defend or indemnify based on nothing but its own speculation that Cascade caused Mr. Riley's injuries. In doing so, it breached its duty to defend. *Woo, surpa.*

Ohio's sole rebuttal to this argument is that Trinity "admitted" that its coverage was primary, and that Ohio's excess provision is automatically triggered by this "admission." This is nonsense. Trinity has *never* "admitted" that its policy provided coverage to MBC for its liability to Mr. Riley. Trinity has consistently taken the position that, unless the factual development of Mr. Riley's case generated some basis to believe that Cascade's acts or omissions were the cause of the accident (which it did not), Ohio alone was responsible for indemnification. CP 113. Trinity's position that Ohio was "co-primary, *at least with respect to the defense obligation*" was a reflection of this binary coverage situation; it was either Trinity *or* Ohio that would be responsible for indemnity. "Co-primary" does not mean that both policies covered the liability; in this context, it indicated only that it was factually conceivable that either policy (but not both) *could* be called on for indemnification. It is this possibility which is the beginning and the end of determining an insurer's duty to defend. Intentionally or otherwise, Ohio misleads the Court when

it states, "Trinity and Ohio Casualty agreed that Trinity owed primary insurance coverage for the defense and indemnification of a worksite personal injury lawsuit." *Brief of Appellant at 4*. Trinity did not admit that its policy covered MBC's liability to Mr. Riley.

Trinity invited Ohio to attend the mediation at which the case ultimately settled, but Ohio refused to do so. For purposes of insurance coverage, where a settlement settles lawsuit, the "claims" settled are exactly those that were asserted in the complaint. *Prudential Prop. & Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 120, 724 P.2d 418 (1986). Because there remained no indication that Cascade's acts or omissions caused the injury, Ohio was responsible to indemnify. But Trinity refused to allow Ohio's recalcitrance to jeopardize the insured's interests. Trinity paid the bill, and pursued Ohio's breach via subrogation.

Because the party seeking to establish a meritorious defense has the burden of establishing the facts on which that defense rests, Ohio was required to identify facts showing that Mr. Riley's injuries were caused by Cascade. *TMT v. Petco, supra*. With respect to the duty to defend, Ohio did not dispute Trinity's characterization of Riley's allegations in the complaint against MBC, or it would have submitted a copy for the trial court's consideration (it did not). With respect to the duty to indemnify, Ohio continues to offer *nothing* to suggest that Cascade caused MBC's

liability. Instead, Ohio relies on a made up "admission" that Trinity's policy "covered" MBC's liability to Riley. That is not true, and not enough. Ohio has offered no evidence of a meritorious defense to Trinity's charge that it breached its duty to defend and indemnify its insured.

b. Trinity had a right to assert bad faith / CPA / IFCA claims.

While reciting its "meritorious" defense, Ohio re-asserts that Trinity had no right to assert bad faith, CPA or IFCA claims. This defense fails for all of the reasons described above.

c. Ohio's coverage position was both wrong and unreasonable.

Ohio also argues that even if it did wrongly fail to defend and indemnify MBC, this failure was not bad faith because it was "reasonable." However, this is the classical scenario in which an insurer resolved what was (most charitably) a factual doubt about coverage in its own favor and denied a defense. *Woo, supra*. Doing so is *never* reasonable. *American Best Food, supra*. Ohio, still with the burden of establishing the factual basis for a "meritorious" defense, points to nothing to show that resolving this doubt in favor of its own financial interest was some kind of understandable mistake. Nor can Ohio contend that it simply did not think of this reasonable interpretation of its policy; Trinity repeatedly explained it to no avail. Ohio has offered no meritorious defense to Trinity's claim of unreasonable denials.

d. Ohio's incorrect denial caused harm.

Ohio next attempts to assert that there can be no bad faith, CPA or IFCA liability because MBC suffered no harm from Ohio's unreasonable denial. This is an old argument that is consistently rejected by our courts. For example, in *U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn. App. 823, 837, 16 P.3d 1278 (2001), the court recounted and reaffirmed the Washington cases firmly rebuffing the notion that the insured has suffered no loss simply because a paying insurer protected it from liability. Ohio's citation to *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.,* 150 Wn. App. 1, 206 P.3d 1255 (2009) is unavailing. In that case, the insured itself (Ledcor) asserted a bad faith and CPA claim against Mutual of Enumclaw for failure to contribute to defense fees, where other insurers had provided a full defense *and* Mutual of Enumclaw had fully complied with its indemnity obligation. Mutual of Enumclaw never denied that it owed a defense, and Ledcor did not sustain any financial harm as a result of Mutual of Enumclaw's delay in reimbursing *other insurers* for its share of the cost of defense. *Id.* In short, there was a separation of rights and damages; the parties that actually would have suffered financial harm from Mutual of Enumclaw's failure to pay defense fees were not parties to the suit. The opposite is true here. Not only has Ohio refused to defend or indemnify, (unlike Mutual of Enumclaw), but

here there is a unity of interest between Trinity as the subrogated owner of the CPA and IFCA claims, and Trinity as the party that was directly financially damaged as a result of the relevant violations[14]. The fact that Trinity absorbed the harm that Ohio caused its insured does not mean that there was no harm. Ohio's claim that its unreasonable failure to provide policy benefits caused no harm should be rejected; it is not a meritorious defense.

e. No hearing on damages was required.

Ohio's next claimed defense is that the trial court did not hold a hearing on damages. This is a challenge rooted in CR 55, which requires a hearing where damages cannot be computed with certainty. Ohio contends that Trinity's Complaint only sought some portion of the defense and indemnity expense from Ohio, and thus the amount of the judgment could not be so computed. This is incorrect. Trinity has been consistent in its position that Ohio Casualty was alone responsible for indemnity so long as Riley did not establish that Cascade caused his injury (which he did not). The Complaint reflects this. Trinity alleged that Ohio was not entitled to rely on its "excess" provision, and prayed for an award of "damages for

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[14] *Werlinger v. Warner*, 126 Wn. App. 342, 109 P.3d 22 (2005) is similarly distinguishable. In that case, the insured stipulated to a judgment against itself for a liability that had been discharged by bankruptcy. The court found the settlement unreasonable on this basis. *Werlinger* had nothing to do with whether a party that paid real dollars to insulate an insured actual damages could assert that payment as damages as subrogee.

[Ohio's] breach of its duty to indemnify MBC."

With respect to the $20,432.69 cost of defense, Trinity alleged that Ohio breached its duty to defend, and that Trinity was entitled to assert MBC's contract and bad faith causes of action against Ohio on this basis. Trinity did not limit the relief it requested to only a portion of the defense expense. Ohio could have asserted a defense that it was entitled to an allocation of the fees for which it contended Trinity sould be responsible[15]. But in any event, an insurer that improperly refused to participate in the insured's defense is not entitled to an allocation at all. *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1430 (9th Cir. 1995). There is no case anywhere that suggests a plaintiff taking a default judgment is required to raise and disprove defenses that might have been brought by the defendant, *if* it had appeared and defended. The trial court was presented with admissible evidence of the cost of defense and indemnification (CP 51-54), which were computed with certainty along with the statutory multipliers. There was no need for the trial court to hold a hearing to determine the value of an un-asserted defense[16]. Furthermore, under *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1,

[15] The Court should note that Ohio has yet to propose how an allocation of defense fees "should" have been conducted.

[16] The trial court abuses its discretion by raising an affirmative defense that would be available to a defendant, and for that reason denying a default judgment. *J-U-B Engineers, Inc. v. Routsen*, 69 Wn.App. 148, 150, 848 P.2d 733 (1993).

the trial court has discretion to award defense fees in proportion to the percent of indemnity for which each carrier was liable. In this case, an award of the entire cost of defense follows inherently from an award of the entire cost of indemnity. In its Complaint, Trinity sought treble damages under the IFCA and the CPA for damages from Ohio's breach of its duty to defend and indemnify MBC; this is the relief the trial court granted in its Judgment; it did not grant more or different relief than was requested in the Complaint. Karl B. Tegland, 4 Washington Practice at 13.

There are three other points worthy of mention on this issue. First, findings and conclusion are not required *even where damages are uncertain* if it is clear from the record exactly what the judgment was based on. *Little v. King,* 160 Wn. 2d 696, 706, 161 P.3d 345 (2007). Here, it is very clear. Second, the "hearing" contemplated by CR 55 does not require live testimony. *Thomas v. Green,* 32 Wn.App. 29, 32, 645 P.2d 732 (1982). Trinity submitted admissible evidence to support the judgment amount in the form of a declaration. Third, CR 55 is not an independent basis upon which a defendant can move to vacate a default judgment. The provisions of CR 60(b) are the only bases for vacating a judgment. Review of a denial of a CR 60(b) motion is generally limited to the propriety of the denial, and is not a review of the original judgment. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450, 618 P.2d 533, 534 (1980). At the very

most, the absence of express findings would be a time-barred CR 60(b)(1) "irregularity."

2. Inexcusable Neglect

Ohio also argues that *if* it were entitled to assert CR 60(b)(1) in spite of the limitations period, it would be able to demonstrate that it failed to appear and defend because of "excusable neglect." To support this argument, Ohio posits that a "mystery" occurred which caused it not to receive the Summons and Complaint. This "mystery" is not as mysterious as Ohio contends. There is uncontested proof that Trinity properly served the Insurance Commissioner pursuant to statute. There is uncontested proof in the form a declaration of service from the Commissioner that it mailed a copy of the Summons and Complaint to Ohio's appointed agent, Corporation Services. There is uncontested proof that this letter was received by Corporation Services, in the form of Corporation Services stamp on the registered mail return. The only "mystery" is how Corporation Services lost the Summons and Complaint[17]. The remaining reasonable conclusion is that it was a mailroom mix-up at Ohio's agent.

[17] Ohio conjures several scenarios involving empty envelopes and return receipts that got stamped without receipt of any envelope at all. Ohio apparently forgets that there is an uncontested declaration from the Commissioner that the Summons and Complaint were placed in the mail to Ohio's agent. Similarly, Ohio discusses "evidence" its attorney "discovered" when he apparently spoke with a post office employee. Ohio appears to have forgotten that the trial court judge correctly ruled that this was inadmissible hearsay, and refused to consider it. CP 381 (Motion) 524 (Order). Without challenging that discretionary ruling, Ohio simply presents this "evidence" again on appeal. *At the very least*, the Court should disregard it.

This is not enough. "Judicial decisions have repeatedly held that, if a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable." *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. at 212. Here, Ohio has not established a "virtually conclusive" defense, nor has it established excusable neglect. Even if Ohio were entitled to assert these CR 60(b)(1) arguments, the trial court properly refused to vacate the Judgment. This Court should affirm.

F. The trial court properly awarded fees to Trinity in this action.

Finally, Ohio challenges Trinity's entitlement to fees under *Olympic Steamship*[18], the CPA and the IFCA. Ohio's only contention with respect to fees under the CPA and IFCA is that Trinity allegedly was not entitled to assert these claims at all. As described above, that presupposition is false. With respect to *Olympic Steamship* as an independent basis for a fee award, Ohio argues that an insurer seeking *contribution* is not entitled to *Olympic Steamship* fees, citing *Safeco Ins. Co. of Illinois v. Country Mutual Ins. Co.*, 165 Wn. App. 1, 267 P.3d 540 (2011). In that case, the court held that where an insurer asserts its own right to *equitable contribution* it is not entitled to an *Olympic Steamship*

[18] 117 Wn. 2d 37, 811 P.2d 673 (1991).

award, because the insurer is not "standing in the shoes" of the insured in seeking coverage. However, it specifically distinguished the case where the insurer is asserting *the insured's* rights as subrogee. Specifically addressing that issue is the case of *Mid-Continent Cas. Co. v. Titan Const. Corp.*, 2009 WL 2391527 (W.D.Wash.). There, the court held that the subrogated insurer, which had incurred attorney fees to establish coverage "standing in the shoes" of the insured, was entitled to *Olympic Steamship* fees[19]. The Court should affirm the trial court's award of in this case.

G. Fees on appeal

Trinity requests its fees on appeal, pursuant to RAP 18.1, on the basis of the CPA, the IFCA, and *Olympic Steamship*. It is entitled to these fees for the same reasons it was entitled to them at the trial court.

IV. Conclusion

For the foregoing reasons, Trinity respectfully requests that the Court affirm the trial court, and award it fees on appeal. RAP 18.1.

Respectfully submitted,

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[19] The same is true where the paying insurer asserts the insured's rights under an assignment, equivalent in all relevant ways to subrogation. *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 928, 250 P.3d 121, 130 (2011), *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn. 2d at 424.

CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the state of Washington, that on May 9, 2012, I served a copy of the Brief of Respondent on counsel of record by ABC Legal Messenger to the following address:

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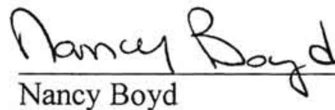

Nancy Boyd