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COURT OF APPEALS  
STATE OF WASHINGTON  
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**No. 33379-1-II**  
**COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

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

Respondents/Cross-Appellants

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY; a foreign  
insurer;

Appellant/Cross-Respondent

and

LEN VAN DE WEGE and "JANE DOE" VAN DE WEGE, husband and  
wife and the marital community composed thereof,

Cross-Respondents.

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**BRIEF OF RESPONDENTS/CROSS-APPELLANTS**

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## INTRODUCTION

Universal Underwriters Insurance Company claims to have been victimized by the trial court. But, while raising every possible error it perceives, one error it does not claim is that the jury did not have substantial evidence to support its affirmative answers to three special interrogatories:

1. Was the defendant's action in not producing its underwriting file the proximate cause of damage to the plaintiffs?
2. Was the defendant's action in compelling plaintiffs to litigation the proximate cause of damage to the plaintiffs?
4. Was the defendant's failure to produce its underwriting files to the plaintiffs the proximate cause of the plaintiffs' confession of judgment to the Tomyns?

**(Appendix A)** Nor does it claim that the jury did not have substantial evidence to support the conclusion that Universal's actions caused the Sharbonos to lose two of their three businesses.

As Universal certainly knows, and this court would quickly remind us, portraying oneself as a victim does not win appeals. To prevail on appeal one must demonstrate legal error and resulting prejudice. On that, Universal falls short.

The record in this case will show that over the four and one-half years this case was pending, Universal had every opportunity to conduct discovery, develop evidence, analyze issues, and present its argument. Every issue it challenges was decided in orderly fashion with Universal's full participation. Universal was not a victim either of their insureds, from whom Universal had accepted insurance premiums for years before labeling them liars (RP 497, 1691, 1817, 1830, 1831, 1832, 1835, 1855, 1857), or from the trial court, who dismissed many of the Sharbonos' claims at Universal's request.

The record in this case will show that the court found coverage because the language of Universal's policies clearly and unambiguously extended coverage to the Sharbonos for their personal liability. The limits of the coverages could be added together because the policy language did not clearly and unambiguously preclude stacking. The trial court approved the settlement between the Tomyns and the Sharbonos because the evidence showed it was reasonable, and because Universal submitted virtually nothing but rhetoric to show it was not. The trial court found bad faith as a matter of law because Universal's "proprietary information" argument was indisputably pretext for the months that Universal simply bullheadedly refused to allow

the Sharbonos access to materials that could help them determine how much insurance coverage they should have. Universal lost because it could offer no reasonable explanation for telling the Sharbonos they would have to sue to get the underwriting files. (CP 1000) Universal lost at trial not because of trial court decisions, but because of its own actions and because the jurors did not believe it when Universal told them the Sharbonos were liars who, within days of the underlying accident, began fabricating a claim just to get more insurance they did not yet know they needed.

The record will show that the trial court gave Universal every opportunity to present its case. Universal did. It lost because the facts, the evidence, and the language of its policies dictated that it should lose, not because of trial court error.

#### **ASSIGNMENTS OF ERROR ON CROSS-APPEAL**

1. The trial court erred in granting summary judgment on March 30, 2005, dismissing plaintiffs' claims against defendant Len van de Wege. (CP 2174-78) [Cross-Appellants seek review of this error only if this Court remands to the trial court for proceedings on the merits of Plaintiffs' claims.]

2. The trial court erred in calculating the attorney fees awarded to plaintiffs. (CP 2420-32)

### **ISSUES ON CROSS-APPEAL**

1. Does a finding that sufficient insurance coverage exists to cover a loss render moot insureds' claims against their insurance agent for negligence in failing to procure insurance? (Assignment of Error 1.)

2. When a prevailing party who is entitled to an award of attorney fees has agreed to pay their attorney on an hourly basis, do the actual fees paid by the party establish the fee award and relieve the trial court from determining a lodestar figure and independently calculating a reasonable fee? (Assignment of Error 2.)

### **COUNTER-STATEMENT OF THE CASE**

Universal's Statement of the Case conveys enough of the bare bones of the dispute between it and the Sharbonos that Respondents can address the essential facts in the context of their argument. However, because Universal strays so far from providing a fair statement of the case, response is necessary.

Initially, a large part of this case was resolved on motion for summary judgment. That includes the issues of whether Umbrella (Coverage Part 980)

applied to the accident (CP 448-49), whether the multiple coverages Universal provided for the accident could be added together (CP 450-51), whether the settlement between the Sharbonos and the Tomyns was reasonable (CP 778-79), and whether Universal acted in bad faith when it blocked the Sharbonos' efforts to investigate whether they had more coverage. (CP 2174-78) Resolution of these issues turned on the evidence presented at the various motions. Trial was limited to the issue of whether Universal's bad faith actions were a proximate cause of damage to the Sharbonos and, if so, how much. Universal's Statement of the Case intertwines evidence presented at trial with evidence presented at the motions in a transparent effort to influence this Court's evaluation of the motions. Review of the trial court's orders should be made on the record before the court at the time the orders were entered. Review of error claimed at trial should be based on the record of trial.

Next, Universal struggles mightily to portray this as a case where the Sharbonos are trying to cover purely personal loss with purely commercial insurance. In that vein, Universal repeatedly refers to its insurance as commercial insurance and, in particular, its Umbrella (Coverage Part 980) as

“commercial umbrella.” Universal fails to point to any part of the record where the trial court or the jury determined that its policies were purely commercial policies. Universal’s invitation that this court do so ad hoc should be rejected for the simple reason that Universal admits and does not dispute that it sold, and its so-called “commercial policy” provided, at least \$1 million of insurance coverage to the Sharbonos for their purely personal loss. This case is not about forcing commercial insurance to cover a personal loss, it is about how much personal insurance Universal sold the Sharbonos. Though Universal wants this Court to ignore the language of the policy in favor of a generalized finding that its insurance is “commercial” and therefore should not apply to a personal loss, the court should follow the law and apply the words of the policy. As will be seen, by its express and unambiguous terms, which Universal authored, Umbrella (Coverage Part 980) applies to James and Deborah’s liability for Cassandra’s accident.

Universal’s Statement of the Case also contains many misstatements. These further demonstrate its effort to curry this Court’s favor by shading facts to help re-define the issues. Some require response.

One of Universal’s efforts is to convey the impression that there was

no evidence to support the Sharbonos' contention that they and Cassandra should have had more coverage under Personal Umbrella (Coverage Part 970) than the \$1 million Universal admitted they had. By order of the court, the issue of whether the Sharbonos should have had more Personal Umbrella (Coverage Part 970) was not determined in the trial court. (CP 2174-78) Once the trial court decided that Universal had wrongly denied coverage under Umbrella (Coverage Part 980), it also decided the Sharbonos had sufficient insurance to pay for the loss occasioned by Cassandra's accident. Therefore, the court decided, the need for more coverage under Personal Umbrella (Coverage Part 970) was moot. *Id.*

Nevertheless, the issue of how much Personal Umbrella (Coverage Part 970) the Sharbonos should have had remained relevant to the case. This was because Universal's efforts to block the Sharbonos from investigating whether they should have more of that coverage was a basis for the Sharbonos' bad faith claim. When the trial court decided that Universal's actions were in bad faith, the case proceed to trial on whether those actions were a proximate cause of damages. Universal defended that issue on the theory that the Sharbonos were lying when they said they purchased \$3

million of Personal Umbrella (Coverage Part 970). (RP 1816-17) Thus, Universal contended the Sharbonos could not have been harmed when Universal blocked their investigation because the Sharbonos knew the investigation would reveal they only had \$1 million in coverage. (RP 1834-36)

Despite the impression conveyed by Universal's Statement of the Case, the Sharbonos presented substantial evidence in opposition to Universal's contention. The jury agreed with the Sharbonos and rejected Universal's contention. Universal does not raise on appeal any issue that substantial evidence did not support the jury's decision, and that finding is a verity. Nevertheless, in its Statement of the Case, Universal uses misstatements and half-truths to convey as "fact" that Universal was victimized because the Sharbonos had no basis for claiming they should have had more Personal Umbrella (Coverage Part 970). Some examples follow.

For example, Universal states that "the contemporaneous documents contradict" the Sharbonos' contentions that they asked for \$3 million in personal umbrella coverage, to be issued as \$1 million of coverage on each of the three policies Universal sold them. In fact, the Sharbonos produced

contemporaneous documents which supported their contention. They produced a letter indicating that Universal's sales agent, Len van de Wege, actually acknowledged their request for three \$1 million policies (Ex. 11, paragraph 2: "We need to issue only one personal umbrella policy for you and Jim, **rather than have one on each of the business policies.**"), and a letter indicating that van de Wege sent them multiple personal umbrella applications to complete for just that purpose. (Ex. 229: "I'll put a clean copy along with applications in the mail today.").

Universal states as fact that "Mrs. Sharbono signed a two-sided application on February [sic: July] 7, 1997 for a \$2 million personal umbrella policy" that the "document shows that Mrs. Sharbono did not initially ask for \$3 million in coverage" and that "she sought \$2 million in personal umbrella limits." Brief of Appellant at 9. Universal does not tell the court that the contents and the authenticity of the application were hotly contested. Mrs. Sharbono testified that the handwriting identifying the amount of coverage sought as \$2 million was not her handwriting. (RP 1684) The Sharbonos testified and produced documentary evidence that not only did they not sign the document on July 7, 1997 as Mr. van de Wege testified, they did not even

see Mr. van de Wege that day. They presented this evidence in the form of VISA bills and testimony which showed that on July 6, 1997 they were in Oregon and on July 7 they were in Boise, Idaho, all as part of an annual Fourth of July motor home trip. (Ex. 226; RP 1687-88) The Sharbonos testified they signed that application and two others just like it at a much earlier time and in blank for Mr. Van de Wege to complete to secure \$3 million in coverage. (RP 1681-82) Moreover, while Universal tried to match the “2's” from the application to “2's” from another document Mrs. Sharbono admittedly wrote, it did not produce a handwriting expert, and the jury simply did not accept Universal’s contention because other “2's” from the same comparison document were different.<sup>1</sup> To state as fact that the application showed that the Sharbonos did not ask for \$3 million in coverage misrepresents the evidence.

Universal goes on to state as fact that the Sharbonos “did not object to” to a July 7, 1997 letter from Len van de Wege telling the Sharbonos that

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<sup>1</sup> The comparison document had other “2's”, also written by Mrs. Sharbono, that did not “bear a remarkable resemblance” as Universal states (Brief of Appellant at 9, n. 3), to the one on the application. (Compare Exhibit 1 and Exhibit 42).

he would secure \$2 million of personal umbrella coverage, that the Sharbonos did not fax or call Universal's Customer Service Representative Teri Hasegawa to complain about insufficient limits, never indicated in coverage reviews any disagreement with \$2 million policy limits, and paid premiums on \$2 million coverage limits. Brief of Appellant at 10. The actual testimony shows otherwise. In interrogatory answers and at trial, Mrs. Sharbono testified that she did follow up on van de Wege's July 7, 1997 letter, did call Teri Hasegawa, and specifically told Ms. Hasegawa they wanted \$3 million, not \$2 million in coverage.

She [Deborah Sharbono] also **called and spoke to Teri**. She informed Teri that **the amount for us was wrong, the coverage should be three million**. Deborah also informed her that we wanted the coverage issued as three separate one million dollar policies through each of the businesses so that the costs could be attributed to the appropriate business.

(RP 1681-82; accord RP 270-72, 1156, 1158) Mr. Sharbono also testified that he raised the issue of the amount of coverage in his annual policy reviews with Mr. van de Wege. The first review after the Sharbonos thought they had purchased personal umbrella coverage from Universal occurred in October, 1997. About that review, Mr. Sharbono testified:

Q. Okay. And do you recall an account review in October of 1997?

A. Yes, we had account [sic] review in October.

Q. Did the subject of personal umbrella insurance come up during those – during that account review?

A. Yes, it did?

Q. And do you recall what was discussed?

A. When we were going through the check sheets, I noticed that a couple of them were checked wrong and I asked why we didn't have personal umbrella checked off, as that [sic] we had it. And Len [van de Wege] said that he would check into it and make sure it was in place, that we in fact had the insurance that we thought we had.

(RP 296) The second review occurred in November 1998. About that review, Mr. Sharbono testified.

Q. Were there account reviews in November – or excuse me, in 1998?

A. Yes there was.

Q. And did you participate in those?

A. Yes, I did. I was working in the shop with Casey, or I was in the shop with Casey, I may not have been working with him. And Debbie intercomm'd me in, Len was there to have an account review and we just set down in Debbie's office and did it there.

. . . . .

Q.... During the course of those account reviews, did the issue of personal umbrella insurance come up?

A. Yes, it did.

Q. And would you tell the jury what was discussed?

A. Whether they were in place or not. You know, we wanted to make sure that we [sic] were there, as we were told they were.

Q. And were you given any assurances that they were or were not?

A. We were given insurances [sic] that they were. And the reason the question came up again, they were not checked properly in the review form.

(RP 304-05) The Sharbonos paid the premiums, but Universal does not tell this Court that the premium notices did not identify the amount of insurance or the individual coverages they were paying for. The billing statements simply provided the Sharbonos with a dollar amount owed as premium for the policy. (RP 1546-47) Thus, stating as a fact that the Sharbonos “did not object to” Mr. van de Wege’s July 7, 1997 representation that he would secure \$2 million, that they did not fax or call Teri Hasegawa to complain about insufficient limits, never indicated in coverage reviews any disagreement with \$2 million policy limits, and paid premiums on \$2 million

coverage limits again misrepresents the evidence presented at trial.

Perhaps the greatest inaccuracy is Universal's portrayal of the facts underlying the Sharbonos' claim of bad faith. Through its Statement of the Case, Universal portrays itself as having cooperated with nearly every aspect of the Sharbonos' request for information, and on one occasion declined for legitimate reasons to produce information that was protected, privileged, and non-disclosable. Universal portrays the Sharbonos' counsel as manipulative and duplicitous. In fact, the facts were quite the contrary.

Though the dispute over how much insurance the Sharbonos had surfaced immediately after the accident, it did not become significant until the Tomyns made a claim for damages. The Tomyns did not immediately file suit for Cynthia's death. In June of 1999, the Tomyns' attorney, Ben Barcus, presented a \$5 million settlement demand to State Farm, the Sharbonos' primary auto insurer. Within days, State Farm told James and Deborah about the Tomyns' demand, that the claim exceeded their available insurance, and that they may suffer personal liability as a result. (RP 318-20; Trial Exhibits 39, 117) State Farm quickly retained attorney Dennis LaPorte to represent the Sharbonos. (RP 328; Trial Exhibit 117) At their initial meeting, Mr.

Laporte advised the Sharbonos of other similar cases, one of which had settled for \$20 million. (RP 328-29) The Sharbonos then hired attorney Maureen Falecki to investigate their belief that they should have more coverage from Universal. (RP 329-30)

Over the course of the next few months, two things occurred. First, Ms. Falecki and Universal exchanged several letters. (Ex's 16, 19, 21, 22, 23, 24, 25, 56, 61)<sup>2</sup> These letters are attached in chronological order as **Appendix B** (without attachments). Second, the Tomyns and the Sharbonos engaged in two meditations.

Events transpired as follows: Ms. Falecki initiated communication with Universal beginning in August 5 and 6, 1999. (Exs. 21, 56) In her first letter to Universal, Ms. Falecki explained the Sharbonos' belief regarding the amount of Personal Umbrella (Coverage Part 970) they should have; she informed Universal that a mediation was to occur on August 19, 1999; and she asked Universal to provide copies of its underwriting files pertaining to the Sharbonos' three policies. (Exs. 21, 56)

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<sup>2</sup> These same letters were submitted in support of the Sharbonos' motion for summary judgment on bad faith. (CP 969-77, 982-1002)

The Sharbonos have maintained separate insurance policies with Universal Underwriters Group for their three businesses, Parkland Transmission, All Transmission & Automotive, and Trans-Plant, for over four years. The policies were written by your agent, Len Van De Wege. Sometime in 1997, Mr. Van De Wege advised the Sharbonos that Universal Underwriters could provide them with personal liability umbrellas under each of their three business policies. The policies would provide the Sharbonos with three separate \$1 million personal umbrella policies for a total of \$3 million dollars in personal coverage. The Sharbonos agreed to Mr. Van De Wege's proposal and canceled a two million dollar personal umbrella policy they had maintained with another carrier for years.

I have been advised by the Sharbonos, however, that Universal Underwriters Group has verbally accepted coverage for the loss under one of the personal umbrellas, the umbrella issued with the All Transmission and Automotive business policy, while verbally denying the existence of any personal umbrella coverages under the policies issued to Parkland Transmission and Trans-Plant. Universal Underwriters Group has not provided the Sharbonos with any such acceptance or denial in writing.

Discussions are currently taking place to arrange a mediation on August 19, 1999 in an attempt to resolve this matter short of litigation. In light of the Tomyns Estate demand [of \$5 million], it is clear that the Sharbonos face considerable exposure. . . .

In light of the upcoming proposed mediation . . . , I ask that the complete underwriting files for the Sharbonos' three businesses be forwarded to me.

Universal responded, indicating that its investigation revealed the Sharbonos

had \$1 million in Personal Umbrella (Coverage Part 970), and declining to provide the underwriting files:

You have also requested copies of our underwriting files. Those files are located in our Foster, CA office and could not be reproduced and made available by August 11, 1999 as you requested. In any case, I am not aware of any authority that will give you access to those records at this time. . . . (Ex. 19)

Ms. Falecki responded on August 12 including a signed stipulation from the Sharbonos allowing her access to Universal's files pertaining to them. (Ex. 16) Universal again declined. *Id.*

The Sharbonos asked for the underwriting files again on August 27, 1999. (Ex. 22) In the interim, mediation had occurred, but failed. Ms. Falecki informed Universal:

Given the various coverage issues, I will ask again that you provide me with the Sharbonos' underwriting files. . . . Resolution of the coverage issue is imperative in light of the demands being made by the Tomyns' attorney and clear potential for excess exposure.

. . . .

Time is of the essence. As you know, mediation was undertaken last Thursday, August 19, 1999, in an attempt to resolve the Tomyns claims. The mediation did not resolve the claims . . . . The Sharbonos do not have the means to advance funds required to effect a settlement of the Tomyns' claims. They will be forced into bankruptcy should the mediation fail.

By this time, Ms. Falecki's investigation had revealed that 17 days before Cassandra's accident, Universal had cancelled the \$2 million Personal Umbrella (Coverage Part 970) it had issued to the Sharbonos on the Trans-Plant policy and replaced it with the \$1 million coverage on the All-Tran policy which Universal claimed applied to the accident. Ms. Falecki raised this as an additional reason for needing the underwriting file. (Ex. 22) In the letter, Ms. Falecki also stated: "If you are unwilling to cooperate with the coverage investigation and provide the files voluntarily, the only other avenue I have is to file suit and subpoena the files." Universal refused this request. (Ex. 10)

A second mediation was attempted in October 1999. The Sharbonos, Ms. Falecki, and a representative of Universal attended the mediation, along with the Tomyns and their attorney. Up to this time, the Sharbonos had not disclosed their coverage dispute with Universal to the Tomyns or their attorneys. (RP 650) That changed at the second mediation. Ms. Falecki testified that she felt compelled to notify the Tomyns' counsel of the pending dispute. (RP 668) Ms. Falecki and the Sharbonos also testified that at the mediation they asked Universal's representative, Glen Reid, if Universal was

going to provide the underwriting files. After telephoning someone at Universal, Mr. Reid informed the Sharbonos they would have to sue Universal to get the files. (RP 669) The mediation failed.

Ms. Falecki again wrote to Universal on October 4, 1999, stating:

As you know, a second mediation in this case occurred on October 1, 1999. The case did not settle. A principal reason for the failed mediation is that there are unresolved Universal Underwriters' coverage issues.

....

Also in my previous letters to you, I requested copies of the underwriting and agent's files covering the Sharbonos. In response, you indicated that no authority existed which required you to voluntarily produce those files to me. At today's mediation, Universal was represented by Glenn Reid. We advised Mr. Reid of the need to review the previously requested underwriting and agent's files before a settlement of the Tomyns' claims could be resolved. That request was again refused. We were advised that the Sharbonos will have to file suit to obtain copies of those documents. Prior to filing suit, I am, at this time, asking once again for production of the needed files.

(Ex. 23) Universal responded, again denying access to the files, but this time threatening to sue the Sharbonos for abuse of process or malicious prosecution if the Sharbonos filed suit to obtain the files.

I must advise you that your stated intention of filing law suit for the sole purpose of obtaining documents you have no right

to obtain would result in our examining our right to file an action for abuse of process or malicious prosecution.

(Ex. 24)

At this point, the Tomyns became involved. Now knowing about the dispute, their counsel, Mr. Ben Barcus, wrote to Universal on October 12, 1999, warning it that they would file suit against the Sharbonos unless Universal cooperated with its insureds' request and disclosed the underwriting files:

[W]e have refrained from initiating litigation against your insureds in an attempt to resolve this matter in a good faith, amicable manner. However, your intransigence in providing the information that will obviously be required to be produced through litigation discovery, will only serve to prejudice your insured and expose their personal assets.

(Ex. 25) Universal again refused. (CP 27)

The Tomyns filed suit in November, 1999. (CP 483-88) Several events occurred thereafter. Within their personal injury suit, the Tomyns tried to subpoena Universal's underwriting files pursuant to Civil Rule 26. The Sharbonos joined in that effort. (CP 964-1020) Universal resisted. The trial court enforced the Tomyns' subpoena. Universal sought discretionary review, which was granted. Ultimately the appeal was dismissed as moot

after the Tomyns and the Sharbonos settled their claims.

This is the background surrounding the Sharbonos' bad faith/CPA claim: Universal's knowledge of the dispute and the need for the files, its repeated refusal to disclose the underwriting files, telling the Sharbonos they would have to sue to get the files, threatening to counter-sue the Sharbonos if they did, refusing even when informed that it may result in the Tomyns suing the Sharbonos, and ultimately producing the files after it was sued without so much as a hint of need to protect anything in them. Ultimately, the trial court agreed that Universal's actions amounted to bad faith because Universal did not and could not identify a single document in its underwriting files that was sensitive, privileged, or deserved any protection whatsoever. In fact, during trial Universal worked hard to assure the underwriting files were admitted into evidence and actually became part of the public record in this case. (Ex. 221)

The purpose of an appellate brief is not simply to rehash factual arguments unsuccessful at trial, nor to present facts as one would to a jury, but to demonstrate legal error and resulting prejudice. Accordingly, RAP 10.3(a)(4) requires the brief to contain a "**fair** statement of the facts and

procedure relevant to the issues presented for review **without argument.**” While Universal’s Statement of the Case ultimately conveys the foundation of the dispute in this case, it strays far from RAP 10.3(a)(4) in doing so. It is one-sided, and permeated with overstatements, innuendos, misrepresentations, argument, and misstatements. Many, many of the statements Universal includes as “fact” are actually its resolution of disputed contentions, contentions for which both sides presented competing evidence, but for which Universal now presents its side of that dispute as “fact.” The Sharbonos will discuss the relevant facts in the context of its argument on the issues.

## **RESPONSE ARGUMENT**

### **A. The Trial Court Correctly Decided That Umbrella (Coverage Part 980) Applies to James and Deborah’s Liability for Cassandra’s Accident.**

#### **1. The Trial Court Did Not Decide That Umbrella (Coverage Part 980) Covered Cassandra Sharbono, Only James and Deborah Sharbono Who Were Named Insureds on the Policy.**

In its brief, Universal wrongly states:

The trial court's determination that a commercial umbrella covered Cassandra Sharbono while operating a personal vehicle for personal use, and not commercial, purposes should be rejected. Such an interpretation is a strained interpretation eschewed by Washington courts in interpreting insurance language.

Brief of Appellant at 37. This statement is wrong in two respects. First, the Sharbonos did not argue and the trial court did not determine that Cassandra Sharbono was covered under Umbrella (Coverage Part 980). The Sharbonos argued and the trial court determined only that **James and Deborah Sharbono** were covered by Umbrella (Coverage Part 980) for their liability arising from Cassandra's accident. (CP 315, lns. 23-25) The Sharbonos only argued James and Deborah were covered because they were named insureds on the two policies at issue and the policies specifically listed them as "designated persons" for purposes of Umbrella (Coverage Part 980). (CP 316 lns. 17-21 & n.1)

Second, the trial court's interpretation that this Umbrella (Coverage Part 980) applied to James and Deborah's liability arising from Cassandra's accident was far from strained. As will be seen, the clear and unambiguous language of the insurance policy extends coverage to James and Deborah's

personal use of vehicles. Only by re-writing the policy can Universal justify any other interpretation.

## **2. Standard of Review and Rules of Construction**

The trial court decided that Umbrella (Coverage Part 980) applied to James and Deborah's liability for Cassandra's accident on motion for summary judgment. Orders granting summary judgment are reviewed de novo. "An appellate court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court, and viewing facts in a light most favorable to the nonmoving party." *Kalmas v. Wagner*, 133 Wn.2d 210, 215, 943 P.2d 1369 (1997). "A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The rules of construction applicable to insurance policies are clear and simply stated. Interpretation of the language of an insurance policy is a matter of law for the court to decide. *Kitsap Cty. v. Allstate Ins. Co.*, 136

Wn.2d 567, 575, 964 P.2d 1173 (1998). The language must be given a fair, reasonable, and sensible construction that would be understood by the average person buying insurance. Insurance policies must be interpreted in accordance with the understanding of the average man, rather than in a technical sense even if intended by the insurer. State Farm Gen. Ins. Co. v. Emerson, 102 Wn.2d 477, 687 P.2d 1139 (1984); Nationwide Mut. Ins. Co. v. Kelleher, 22 Wn. App. 712, 715, 591 P.2d 859 (1979); Dairyland Ins. Co. v. Ward, 83 Wn.2d 353, 517 P.2d 966 (1974). Clear and unambiguous language in an insurance policy will be enforced. Where the contract language is clear and unambiguous, the courts should not rewrite the policy under the guise of construing the language. Batdorf v. Transamerica Title Ins. Co., 41 Wn. App. 254, 702 P.2d 1211 (1985). However, the purpose of insurance policies is to insure; therefore, inclusionary clauses are construed liberally in favor of coverage and exclusionary clauses are construed narrowly. Ross v. State Farm Mut. Auto Ins. Co., 82 Wn. App. 787, 792, 919 P.2d 1268 (1996). If the language of the policy is susceptible to two reasonable and fair interpretations, ambiguity exists. Vadheim v. Continental Ins. Co., 107 Wn.2d 836, 840-41, 734 P.2d 17 (1987). Ambiguity must be

resolved in favor of the insured regardless of the intent of the insurer. *Trans Continental Ins. Co. v. Washing Public Util. Dists' Util. Sys.*, 111 Wn.2d 452, 760 P.2d 337 (1988), *National Union Fire Ins. Co. v. Zuver*, 110 Wn.2d 207, 210, 750 P.2d 1247 (1988); *Vadheim, supra*, 107 Wn.2d at 841; *McInturff v. Dairyland Ins. Co.*, 56 Wn. App. 773, 775, 785 P.2d 843 (1980).

**3. By its Clear and Unambiguous Terms, Umbrella (Coverage Part 980) Applies to Jim and Deborah Sharbonos' Liability for the December 11, 1998 Accident.**

Little of Universal's argument on the issue of coverage actually focuses on the language of the policy. Moreover, upon close examination, the court will see that Universal is not asking the court to apply the policy as worded, but to re-write the definition of a critical term: "YOU." It requires little examination and no deviation from the rules of insurance policy construction to see that this coverage is not simply the "commercial umbrella" that Universal wants the court to see, but is, as its name implies an "umbrella" that provides coverage for personal and commercial losses.

Like most liability policies, Umbrella (Coverage Part 980) starts by stating the broad range of coverage in the coverage provision. The coverage

provision in Umbrella (Coverage Part 980) states:

**INSURING AGREEMENT** - WE will pay for LOSS, subject to the terms and conditions of this Coverage Part, in excess of:

- (a) coverage provided in any UNDERLYING INSURANCE;
- (b) coverage provided to an INSURED in any other insurance;
- (c) in the absence of (a) or (b) the retention shown in the declarations.<sup>3</sup>

WE have the right and duty to defend any SUIT for LOSS not covered by other insurance, but WE have no right or duty to defend SUITS for LOSS not covered by this Coverage Part. WE may investigate and settle any claim or SUIT WE consider appropriate.

WE also have the right to defend any SUIT for LOSS covered by other insurance.

(CP 119, 255) The provision contains no limitation to commercial or business related losses.

The critical coverage phrase in this provision is "LOSS." "LOSS" is what the company agrees to pay. The policies define the term "LOSS."

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<sup>3</sup> Paraphrased, these provisions say that the Umbrella Coverage will apply (1) in excess of either underlying insurance (i.e., insurance specifically listed in the declarations), other insurance, or the retention (i.e., deductible),

"LOSS" means all sums the INSURED legally must pay as DAMAGES because of INJURY to which this insurance applies caused by an OCCURRENCE. "LOSS" also means all sums the insured must pay as COVERED POLLUTION DAMAGES to which this insurance applies caused by an OCCURRENCE.

(CP 121, 257) Thus, through the definition of "LOSS" Universal describes both what it will pay, under what circumstances it will pay, and who it will pay for. Paraphrased, Universal agrees to pay all the sums the insured legally must pay as damages because of injury, caused by an occurrence. The provision contains no limitation to commercial or business related losses.

Since no one disputes that Cassandra's accident produced a legal obligation on James and Deborah to pay "damages" because of "injury" caused by an "occurrence", the definitions of those terms are unimportant here. The term "INSURED" however, is important and defined in the policy. The definition of "INSURED" initially appears at page 5 of the printed policy form, the first page of the policy's general conditions. (CP 57, 192) It states:

"INSURED" means "any person or organization qualifying as an INSURED in the WHO IS AN INSURED provision of the coverage part.

(CP 57, 192) In Umbrella (Coverage Part 980) the "WHO IS AN INSURED provision" appears on page 71 of the pre-printed form. (CP 122, 258) The

section breaks out insureds for purposes of auto-related coverage and other types of coverage. With regard to auto-related coverage, the policies state:

**With respect to any AUTO or water craft:**

(a) **YOU;**

**With respect to (1) any AUTO or water craft used in YOUR business or (2) personal use of any AUTO owned or hired by YOU:**

**(a) any person or organization shown in the declarations for the Coverage Part as a "Designated Person."**

(CP 122, 258) (emphasis added) These provisions mean that those persons identified as "YOU" are covered for use of any auto -- personal or business -- and "Designated Persons" specifically identified in the declarations for this coverage part are covered for use of autos in business, and also for **personal use** of a vehicle owned by "YOU." These provisions show that, as much as Universal wants to characterize this coverage as purely "commercial" umbrella, Umbrella (Coverage Part 980) actually contemplated and provides coverage for personal use of vehicles.

To complete the operation of these provisions, definitions are needed for the word "YOU" and the term "Designated Persons". Like the definition

of “INSURED”, the definition of "YOU" appears at page 5 of the printed policy form, outside the specific provisions related to Umbrella (Coverage Part 980), on the first page of the policy’s general conditions. (CP 57, 192)

It states:

"YOU" and "YOUR" means the person or organization shown in the declarations as the Named Insured.

(CP 56, 192) The phrase “Named Insured” is capitalized in the original. “Named Insureds” are identified in only one place in the declarations: on the first page of the declarations. (CP 31, 171) James and Deborah Sharbono are specifically listed as “Named Insureds.” (CP 31, 171)

"Designated Persons" is not defined, except by inference from its use above. Its use suggests such persons will be “shown in the declarations for the Coverage Part.” The declarations for Umbrella (Coverage Part 980) list James and Deborah Sharbono under the heading “Designated Persons.” (CP 42, 179-80)

Umbrella (Coverage Part 980) covers James and Deborah’s liability for two reasons: First, on policy 115279 (All Transmission and Automotive) and policy 115278 (The Trans-Plant), James and Deborah Sharbono are separately identified as named insureds along with their businesses. (CP 31,

171) Thus, under the first provision of “WHO IS AN INSURED”, James and Deborah Sharbono are insureds with respect to "any auto" because they are named insureds and consequently are “YOU.” Cassandra is not because she is not a named insured and, therefore, not “YOU.”

Second, James and Deborah are "Designated Persons." Universal also chose to list and specifically show them in the declarations for the Coverage Part as such. (CP 42, 179-80) Thus, they fall under the second part of “WHO IS AN INSURED.” As Designated Persons, the Sharbonos are insureds with respect to personal use of vehicles owned by “YOU”. The vehicle involved in the accident was owned by “YOU” because it was owned by a named insured, James and Deborah Sharbono. James and Deborah’s liability for Cassandra’s accident arises from their use – i.e. allowing Cassandra to use the vehicle – of the vehicle. See *Farmers Ins. Grp. v. Johnson*, 43 Wn. App. 39, 715 P.2d 144 (1986) (entrustment of a vehicle is use of the vehicle).

Universal does not actually dispute this analysis. Instead it argues two points. First, it argues generally that Washington law prohibits a commercial policy from covering a personal loss. Universal states:

Given the nature of the underlying coverages to which Universal's personal and commercial umbrellas were excess, the trial court's decision that there was a [sic] coverage under a *commercial* umbrella for an occurrence involving the Sharbonos' daughter using a *personal* vehicle for *personal* purposes makes little sense.<sup>4</sup>

Washington law clearly indicates that an insured may not derive coverage from a commercial liability policy for personal activities.

The trial court's decision, however, effectively conflated the personal and commercial coverages contrary to the very purpose of a *commercial* umbrella liability part; the trial court provided coverage under a *commercial* umbrella part to the Sharbonos' daughter while driving a *personal* vehicle on a *personal* errand with no connection whatsoever to the business.

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<sup>4</sup> To the extent this passage is suggesting that the kind of underlying insurance suggests the kind of situations to which this coverage applies, Universal is mistaken. The policy specifically addresses situations like the one present here where the listed "UNDERLYING INSURANCE" does not apply:

(c) when there is no coverage for a LOSS available to the INSURED in the UNDERLYING INSURANCE but there is coverage available under another insurance policy (which was not purchased as excess of this policy), WE will pay OUR limit in excess of the limits of such other insurance.

(CP 126, 262)

Brief of Appellant at 35-36 (emphasis in original)(citations omitted). These have simple responses (1) If it makes so little sense to cover personal use in commercial insurance, why did Universal do it? Why did it write the policy to apply Umbrella (Coverage Part 980) to “any vehicle” the named insured was operating without regard to business or personal use, and why did it agree to cover designated persons for their personal use of vehicles owned by the named insured? Universal was fully in charge of the coverages it provided. It, not the court, should be giving sense or purpose to its decisions. (2) Washington courts have not held that insureds may not derive coverage from commercial liability insurance policies for personal activities. Our courts, including those deciding the cases to which Universal points, have simply applied the language of the policy to the facts of the case. As the Supreme Court stated in *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wash.2d 751, 762, 58 P.3d 276 (2002), particular cases may be helpful in analyzing a similar exclusion or provision within a similar policy, but certainly do not limit the coverage that an insurer may agree to provide to an insured. Where the policy language restricts coverage to liability incurred in the course of employment, courts apply that language. Where it does not, the

court may not rewrite the coverage because the policy is commercial, personal or any other type. (3) The trial court did not conflate commercial and personal coverages, Universal did when it decided to write the policy to apply Umbrella (Coverage Part 980) to “any vehicle” the named insured was operating without regard to business or personal use, and to cover designated persons for their personal use of vehicles owned by the named insured. While Universal now wants to deny that it combined personal and commercial insurance into one coverage so it can characterize the coverage as “commercial”, the fact remains that the trial court simply applied the policy as Universal wrote it.

Universal’s second contention is that the preamble to the coverage part changes the definition of “YOU”. The preamble states:

This Coverage Part applies only when it is shown in the declarations. Such insurance applies only to those insureds, security interests and locations designated for each coverage as identified in declarations item 2 by letter(s) or number.

(CP 119, 255) Another preamble appears at the at the beginning of the policy, and states:

The entire document constitutes a multiple coverage insurance policy. Unless stated otherwise in a Coverage Part, each Coverage Part is made up of its provisions, plus those of

the State Amendatory Part (if any), the General Conditions, and that portion of the declarations referring to the Coverage Part, including all endorsements made applicable to that Coverage Part. Each Coverage Part so constituted becomes a separate contract of insurance.

(CP 55, 191) Universal argues that these provisions mean that only those “Named Insureds” identified as “insureds” in the declarations for the specific coverage part are “YOU” for purposes of that coverage part. Because James and Deborah are not Named Insureds identified as “insureds” in the declarations specific to Umbrella (Coverage Part 980), Universal contends they are not insureds under this coverage part.

For purposes of this coverage [Umbrella (Coverage Part 980)], “YOU” was the business, whether All-Transmission or Trans-Plant. The businesses were described by symbol “01” in each declarations page. The commercial umbrella coverages were limited in each policy to “01” as the insured.

Brief of Appellant at 34.

Universal’s analysis is wrong and should be rejected for several reasons. First, in order to reach Universal’s result, the court has to rewrite the definition of “YOU.” As written, the definition says:

"YOU" and "YOUR" means the person or organization shown in the declarations as the Named Insured.

(CP 56, 192) Universal wants the definition of “YOU” to say:

"YOU" or "YOUR" means ~~the~~ that person or organization shown in the declarations as the Named Insured and identified as an insured in that part of the declarations pertaining to the particular coverage.

Universal must suggest this change because as originally written, the definition of "YOU" refers to "Named Insureds." There is only one place in the declarations where "Named Insureds" are identified: the first page of the declarations of each policy. (CP 31, 171) Nowhere in the declarations pertaining to Umbrella (Coverage Part 980) does the phrase "Named Insured" appear. Thus, if one goes to the declarations pertaining to Umbrella (Coverage Part 980) and looks for the "person or organization shown in the declarations as the Named Insured", one would not find anyone or any organization listed. Only by altering the definition of "YOU" would a person know to look in two locations in the declarations to determine "WHO IS INSURED." The preamble gives no fair warning that it is inserted to redefine the word "YOU" and this court is not in the business of re-writing insurance policies.

Moreover, the policy itself prohibits Universal from modifying the definition of "YOU" with a provision in Umbrella (Coverage Part 980). In the General Conditions, where the definition of "YOU" appears, the

following introductory paragraph appears:

**DEFINITIONS - Except for headings or titles, a word written in all capital letters indicates it has a specific meaning defined in each Coverage Part. The following definitions apply to any Coverage Part where they appear.**

(CP 56, 192)(Emphasis added) The definition of “YOU” is one of the definitions that follows. Thus, by its express terms the policy states that the definition of the “YOU” is the definition found in the general conditions, not one that is modified by provisions in the specific coverage where it is being used.

Universal may argue, however, that the court need not re-write the definition of “YOU” to obtain the result it desires. Instead, the court merely needs to recognize the preamble as a restriction or limitation on who is insured, much like an exclusion restricts the general statement of coverage. Universal may contend that the preamble simply restricts or limits the broad language of the “WHO IS AN INSURED” provision.

This argument also fails because the word “YOU” is used to describe more than just who are insureds, and these other uses also affect coverage. For example, as noted above, one section in the “WHO IS AN INSURED” section of Umbrella (Coverage Part 980) states:

**With respect to . . . personal use of any AUTO **owned or hired by YOU:****

(a) any person or organization shown in the declarations for the Coverage Part as a "Designated Person."

(CP 122, 258) In this phrase, the policy uses the word "YOU" to identify a particular vehicle. The use of this term bears no relationship to the preamble. One looking to determine if they were within this category of insured would look first to determine if they were identified in the declarations of Umbrella (Coverage Part 980) as "Designated Persons" and then look to the definition of "YOU" to determine if the vehicle they were operating was "owned or hired by YOU". Following that approach, and applying the policy language as written, the Sharbonos would find that they were specifically listed in the declarations for Umbrella (Coverage Part 980) as "Designated Persons." (CP 42, 179-80) and their liability arose from their personal use of a vehicle owned by "YOU" because they are persons shown on declarations as Named Insureds. Thus, they would find they meet the second criterion for "WHO IS INSURED." Universal cannot avoid this result if the preamble merely pertains to identification of insureds. For Universal to avoid the Sharbonos being insureds under the second provision of "WHO IS INSURED,"

Universal must show that the preamble actually re-defines the word “YOU.” The court must give an entirely new definition to the word “YOU.” Applying the preamble as one would an exclusion or limiting clause simply is not enough for Universal to prevail.

These defects in Universal’s analysis exist because Universal is wrongly and unreasonably interpreting the preamble. While Universal argues that the preamble identifies who are insureds for purposes of each individual coverage if only those persons identified in the declarations for Umbrella (Coverage Part 980) by letter or number are insureds, then the entire section entitled “WHO IS AN INSURED” is unnecessary. There should be no need for the policy definition of “INSURED” and no need for that definition to refer back to the “WHO IS AN INSURED” provision. Moreover, the part of that section which extends coverage to “Designated Persons” adds nothing because “Designated Persons” are not identified by letter or number. (CP 42, 179-80) Universal’s interpretation of the preamble simply reads out all these other terms and provisions identifying insureds.

None of these problems arise if the preamble is correctly interpreted. The correct interpretation applies the preamble as the court would the initial

coverage provision: interpreting it as a broad general statement, in this case a statement of the range of possible insureds under this coverage. The court should then apply the more specific “WHO IS AN INSURED” section as a limiting section, like an exclusion, narrowing the coverage for purposes of that specific coverage. If the court follows this procedure, James and Deborah Sharbono clearly meet the preamble’s conditions. The first sentence of the preamble means that “This Coverage Part” – Umbrella (Coverage Part 980) – only applies when it is shown in the declarations. Universal does not dispute that Umbrella (Coverage Part 980) is shown in the declarations, so that sentence is met here. The second sentence then says that Umbrella (Coverage Part 980) “applies only to those insureds, security interests and locations designated for **each** coverage as identified in declarations item 2 by letter(s) or number.” The provision refers to *each* coverage in the policy, not simply “this” Umbrella (Coverage Part 980). To determine which insureds, security interests and locations are covered by Umbrella (Coverage Part 980), one must look to those insureds, security interests and locations identified by letter or number in the declarations item 2, where insureds, security interests and locations are designated for the entire policy. “Item 2” appears on the

first page of the declarations. (CP 31, 171) The insureds, security interests and locations identified in “item 2” then represent the range of possible insureds, security interests and locations to which the coverage may apply. James and Deborah are clearly within the range because they are listed in Item 2. They are, therefore, among the insureds to which Umbrella (Coverage Part 980) applies. Having satisfied the preamble, the insured would go to the “WHO IS AN INSURED” portion of the particular coverage to determine if they are within the particular group of insureds to which this coverage applies. James and Deborah are within the provisions of “WHO IS AN INSURED” because they are “YOU” and because they are specifically designated as insureds within the declarations applicable to Umbrella (Coverage Part 980).

Finally, contrary to Universal’s argument, applying Umbrella (Coverage Part 980) to the Sharbonos is neither unreasonable (commercially<sup>5</sup> or otherwise) or illogical. In at least once case, Universal

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<sup>5</sup> In its footnote 23, Brief of Appellant at 37, Universal suggests that a “commercial reasonableness” standard, not the ordinary standards for interpretation of insurance policies, should be applied to the Sharbonos because they are “sophisticated business people.” While the Sharbonos believe their success has come from hard work rather than sophisticated

conceded that individuals who are designated insureds are covered under Umbrella (Coverage Part 980). See United Ohio Ins. Co. v. Metzger v. Universal Underwriters Ins. Co., 1999 WL 84201 (Ohio App.) Moreover, the result is of Universal's own doing.

Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence....

Emter v. Columbia Health Servs., 63 Wn. App. 378, 384, 819 P.2d 390 (1991), quoting Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534, 540 (9th Cir.1990). If Universal wanted to limit umbrella coverage to businesses, very simple policy changes could have accomplished that goal.

Interpretation of an insurance policy is a question of law. Here, the trial court evaluated the policy language in light of the undisputed facts giving rise to the loss. Because the terms of Umbrella (Coverage Part 980)

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business knowledge, regardless, the Washington Supreme Court has rejected the contention that the sophistication of the insured alters the rules of insurance policy construction. Boeing v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 882-83, 784 P.2d 507 (1990).

clearly obligated Universal to cover James and Deborah Sharbono for accidents involving their personal use of a personal vehicle, the trial court correctly entered summary judgment determining that coverage applied to their liability for Cassandra's accident. The trial court should be affirmed.

**B. The trial court correctly decided that the policy limits of Umbrella (Coverage Part 980) in both policies and the Personal Umbrella (Coverage Part 970) in the All-Trans policy could be added together.**

Background: The policies Universal sold to the Sharbonos contained two different Umbrella Liability coverages: Umbrella (Coverage Part 980)(CP 119-28, 255-64) and Personal Umbrella (Coverage Part 970)(CP 113-18). Universal admitted that Personal Umbrella (Coverage Part 970) applied to the accident. When the trial court determined that Umbrella (Coverage Part 980) applied to the accident, the issue of how much of the limits of each coverage applied arose. On the Sharbonos' Motion for Summary Judgment, the trial court determined that the policy limits of Umbrella (Coverage Part 980) in both policies and the Personal Umbrella (Coverage Part 970) in the All-Trans policy could be added together. (CP 450-51, 2176) The limits for Umbrella (Coverage Part 980) in both policies

were \$3 million. (CP 42, 179) The limits Universal admittedly issued for Personal Umbrella (Coverage Part 970) were \$1 million. (CP 41) The court's decision made a total of \$7 million of umbrella liability insurance available to pay for the Tomyns' damages from Cassandra's accident. (CP 2176) Because the policies allowed the limits of the different coverages to be added together, the trial court's decision was correct.

Initially, though Universal suggests otherwise, adding together multiple policy limits is not unusual, unreasonable, or in violation of public policy. It is allowed unless specifically prohibited by the policy. *Safeco Corp. v. Kuhlman*, 47 Wn. App. 662, 666, 737 P.2d 274 (1987) (“The practitioner should be aware that many policies applicable to accidents after the effective date of this statute may not contain these anti-stacking provisions. In that case the contract controls and the insured would be allowed to stack even if the policy does not so indicate because of the more liberal stacking clauses currently contained in most policies.”); *Nationwide Mut. Ins. Co. v. Kelleher*, 22 Wn. App. 712, 591 P.2d 859 (1979) (adding auto liability and PIP limits). Indeed, in some cases policy provisions prohibiting adding limits have been struck as violating public policy. *Cammel v. State*

Farm Mut. Auto. Ins. Co., 86 Wash.2d 264, 543 P.2d 634 (1975); Federated Am. Ins. Co. v. Raynes, 88 Wash.2d 439, 563 P.2d 815 (1977); American States Ins. Co. v. Milton, 89 Wash.2d 501, 573 P.2d 367 (1978); Vadheim v. Continental Ins. Co., 107 Wash.2d 836, 734 P.2d 17 (1987). If provisions attempting to limit stacking are ambiguous, they will be interpreted most favorably to the insured. State Farm Mut. Auto. Ins. Co. v. Johnson, 72 Wn. App. 580, 871 P.2d 1066, *rev. denied* 124 Wn.2d 1018 (1994).

Each of Universal's policies contain two identically named but differently worded clauses entitled "Non-Stacking of Limits." The first appears within the coverage parts. The provision in Umbrella (Coverage Part 980) and Personal Umbrella (Coverage Part 970) reads:

**NON-STACKING OF LIMITS** - When an insured has coverage for a LOSS under this Coverage Part and any other Umbrella policy issued by US, the most WE will pay is the percentage the limit under this Coverage Part bears to the total limits of all such policies, but not for more than that percentage of the highest limit of all such policies.

(CP 118,127, 263) The second is at the end of the policy in the General Conditions Section. It states:

**NON-STACKING OF LIMITS** — If more than one Coverage Part or policy issued by US to YOU should insure a LOSS, INJURY, OCCURRENCE, claim or SUIT, the most WE will pay is the highest limit applicable. The limit under

that Coverage Part or policy will be inclusive of the lower limit in the other Coverage Part(s) or policy(s), not in addition to them.

(CP 127, 263) Except to state that these provisions prevent stacking, Universal offers no explanation of how they operate.

Preliminarily, for two reasons the provision in the General Conditions part of the policies can have no effect and should be disregarded. First, the individual coverages preclude Universal from relying on the Non-Stacking of Limits provision in the General Conditions. The second paragraphs of Umbrella (Coverage Part 980) and Personal Umbrella (Coverage Part 970) state: “The General Conditions apply **except as amended or replaced in this Coverage Part.** (CP 113, 119, 255) Because Umbrella (Coverage Part 980) and Personal Umbrella (Coverage Part 970) contain their own identically titled “Non-Stacking of Limits” provisions, this opening provision requires the Non-Stacking of Limits provisions in the specific coverages prevail over the same titled provision in the General Conditions.

Second, the provision in the General Conditions directly contradicts another provision within Umbrella (Coverage Part 980) and Personal Umbrella (Coverage Part 970). The General Condition’s provision provides

that when Universal has issued more than one applicable coverage, the most it will pay is the limit of the coverage part with the highest limit of liability. But, Umbrella (Coverage Part 980) and Personal Umbrella (Coverage Part 970) are “umbrella” coverages. Umbrella coverages provide excess insurance in addition to other insurance. *MacKenzie v. Empire Ins. Co’s*, 113 Wn.2d 754, 759, 782 P.2d 1063 (1989); *Thompson v. Grange Ins. Ass’n*, 34 Wn. App. 151, 156-57, 660 P.2d 307, *review denied* 99 Wn.2d 1011 (1983). Thus, provisions in both Umbrella (Coverage Part 980) and Personal Umbrella (Coverage Part 970) state:

[W]hen coverage for a LOSS is available to the INSURED in the UNDERLYING INSURANCE only, WE will pay OUR limit in excess of such UNDERLYING INSURANCE;

(CP 116, 126, 262) These provisions mean that when the insured has additional insurance, the umbrella limits are in excess of the underlying insurance. The umbrella limits cannot be both excess of the underlying limits and reduced by the underlying insurance. In this circumstance, the General Conditions provision must give way to the contrary provision within the specific coverage.

Universal is left, therefore, to rely upon the “Non-Stacking of Limits”

provisions placed within the umbrella coverages. Universal contends that the trial court simply invalidated these provisions. In fact, the trial court correctly found that the provisions were susceptible to more than one reasonable meaning and, consistent with well-established rules of construction, applied the meaning most favorable to the insureds.

The provision as worded works like this: The provision assumes there are two or more Umbrella policies issued by Universal. Thus, it states: "When an insured has coverage for a LOSS under this Coverage Part and any other Umbrella policy issued by US . . ." After that assumption, the provision states: "the most WE will pay. . ." Through this phrase, Universal is describing how much it will pay for all the policies combined, not just under this one coverage. The provision then states the most Universal will pay is "the percentage the limit under this Coverage Part bears to the total limits of all such policies," In this case the total limits of all three coverages is \$7 million (\$3 m + \$3 m + \$1 m). Thus the "percentage" the individual coverages bear to the total of the coverages is 3/7ths (43%), 3/7ths (43%) and 1/7th (14%). However, while the provision states how this percentage is determined, it fails to identify what the percentage is applied to. In essence,

as applied to this case, the clause reads: "When the Sharbonos have coverage for a LOSS under this Coverage Part and any other Umbrella policy issued by Universal, the most we will pay is 43% or 14%." The question remains: 43% or 14% of what? Is the most Universal will pay under each Umbrella (Coverage Part 980) 43% of the Sharbonos' total liability, 43% of the sum of all the applicable coverages, 43% of the Sharbonos' settlement with the Tomyns? Does it pay 43% of its own policy limit? While Universal seems to argue that it should pay the lowest possible amount, 43% of its \$3 million policy limits, this interpretation has no more support in the policy language than the others.

The confusion is compounded by the clause at the end of the provision: ". . .but not for more than that percentage of the highest limit of all such policies." This provision is nonsensical. If this phrase is describing the most Universal will pay when there are multiple policies, what is the "percentage of the highest limit of all such policies"? Does this mean the percentage of the policy with the highest limits becomes the **maximum payable under all the policies** -- in the case of Umbrella (Coverage Part 980), 43% of \$3 million -- so the insureds actually receive less coverage

because Universal has issued multiple policies? Or, is the percentage 100%, meaning the insureds are not entitled to more than the sum of all the policies added together?

Policies are to be read as they would be by the average person purchasing insurance. Grange Ins. Ass'n v. Brosseau, *supra*, 113 Wn.2d 91, 95, 776 P.2d 123 (1989). Ambiguity exists if two reasonable and fair interpretations of a policy provision are possible. Vadheim v. Continental Ins. Co., 107 Wn.2d 836, 840-41, 734 P.2d 17 (1987). When faced with ambiguity, the court applies a meaning and construction most favorable to the insured, even if the insurer intended another meaning. Trans Continental Ins. Co. v. Washing Public Util. Dists' Util. Sys., 111 Wn.2d 452, 760 P.2d 337 (1988). In other words, ambiguity is resolved in favor of the insured regardless of the insurer's intent. National Union Fire Ins. Co. v. Zuver, 110 Wn.2d 207, 210, 750 P.2d 1247 (1988); Vadheim, *supra*, 107 Wn.2d at 841; McInturff v. Dairyland Ins. Co., 56 Wn. App. 773, 775, 785 P.2d 843 (1980).

In this case it is questionable whether any reasonable meaning can be gleaned from Universal's "Non-Stacking of Limits" clause. The clause is either incomplete or simply makes no sense -- or makes no sense because it

is incomplete. If any reasonable meaning is possible, one reasonable meaning is that if there are multiple coverages each coverage pays the insured's liability based on the percentage its policy bears to the total of the available insurance. This means that the total limits of the coverages are available to the Sharbonos. Because that reading maximizes available coverage, and is consistent with the Sharbonos' payment of separate premiums for each coverage, it favors the insured. Applied to this case, the two Umbrella (Coverage Part 980) coverages in each policy would pay 43% of the Sharbonos' legal liability until the policies are exhausted, and the one Personal Umbrella (Coverage Part 970) should pay 14%. Because this interpretation favors the insured by maximizing coverage, it is the one the trial court correctly applied. The trial court's order allowing the coverages to be added together should be affirmed.

**C. The trial court properly determined that Universal was guilty of bad faith as a matter of law because Universal failed to present any evidence showing it gave equal consideration to the Sharbonos' interests.**

"Whether an insurer acted in bad faith is a question of fact." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). However,

questions of fact may be determined as a matter of law if reasonable minds could reach but one conclusion. *Id.* at 485. Once the moving party submits adequate affidavits to support summary judgment, the burden shifts to the nonmoving party to set forth specific facts that rebut the moving party's contentions and reveal a material issue of fact. *Rizzuti v. Basin Travel Service of Othello, Inc.*, 125 Wn. App. 602, 615, 105 P.3d 1012 (2005). The nonmoving party may not rely on speculation, argumentative assertions, or unsupported affidavits. *Id.* Consequently, the question before this Court is whether Universal established a material issue of fact sufficient to defeat the trial court's determination as a matter of law that Universal breached its duty of good faith. *Smith*, 150 Wn.2d at 486.

The Sharbonos' claims for bad faith and violation of Washington's Consumer Protection Act, had four parts. The Sharbonos contended that Universal acted in bad faith when it (1) refused to assist them in determining how much coverage they had by providing copies of the underwriting files on the Sharbonos' policies, (2) by threatening to sue the Sharbonos if they took action to obtain those files (3) by forcing the Sharbonos to sue Universal to recover the files, and (4) by denying coverage under Umbrella (Coverage Part

980) without providing a reasonable explanation. The trial court granted summary judgment only on the first and third ground. The issues, therefore -- which Universal largely ignores -- are (1) whether the duty of good faith may require an insurer to disclose underwriting files and (2) whether the trial court correctly decided that there was no genuine issue of material fact as to whether Universal violated that duty. Both should be answered “yes.”

**1. The duty of good faith may require an insurer to disclose its underwriting file.**

Insurers have a fiduciary relationship with their insureds. *See Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998)(citing *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986)). In light of its fiduciary relationship, “[a]n insurer has an obligation to give the rights of the insured the same consideration that it gives to its own monetary interests.” *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002). In other words, “[a]n insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured’s financial risk.” *Ellwein v. Hartford Acc. and*

Indem. Co., 142 Wn.2d 766, 779, 15 P.3d 640 (2001). An insurer acts in bad faith when it *overemphasizes its own interests*. Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 329, 2 P.3d 1029 (2000), *review denied*, 142 Wn.2d 1017 (2001).

These general duties translate into requirements for real action. For example in Smith v. Safeco Ins. Co., 112 Wn. App. 645, 653, 50 P.3d 277 (2002), *reversed on other grounds*,<sup>6</sup> 150 Wn.2d 478, 78 P.3d 1274 (2003), the court held that the duty of good faith requires insurers to disclose their policy limits to a claimant if doing so furthers their insured's interests. In Truck Insurance Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 58 P.3d 276 (2002), the trial court determined as a matter of law that the insurer acted in bad faith when it waited almost one year to deny coverage, then refused the insureds' repeated requests for explanation. In Harris v. Drake, 152 Wn.2d 480, 99 P.3d 872 (2004), the Court recognized that an insurer may be guilty of bad faith if releases a physician's report it had received pertaining to its

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<sup>6</sup> The Supreme Court agreed with the Court of Appeals that the insurer's duty of good faith may require it to disclose policy limits even before litigation. It reversed the Appellate Court's determination that the insurer acted with good faith as a matter of law.

insured. “Taking a position opposed to its insured might be interpreted as a violation of USAA's quasi-fiduciary duty to Harris.” 152 Wn.2d at 492.

Each of these cases turn on the obligation that insurers give the rights and interests of their insureds equal consideration as they gives to their own interests. “An insurer must give equal consideration in all matters to the policyholder's interests as well as its own.” *American States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 470, 78 P.3d 1266 (2003). The question here, therefore, is whether there was a genuine issue of material fact as to whether Universal gave equal consideration to the Sharbonos’ interests as its own.

**2. The Sharbonos were entitled to judgment as a matter of law because Universal failed to present any evidence that either its interests or the Sharbonos’ interests would be harmed by disclosing the underwriting file.**

In their motion for Summary Judgment, the Sharbonos presented the following facts. After the dispute arose regarding the amount of Personal Umbrella (Part 970) the Sharbonos had, the Sharbonos retained personal counsel, Maureen Falecki. (CP 969) On their behalf, beginning in August,

1999, Falecki contacted Universal by letter and demanded that Universal disclose its underwriting files so that she could use them to help determine how much coverage the Sharbonos had. (CP 969-71)

The Sharbonos showed that Universal refused to provide the underwriting files. (CP 976-77) The Sharbonos asked for the underwriting files a second time, indicating the files were necessary for settlement. (CP 984-86) Counsel raised an additional matter to which the files were pertinent: the retroactive cancellation of \$2 million personal umbrella liability coverage issued under the Trans-Plant policy. *Id.* In the letter, counsel also stated: “If you are unwilling to cooperate with the coverage investigation and provide the files voluntarily, the only other avenue I have is to file suit and subpoena the files.” *Id.* The Sharbonos showed that Universal refused this second written request for the production of its files. (CP 988-99) A second mediation was attempted in October, 1999. Afterwards, Falecki wrote again explaining that the mediation failed in part because of the unresolved coverage issues. (CP 999) In response, Universal again denied access to the files **and threatened to sue the Sharbonos** for abuse of process or malicious prosecution if they filed suit to obtain the files. (CP 1002)

At this point, October,1999, the Tomyns became involved. The Sharbonos showed that through their counsel, the Tomyns' warned Universal in no uncertain terms that they would file suit unless Universal cooperated with its insured's request and disclosed the underwriting files:

[W]e have refrained from initiating litigation against your insureds in an attempt to resolve this matter in a good faith, amicable manner. However, your intransigence in providing the information that will obviously be required to be produced through litigation discovery, will only serve to prejudice your insured and expose their personal assets. Failure to provide the requested insurance coverage information would clearly violate the Washington Administrative Code, as well as statutory authority as it relates to good faith insurance practices.

(CP 1004-06) Universal again refused. (CP 1008, 1010-11) As promised, the Tomyns filed suit in November, 1999. (CP 1016, see also CP 483-87)

In response to the Sharbonos' contentions, Universal cross-moved for summary judgment.<sup>7</sup> The sum of its arguments regarding production of the underwriting files are found at CP 1705-12. Universal argued that it had a reasonable basis for not producing "its proprietary and confidential

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<sup>7</sup> Universal also filed a direct response to the Sharbonos' motion, but respondents have been unable to locate that response in the record. The Response reiterated the arguments Universal presented in its own motion for summary judgment.

underwriting files.” It stated: “the very fact that Division Two accepted review of Universal’s motion for discretionary review on the question of the underwriting files , it is submitted, is determinative of that issue.” (CP 1705, lns. 13-18) Universal argued that disclosing its policy limits, giving the Sharbonos copies of their insurance applications, and offering to produce any document the Sharbonos themselves generated, went beyond its legal obligations. (CP 1708, lns. 20-22) Finally, Universal argued that even if it acted in bad faith, the Sharbonos suffered no harm.

On these facts, the trial court was correct and should be affirmed. Universal failed to show a genuine issue of material fact that it acted in bad faith. Reduced to basics, Universal offers two reasons to justify its decision.

First, it argues that it was both correct and reasonable that it had no duty to turn over its proprietary underwriting files because CR 26(b)(2) either did not obligate it to do so or it had a reasonable basis for believing CR 26 did not require it to do so. Brief of Appellant at 52-53. It cites the ruling of Commissioner Skerlec of this court as support, arguing that the trial court “snubbed” the Commissioner by not finding her decision controlling on the issue of bad faith. Brief of Appellant at 53.

Universal's argument is wrong because Commissioner Skerlec did not decide the question at issue here. At issue here is whether the duty of good faith may require an insurer to disclose an underwriting file to its insured. The issue Commissioner Skerlec addressed was whether Civil Rule 26(b)(2) requires an insurer to disclose an underwriting file to a person suing an insured as part of the underlying personal injury lawsuit.

The Civil Rules do not establish the boundaries for an insurer's duty of good faith. The duty of good faith requires, for example, that insurer's conduct reasonable investigations, *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998), settle claims, *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 791-92, 523 P.2d 193 (1974), and act within specified time limits, *Truck Insurance Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 58 P.3d 276 (2002), none of which are required by the civil rules. Indeed, in *Smith v. Safeco Ins. Co.*, 112 Wn. App. 645, 653, 50 P.3d 277 (2002), *reversed on other grounds*, 150 Wn.2d 478, 78 P.3d 1274 (2003), this court decided that the duty of good faith may require an insurer to disclose the insured's policy limits to a claimant even before litigation had been started, and thus before the civil rules apply.

*In the absence of a statute or rule requiring disclosure, the insurer must disclose the insured's policy limits if a reasonable person in the same or similar circumstances would believe that disclosure is in the insured's (as opposed to the claimant's) best interests. Conversely, the insurer need not disclose if a reasonable person would believe that disclosure is not in the insured's best interest, or if a reasonable person would not know, after reasonably marshaling the facts and evaluating the claim, whether disclosure was or was not in the insured's best interests.*

*Id.* (emphasis added). As *Smith* makes clear, whether an insurer's duty of good faith requires that it disclose underwriting information is bounded by the general description of the duty of good faith, not by the civil rules. The proper inquiry is not whether CR 26(b)(2) compelled disclosure, but whether a reasonable person in the same or similar circumstances would believe that disclosure was in the insured's best interests, giving equal consideration to the insured's and insurer's interests. Universal's reliance on CR 26 neither shielded it from liability for bad faith, nor created a genuine issue of material fact.

Universal next argues that it was justified in refusing to disclose its underwriting files because the information in it was "proprietary." For several reasons, the court should reject this argument.

First, Washington long ago rejected the contention that insurer's files

are per se protected from disclosure. See *Barry v. USAA*, 98 Wn. App. 199, 208, 989 P.2d 1172 (1999) (“[W]e note that the clearest basis for production is when crucial information is in the exclusive control of the opposing party. . . . [T]he nature of the issues in a bad faith insurance action automatically establishes substantial need for discovery of certain materials in the claims file.”); *Escalante v. Sentry Ins.*, 49 Wn. App. 375, 396 & n.11, 743 P.2d 832 (1987) (same); see also *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 401, 706 P.2d 212 (1985) (the clearest case for ordering production of work product is when crucial information is in the exclusive control of the opposing party). Universal has cited no authority that the law of bad faith recognizes a proprietary information privilege which would serve as an absolute impediment to disclosure. Simply put, labeling the files “proprietary” is not enough. In the absence of a privilege or other absolute bar on disclosure, Universal needed to show that it had some interest in the particular documents or information which outweighed the benefits to the Sharbonos in disclosure.

Universal failed to make that showing. In its opposition to the Sharbonos’ motion, Universal did not point to a single document that

contained sensitive information or information which could have impacted its business interests and thereby justified even a limited non-disclosure. It points to none here. While Universal argued that the file contained information such as pricing data, the disclosure of which could affect its ability to compete in the marketplace, it did not present or point out even one document fitting that description. Indeed, in the course of this litigation Universal produced the entire underwriting file without seeking protection for any document in it, and even fought to assure the file would be presented to the jury and become part of the record of this case. (Ex. 221) Because Universal failed to show even a single sensitive document that deserved some form of protection or consideration, the trial court was justified in rejecting Universal's "proprietary information" argument as unfounded and pretext.

Ironically, what the Sharbonos asked for from Universal was little different than what insurers routinely demand from insureds, usually under the threat that failure to produce such information will invalidate coverage. In the investigation of coverage, insurers often force insureds to disclose highly personal, information including personal financial data, diaries, health information and the like long after the policy has been formed, and insurers

void the insurance if the information is not provided. For example, in *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998), an insurer investigating a fire loss claim submitted what Justice Richard Sanders described as “a laundry list of otherwise confidential and personally invasive financial documents,” asserting these documents (and Mr. Tran's oral examination about those documents in an examination under oath) might provide evidence that Mr. Tran had a "motive [to] submit[ ] a fraudulent [theft] claim." 136 Wn.2d at 233 (Sanders, J., dissenting) Even in the absence of proof of fraud, the insurer denied coverage when the insured failed to produce the information demanded. Neither the highly personal nature of the documents nor the fact that the insurer might use them to deny coverage to its insured permitted the insured to refuse to disclose them. In *Tran*, the insured was not allowed to select the information it would provide to the insurer. Nor was the insured later allowed to claim that because the information would not actually have aided the insurer's investigation, its policy should not be voided.

In *Tran*, the insured's duty to disclose highly sensitive information was based upon the specific terms of the insurance policy: the cooperation

clause. Admittedly, there is no clause in the insurance policy compelling Universal to disclose information to the insured. This is not surprising since the insurer wrote the policy. But the fact that the contract does not compel it does not preclude Universal from having a duty. The law of good faith has developed as an adjunct to the contract, imposing obligations the insurer has chosen to omit. Thus, good faith requires insurers to settle within policy limits when they have opportunity to do so, to reasonably investigate claims, to disclose policy limits, and to act promptly. None of these obligations are stated in the contract. All are imposed by law to assure that the interests of the insured are given at least equal consideration. A result requiring Universal to disclose underwriting information is neither unfair or inequitable, especially where, as here, Universal wholly failed to show any interest in confidentiality. The obligation imposed on Universal here is no greater than the obligation Universal itself imposed on its insureds. It cannot be heard to complain that the trial court unfairly burdened it.

Finally, curiously, Universal argues that the Sharbonos suffered no harm from its bad faith actions. However, the Sharbonos did not ask the court for summary judgment on the issue of damages. Consistent with CR

56©), the Sharbonos only sought judgment on the issue of whether Universal's actions constituted bad faith. Damage caused by the bad faith was reserved for the jury. The jury decided that the uncertainty and delay in determining whether additional coverage existed brought about by Universal's actions caused the Sharbonos to lose two of their three businesses, and significant emotional distress. Universal does not argue that substantial evidence did not support those decisions.

Universal's reliance on Anderson v. State Farm Ins. Co., 101 Wn. App. 323, 2 P.3d 1029 (2000) is misplaced. The court clearly stated its decision: "The record does not support Anderson's argument that State Farm's omissions caused delay in the settlement of her claim and caused her to bear the expense of conducting her own investigation." *Id.* at 334. Here, the record is quite contrary:

- Q. Mr. Barcus, did Universal's refusal to produce the underwriting file delay your ability to perform your due diligence for your clients to determine how much insurance was available to them for their harm?
- A. I believe it was quite clearly conveyed to Universal that its actions in failing to provide the underwriting files were delaying and making it impossible to resolve the claim.

(RP 869-70)(Colloquy and objections omitted) Here, there was clear and direct evidence of harm.

### **3. Summary Judgment under Washington's Consumer Protection Act**

In its discussion of bad faith, Universal moves freely between discussion of bad faith and Washington's Consumer Protection Act. Universal captions its discussion of the Consumer Protection act under the heading of bad faith. Brief of Appellant at 48. While this makes the gist of its argument difficult to discern, Universal apparently argues that the trial court erred in applying WAC 284-30-330(7).

Universal concedes that insured's have a cause of action under the Consumer Protection Act when insurers breach the duty to act in good faith. Brief of Appellant at 48, citing *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 359, 581 P.2d 1349 (1978), and *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). If the Sharbonos had a viable CPA claim, Universal could not suffer harm if the trial court misapplied WAC 284-30-330(7).

In fact, however, the trial court did not misapply WAC 284-30-330(7). That regulation states:

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, specifically applicable to the settlement of claims:

(7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

The obvious purpose of this regulation is to assure that insurers do not use the threat of litigation made possible by their substantial financial advantage to force insureds to accept less under the policy than that to which they are entitled.

In this case, the Sharbonos showed that the duty of good faith compelled Universal, under the facts of this case, to disclose documents and information that could assist them in determining whether they should have additional coverage. Just as the benefit of the insurer's obligation to investigate and to settle claims is a benefit of coverage, access to coverage

information when compelled by the duty of good faith is as well. In response to this request Universal not only offered “substantially less” than what the Sharbonos ultimately recovered, it told the Sharbonos they would have to sue to get the information. (CP 1488)<sup>8</sup> A clearer case of compelling insureds to litigate to obtain the benefit of their policy is hard to imagine.

#### **4. Conclusion**

Universal was asked to assist its insureds in effectuating settlement by disclosing information that could have helped its insureds complete settlement. Here unlike *Smith*, not only did the claimant seek the information, but the insureds did as well. Both specifically informed Universal that the information was needed before settlement could occur. Indeed, the Tomyns told Universal that failure to provide the information would result in the Sharbonos being sued. The nature of the coverage dispute made the request reasonable. The loss to the Tomyns in the underlying accident was catastrophic. The value of their claim clearly exceeded the

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<sup>8</sup> Importantly, Universal did not dispute that Mr. Reid made this statement until trial, long after the court had rendered its decision on summary judgment. (See CP 1694-1713)

limits of admittedly available insurance. In light of the Sharbonos' belief that they had secured greater coverage than what Universal acknowledged, no reasonable attorney representing the Tomyns could possibly consent to settlement for the undisputed coverage without ruling out the existence of additional coverage. Without the information, the Sharbonos were unable to resolve the issue of additional coverage, were forced to face suit, and were forced to negotiate a settlement that left the issue unresolved.

For its part, Universal chose resolutely to refuse to produce the files. It gave no reason other than the fact that no rule or statute compelled it to disclose. What is shocking is that in the consideration of balancing of interests mandated by the fiduciary relationship, Universal received no discernable benefit from its actions; the only consequence was that uncertainty surrounding coverage was heightened, and the Sharbonos were harmed. Universal's insurance coverage was not resolved. Universal ultimately produced the files in the ordinary course of this litigation, just as it was informed it would have to. And, the Sharbonos received no "savings" in the settlement with the Tomyns as a consequence of Universal's refusal.

By taking this course, Universal acted in bad faith and also violated

the CPA as a matter of law. It disregarded its duties toward its insured. In refusing to disclose the files and telling its insureds they would have to sue to get files, Universal overemphasized its own interests, to the exclusion of its insureds.

#### **D. Evidentiary Challenges**

Universal appeals some evidentiary rulings made by the trial court. As part of that, it makes the incredible statement that the court made numerous erroneous rulings, “all against Universal.” Of course that is a statement that invites, but defies, detailed response. It must be sufficient simply to note that litigants are entitled to a fair trial, not a perfect trial, “for there are no perfect trials.” *State v. Rempel*, 53 Wn. App. 799, 803, 770 P.2d 1058 (1989) (quoting *Brown v. United States*, 411 U.S. 223, 231-32, 93 S.Ct. 1565, 1570, 36 L. Ed.2d 208 (1973)). The trial court made many, many, many rulings in the course of this case. Many went against the Sharbonos, many favored Universal. It is wrong to suggest that Universal was victimized by the trial court. Moreover, one must assume that Universal has raised all

the erroneous rulings it believes actually prejudiced the result.<sup>9</sup>

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<sup>9</sup> In footnote 31, Universal raises two issues for which error has not been assigned, yet asks the court to rule on them. One is the admission of the entire underwriting files. The other is allowing two individuals to observe certain trial proceedings. Universal cites no authority in conjunction with either issue.

In fact, no error occurred with regard to either. The trial court did not exclude the underwriting files as a sanction. The trial court excluded the underwriting files because they were not relevant. The Sharbonos contended that Universal's actions in refusing to disclose its underlying file caused its damage, not the contents of the underwriting files. Universal's steadfast, adamant refusal to produce the underwriting files did one thing: it fueled the belief that the files contained something that would show the Sharbonos had more coverage and delayed settlement. As both the Sharbonos' attorney and the Tomyns' attorney advised, and as the jury found, Universal's refusal delayed resolution of the Tomyns' claim which caused the Sharbonos to lose two of their three business. This occurred not because of the contents of the files, but because of Universal's actions. Nevertheless, ultimately Universal succeeded in getting the files into evidence.

On allowing certain witnesses to observe certain proceedings, court proceedings are public. *Public Utility Dist. No. 1 of Klickitat County v. Walbrook Ins. Co.*, 115 Wn.2d 339, 345, 797 P.2d 504 (1990). The decision to exclude witnesses from the courtroom at all is within the trial court's discretion. *State v. Walker*, 19 Wn. App. 881, 883, 578 P.2d 83 (1978). Likewise,

...the exemption of certain witnesses from the exclusion, the decision regarding whether the later testimony of any witnesses allowed to remain in the courtroom will be admitted or excluded, and even the determination concerning whether witnesses who violated an exclusionary rule and remained in the courtroom may testify, are all questions

## 1. Commissioner's Ruling

Universal contends that the trial court wrongly prevented it from presenting the ruling of Division Two Commissioner Skerlec. In the *Tomyn v. Sharbono* lawsuit, the Tomyns attempted to subpoena Universal's underwriting files. Universal acted to quash the subpoena. Superior Court

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within the broad discretion of the trial court.

Furthermore, the admission and determination concerning the propriety of rebuttal testimony is another matter resting entirely within the discretion of the trial court.

*State v. Bergen*, 13 Wn. App. 974, 978, 538 P.2d 533 (1975). By virtue of the settlement agreement between the Tomyns and the Sharbonos, Mr. Barcus's client had an interest in the proceedings. The trial court could correctly reason that his client's interest justified his presence, and as a lawyer and an officer of the court Mr. Barcus would not allow his testimony to be influenced by observing the proceedings. The court allowed the Sharbonos economic expert to remain in the courtroom while Universal's economist testified so he could assist the Sharbonos' cross-examination and be prepared to respond on re-direct. The trial court did not err. See *State v. Weaver*, 60 Wn.2d 87, 90, 371, 371 P.2d 1006 (1962) (police officer permitted to remain in the court room notwithstanding an exclusion order); *State v. McGee*, 6 Wn. App. 668, 495 P.2d 670 (1972) (sheriff allowed to remain in the court room and testify despite an exclusion order).

Judge Sergio Armijo ordered Universal to comply with the subpoena and Universal sought discretionary review. In granting discretionary review, Commissioner Skerlec commented on the scope of discovery allowable under CR 26(b)(2), siding with Universal's interpretation. At trial, Universal sought to introduce Commissioner Skerlec's ruling. The trial court refused.

In its statement of facts, Universal claims Commissioner Skerlec's ruling was necessary to "rebut the Sharbonos' arguments on Universal's alleged bad faith in opposing Barcus's subpoena for the internal underwriting records." Brief of Appellant at 22. On the same lines, Universal states:

Here, the entire thrust of the Sharbonos' bad faith argument was that Universal improperly withheld its underwriting file from the Tomyns' attorney and from the Sharbonos. According to the Sharbonos, this forced them to sue Universal to obtain the file. The Sharbonos offered the Armijo ruling as evidence of Universal's improper withholding of the file. Universal contended it was not guilty of any bad faith because it turned over the portions of the file to which the Sharbonos were entitled. Universal argued it was entitled to withhold the proprietary materials in the file.

Brief of Appellant at 58. Its arguments fail.

First, by the time of trial, Universal's bad faith had been established by summary judgment. Universal could not longer argue that its actions were justified. To the extent Commissioner Skerlec's ruling was relevant to the

issue of bad faith, Universal had every opportunity to, and did, present it in opposition to the Sharbonos' motion for summary judgment. (CP 1705) Indeed, it was because the issue of bad faith no longer was present that the court refused to admit the ruling. (RP 750, 751)

Second, the Sharbonos did not introduce Judge Armijo's ruling to show bad faith or otherwise. The citations Universal gives to support that contention do not. Rather, as part of their effort to establish that Universal's actions had caused their damages, the Sharbonos questioned witnesses about the efforts made to obtain the underwriting files, the resistance Universal gave, and the impact that resistance had. (RP 710) In response to the question of what efforts were taken in the context of the *Tomyn* lawsuit to obtain Universal's files, Mr. Sharbono testified that suit was filed, that Universal resisted, that Universal refused to release the files when the first court ordered it to and took it up on appeal. (RP 406) Ms. Falecki testified she, on behalf of the Sharbonos, supported and joined in the Tomyns' efforts to get the records. (RP 710-14)

Finally, despite the court's ruling Universal still introduced evidence that the Court of Appeals accepted Universal's appeal for review. (RP 747-

48) The court's ruling only prevented introducing Commissioner Skerlec's written ruling. Universal still was allowed to argue it was correct in resisting the subpoena.

Evidence is relevant if it has a tendency to prove or disprove a fact in issue. *See* ER 401; *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). A trial court's decision on the relevance and prejudicial effect of evidence is reviewed for abuse of discretion. *Rice*, 48 Wn. App. at 11. "An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (citing *Brown v. Spokane Cty.*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)). On summary judgment, Universal was allowed to present Commissioner Skerlec's ruling to counter the Sharbonos' claims of bad faith. However, the Commissioner's ruling was not relevant to an issue presented at trial. Moreover, the court's ruling did not prevent Universal from informing the jury of the substance of the commissioner's decision. The trial court did not err.

## **2. Mediation Disclosures.**

Universal argues that the trial court erred in allowing testimony about events at two mediations. Its contention is meritless.

First, the statute on which Universal relies, RCW 5.60.070(1) does not apply. By its terms the mediation privilege only applies when “there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100.” Universal has presented no evidence that any of these conditions are present.

Second, Universal waived any objection it may have. It used evidence of its offers at mediation to support its contention that releasing the underwriting files would have had no effect on the outcome of the Tomyns’ claim. (RP 463-64, 737, 1166-67) It also failed to object to use of evidence of the mediations. Virtually all of the evidence presented at trial had been presented during the parties’ motion for summary judgment on the issue of bad faith, including Glen Reid’s comments. (See, e.g., CP 985-86, 989, 999-1000, 1006) The tape to which Universal refers was submitted without objection in regards to the reasonableness hearing (CP 760). It also was

material “otherwise subject to discovery” and exempt from the privilege under RCW 5.60.070(b).

Third, Universal’s argument is unprincipled. Universal would apply this privilege to preclude a spouse from presenting evidence in support of a restraining order that during a mediation his or her spouse made threats of violence or brought a weapon. It would apply the statute to preclude showing that a necessary party to mediation violated a court order to mediate in good faith. Under Universal’s approach, a party to a mediation could threaten to destroy evidence and other parties could not present that to a court.

The law does not make mediations the kind of “black hole” Universal asserts. It is well-settled that a statutory privilege is in derogation of common law, strictly construed and “limited to its purposes.” *State v. Ross*, 89 Wn. App. 302, 307, 947 P.2d 1290 (1997), *rev. denied* 135 Wn.2d 1011 (1998); *State v. Harris*, 51 Wn. App. 807, 812, 755 P.2d 825 (1988); *Breimon v. General Motors Corp.*, 8 Wn. App. 747, 751, 509 P.2d 398 (1973). The obvious purpose of the mediation privilege, much like ER 408, is to protect the use of settlement discussions as evidence of liability. But it has long been held that settlement evidence may be disclosed for collateral purposes, such

as to show good faith. *Matteson v. Ziebarth*, 40 Wn. App. 286, 294, 242 P.2d 1025 (1952). Indeed, Universal itself submitted what purported to be confidential settlement communications when it suited its need. (CP 880-86) The privilege should not be applied to collateral matters, when the actions, information or communications pertain to matters independent of the mediation. The trial court did not err in admitting evidence regarding the two mediations.

### **3. Non-disclosed “Expert” Witnesses**

Next Universal argues that the trial court wrongly permitted three witnesses to testify as experts without the Sharbonos having identified them as such. Brief of Appellant at 61. Universal cites no authority. This contention also is meritless.

To be classified as an expert witness, a witness “necessarily must have been retained by a party to develop facts and opinions in anticipation of litigation.” *Paiya v. Durham Const. Co., Inc.*, 69 Wn. App. 578, 580, 849 P.2d 660 (1993) (citing *Bruce v. Byrne-Stevens Assocs. Eng’rs, Inc.*, 113 Wn.2d 123, 129-30, 776 P.2d 666 (1989)). A professional who has acquired

facts and opinions not in anticipation of litigation, but from some other involvement, is not an expert witness. *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 175, 947 P.2d 1275 (1997).

In *Kimball*, the Court of Appeals considered the issue of whether a preservation deposition of a physician should have been admitted in a personal injury case. *Id.* at 174-75. The plaintiff argued that the deposition should have been excluded because, since the physician was allegedly going to be offering opinion testimony, the defendant did not comply with CR 32(a)(5)(B) which governs the use of a deposition of an expert witness at trial. *Id.* The Court disagreed, concluding that the physician was not an “expert witness” within the meaning of the Civil Rules:

Under CR 26(b) generally, only opinions acquired and developed in anticipation of litigation are expert opinions; professionals who have acquired facts and opinions not in anticipation of litigation, but from some other involvement, are not expert witnesses. It is undisputed that Dr. McCollum was not hired by either party, and that he reviewed Ms. Kimball’s medical records and examined her in May 1992 to evaluate her medical condition in relation to her Department of Labor and Industries claim. That was well before this lawsuit was filed by Ms. Kimball. Dr. McCollum was not an expert witness and the court did not abuse its discretion in admitting his deposition under CR 32(a)(3)(B).

*Id.* at 175-76 (internal citations omitted).

Mr. Barcus, Ms. Falecki and Mr. Bufalini were professionals. All of them acquired facts and opinions, but none was retained, and none acquired their opinions in anticipation of this litigation. Their knowledge and facts came in the representation of their clients: Mr. Barcus and Mr. Bufalini for the Tomyns and Ms. Falecki for the Sharbonos. Indeed, it was their facts and opinions that formed much of the factual basis for the Sharbonos' claims. Their knowledge was formed as a result of their presence and observations at the time events were occurring, and their testimony, to the extent it reflected their professional expertise, expressed opinions based on that knowledge. Their opinions were not formed in anticipation of litigation. They were not experts requiring advance disclosure. *See Paiya, supra*, 69 Wn. App. at 580. The trial court did not err in allowing their testimony.

## **E. Instructional Errors**

### **1. Instruction on Prior Rulings**

Universal argues that the trial court wrongly informed the jury of some of its previous rulings through jury instruction 5, CP 2272. Brief of

Appellant at 62. Universal cites no authority that this was error let alone error that requires reversal. Universal even ignores the authority and argument the Sharbonos originally offered in support of the instruction. (CP 2155-58) This contention also is meritless.

It is proper for a trial court to inform the jury of prior rulings, particularly rulings which resolve issues pertaining to those the jury must decide. See *Hill v. Cox*, 110 Wn. App. 394, 408-09, 41 P.2d 495 (2002); *Safeco Ins. Co. v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 680 P.2d 409 (1984).

In this case, the instruction was neutral and justified under the circumstances. Informing the jury that the court had found additional insurance coverage assured that the jury did not consider the Sharbonos' settlement with the Tomyns among the damages the Sharbonos suffered from Universal's wrongful conduct. It also assured that, in light of the substantial evidence indicating Universal had failed to properly add additional Personal Umbrella (Coverage part 970), the jury did not act upon that evidence to Universal's detriment. As to bad faith, the instruction assured that the jury could place the Sharbonos' claims as expressed in instruction 8 (CP 2275) in

correct context and that the jury did not consider among its duties to determine whether Universal's acts were wrongful. This instruction, combined with instruction 8 and the special verdict form (CP 2307-08) clearly informed the jury that its duty was only to determine whether Universal's wrongful acts were a proximate cause of damage and if so, the amount. It did not assure an outcome against Universal. The trial court did not err.

## **2. Instruction on Proximate Cause**

Universal next argues that the court erred in giving instruction 12 (CP 2279), the instruction defining proximate cause. Brief of Appellant at 64. Instruction 12 mirrors WPI 15.02. Again failing to cite any authority that the instruction was erroneous, and providing a curious and incomplete discussion of the acceptance and use of this instruction, its argument is without merit.

In general, according to the Washington courts, a defendant's conduct is a "proximate cause" of harm to another if, in direct sequence, unbroken by any new independent cause, it produces the harm, and without it the harm would not have happened. Alternatively, according to the Restatement (Second) of Torts (hereafter "Restatement"), a defendant's conduct is a "proximate cause" of harm if it "is a substantial factor in bringing about the harm" and no other rule relieves

him from liability, unless the harm would have been sustained even without his conduct.

State v. Meekins, 125 Wn. App. 390, 396-97, 105 P.3d 420 (2005). In a case where either of two forces was sufficient to cause the same harm, the "but for" test is inappropriate; to apply it in such a case would prevent a finding that either force proximately caused the harm. Daugert v. Pappas, 104 Wn.2d 254, 262, 704 P.2d 600 (1985) (citing W. Page Keeton and William Prosser, Prosser and Keeton on the Law of Torts sec. 41 (5th ed.1984)). Instead, the appropriate inquiry is whether the defendant's wrongful act " 'was a substantial factor in bringing about the injury even though other causes may have contributed to it.' " Allison v. Housing Auth. of City of Seattle, 118 Wn.2d 79, 94, 821 P.2d 34 (1991) (quoting Robert Belton, Causation in Employment Discrimination Law, 34 Wayne L.Rev. 1235, 1247 (1988)). The comment to WPI 15.02 states that the substantial factor test has been applied in a variety of cases including employment discrimination, unfair employment practices, securities violations, asbestos injury, toxic torts, and medical malpractice. 6 Wash. Practice 187-88, Comment (2005). In Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 31-32, 935 P.2d

684 (1997), the Court of Appeals decided that the substantial factor test should be used in multi-supplier asbestos-injury cases when all of the plaintiff's exposure to asbestos probably played a role in causing the injury but it was not possible to determine which exposures were, in fact, the cause of the condition.

Most analogous are securities cases. See Herrington v. David D. Hawthorne, CPA, P.S., 111 Wn. App. 824, 47 P.3d 567 (2002); Haberman v. Washington Public Power Supply System, 109 Wn.2d 107, 131-32, 744 P.2d 1032 (1987); Hines v. Data Line Systems, Inc., 114 Wn.2d 127, 787 P.2d 8 (1990). Both businesses are heavily regulated; both businesses require heightened reliance by customers for correct information and proper processing of purchases. In these cases, the "substantial factor" test is applied in at least three circumstances: when a customer alleges harm arising from the conduct of a seller's agent and the harm may include other contributing factors; when the defendant's conduct may have created a force or series of forces which are in continuous and active operation, or a situation which is harmless unless acted upon; and/or when there has been a lapse of time. All of these circumstances recognize the unique risks attendant to the

securities business.

Those uniquenesses are even more pronounced in the relationship between insurer and insured. In *Transamerica Ins. Group v. Chubb & Son, Inc.*, 16 Wn. App. 247, 554 P.2d 1080 (1976), *review denied*, 88 Wn.2d 1015 (1977), the court recognized these uniquenesses. There, in the context of liability insurance, the insurer controlled the defense for 10 months before issuing a reservation of rights. In finding that the insurer's actions caused prejudice as a matter of law, the court noted:

The course cannot be rerun, no amount of evidence will prove what might have occurred if a different route had been taken. By its own actions, [the insurer] irrevocably fixed the course of events concerning the law suit for the first 10 months. Of necessity, this establishes prejudice.

16 Wn. App. at 252, 554 P.2d 1080. In *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 390-91, 823 P.2d 499 (1992), the court applied this reasoning to justify the presumption of harm where an insurer has committed bad faith. Because of the unique setting in which insurers act, and the unique risks that arise when an insurer engages in bad faith, the substantial factor standard is the appropriate standard to determine proximate cause.

In this case, Universal argues the Sharbonos would have been injured

anyway. But, as the *Butler* and *Transamerica* courts recognized, the course cannot be rerun, and no amount of evidence will prove what might have happened if Universal had acted as it should. The testimony indicated that Universal's actions delayed and made it impossible to get the Tomyns' claim settled. (CP 870) By specific interrogatory, the jury determined that Universal's failure to produce the underwriting files was a substantial factor in the Sharbonos' confession of judgment. Under these circumstances, Instruction 12 was the correct instruction.

#### **F. The Damage Award**

As its final argument, Universal contends the jury's award for the Sharbonos' non-economic damages was excessive. Universal does not challenge the jury's \$3.5 million award for the loss of the Sharbonos' two businesses. Universal argues the award was excessive because, almost two years after the Sharbonos watched their businesses and financial security be lost -- businesses and security they had built from nothing for over 15 years -- the Sharbonos agreed to a settlement that "fully protected them from any personal liability on the *Tomyn* claim." Brief of Appellant at 66. While the

claim that the settlement fully protected the Sharbonos is wrong – the Sharbonos were still obligated to incur the hundreds of thousands of dollars they paid to pursue this action – the argument itself is wrong.

"Determining the amount of damages is within the province of the jury and courts are reluctant to interfere with a jury's damage award." Lopez v. Salgado-Guadarama, 130 Wn. App. 87, 91, 122 P.3d 733 (2005) (and cases cited therein).

[T]he jury's constitutionally protected role is that of the finder of fact and part of this role is to determine the amount of damages in a given case. Because these matters are within the jury's province, there is a strong presumption in favor of their validity.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 654, 771 P.2d 711 (1989). When a trial court refuses to remit a damages award, as the trial court did here, "the verdict is strengthened and the discretion of the trial court should be respected." Bunch v. Dep't of Youth Servs., 155 Wn.2d 165, 176, 116 P.3d 381 (2005). Any finding that the amount damages awarded by the jury was excessive must be based on "unmistakable" passion or prejudice. Bunch, 155 Wn.2d at 179; Lopez, 130 Wn. App. at 91; *see also* RCW 4.76.030.

Despite this heavy burden and without acknowledging the

presumption of validity, Universal argues that the jury's award of non-economic damages was "so excessive as to evidence the fact that the jury acted with passion and prejudice." Brief of Appellant at page 71. However, none of the arguments advanced by Universal to support that contention are actually directed toward establishing that the jury's general damages award was "unmistakably" the result of passion or prejudice. Brief of Appellants at pages 68-71. Universal's arguments are premised exclusively on the weight of the evidence the Sharbonos presented to support their claim for general damages. Universal's desire that the jury would have weighed the Sharbonos' evidence differently does not mean the damages award was the result of passion or prejudice, nor does it warrant a new trial.

Universal also makes much of the fact that the Sharbonos never sought professional counseling and that no other witnesses testified as to their emotional damages. Brief of Appellants at page 69. Such evidence is not required to support an award of general damages. See *Bunch*, 155 Wn.2d at 181. In *Bunch*, the Washington Supreme Court reversed a Court of Appeals' remittitur of a general damages award of \$260,000 for emotional distress from racially motivated employment discipline, finding that the plaintiff's

testimony alone, even though "limited", was sufficient to support the jury's award of general damages. *Id.* at 180-81.

In this case, the Sharbonos testified, and the jury found that Sharbonos lost two businesses, \$3.5 million of income, and their financial security as a result of Universal's actions. The testimony of the affect this had on them provided the jury with a sufficient basis to make an award of general damages. It is the jury's right and province to weigh the credibility of a witness and determine whether he or she in fact suffered emotional distress. *Id.* at 181. Universal's disagreement with the jury's determination, without more, does not warrant either remittitur or a new trial.<sup>10</sup>

"Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable." *Bingaman v. Grays Harbor Community Hosp.*, 103 Wn.2d 831, 836, 699 P.2d 1230 (1985). Universal has failed to demonstrate any basis for such a finding by this Court. The jury's award of general damages was not "unmistakably" the result of passion or prejudice given the testimony of the Sharbonos, the

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<sup>10</sup> It is not entirely clear from Universal's brief what relief it seeks from this argument.

amount of economic versus non-economic damages, and the nature of the Sharbonos' economic loss.

### **ARGUMENT ON CROSS-APPEAL**

#### **A. The finding of sufficient insurance to pay the Tomyn judgment did not render the Sharbonos' claim against Universal's sales agent moot.**

The Sharbonos have cross-appealed from the trial court's dismissal of their negligence claim against Mr. van de Wege. They ask the court to consider this issue only if it remands these proceedings on matters affecting the merits.

In January 2005, the Sharbonos made their second motion for partial summary judgment, asking the trial court to find that Universal acted in bad faith and violated the Consumer Protection Act as a matter of law, that Universal was obligated as a matter of law to pay the judgment entered against the Sharbonos by the Tomyns, and that the Sharbonos could "stack" the policy limits of the Personal Umbrella (Coverage Part 970) and Umbrella (Coverage Part 980) policies. (CP 1642-643) In their motion, the Sharbonos explicitly noted their intention that their claims against Mr. van de Wege for

negligence and negligent misrepresentation remained for trial. (CP 1643)

In response, Universal moved for summary judgment, asking in part that the Sharbonos' claims against Mr. van de Wege be dismissed as moot because the trial court had already ruled that the Sharbonos were entitled to an amount of insurance coverage that exceeded the Tomyns' judgment. (CP 1703-704)

In its "Order on Cross-Motions for Summary Judgment," the trial court ordered, *inter alia*, that because its previous rulings established sufficient insurance coverage to cover the underlying judgment against the Sharbonos, any relief the court could provide on the Sharbonos' additional claims would be duplicative of the relief already granted. (CP 2177) Accordingly, the trial court dismissed the Sharbonos' claims against Mr. van de Wege with prejudice, deeming those claims "moot." (CP 2177).

The trial court's dismissal of the Sharbonos' claims against Mr. van de Wege as moot is not supported by law. That a plaintiff might allege multiple theories of recovery against multiple persons which may provide duplicative relief does not mean a theory against one defendant becomes moot when another defendant's liability is established. The trial court's

failure to appreciate this principle appears to result from a misapprehension of the measure of damages the Sharbonos might have recovered against Mr. van de Wege. As was amply demonstrated at trial, the Sharbonos' damages for Mr. van de Wege's failure to properly and adequately procure umbrella coverage were not limited solely to the amount of the underlying judgment. An insurance broker whose negligence leads to inadequate insurance coverage is liable to the insured for **money damages** for the resulting loss. AAS-DMP Mgmt., L.P. Liquidating Trust v. Acordia Northwest, Inc., 115 Wn. App. 833, 838-39, 63 P.3d 860, *rev. denied*, 150 Wn.2d 1011 (2003).

At least one other court has considered this issue and held that a trial court's finding of insurance coverage for an underlying lawsuit does not negate an insured's claim of negligence against his insurance broker. In Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC, 26 Cal. Rptr. 3d 452 (2005), insured members of a musical band brought suit against their insurer and their insurance broker after settling a claim against a fired band member. The band members alleged that the insurer wrongfully denied coverage of the fired member's claims and that their broker negligently failed to advise the band of a relevant policy exclusion, which would have required

the band to procure an additional errors and omissions policy to guarantee full coverage. *Id.* at 456. The band members and the insurer cross-moved for summary judgment and the trial court ordered that the insurer had a duty to defend the band against the fired member's claims and that the relevant exclusion was ambiguous as applied to the allegations of the fired member. *Id.*

The band and the insurer eventually settled their claims and, shortly thereafter, the insurance broker filed a motion for judgment on the pleadings. The trial court granted the motion, holding that the band's causes of action against the broker no longer stated a claim for relief because they were "predicated" on a claim that the policy was insufficient to provide coverage, yet the trial court had found in prior orders that the policy was sufficient. *Id.* at 456-57. The appellate court reversed, finding that the band alleged claims against its broker that were not premised on the sufficiency of the insurance policy and, therefore, that the broker's liability was independent of the insurer's liability for denying coverage. *Id.* at 457-58.

Similarly here, whether Mr. van de Wege negligently misrepresented the umbrella coverages he sold to the Sharbonos and/or whether he

negligently failed to properly secure the coverages the Sharbonos believed they had purchased from him are issues that are entirely separate and apart from the question of coverage, nor is Mr. van de Wege's alleged negligence dependent on whether Universal acted in good or bad faith toward the Sharbonos. The Sharbonos alleged and presented evidence that they suffered damages well in excess of the amount of the underlying judgment; the fact that the trial court found that Universal was liable for the amount of that judgment did not preclude the Sharbonos from recovering damages against Mr. van de Wege for his negligence. The trial court erred in so holding.

**B. A court making an award of reasonable attorney fees should calculate a lodestar figure even where the prevailing party has retained counsel on an hourly fee.**

After the jury returned its verdict, counsel for the Sharbonos moved for an award of attorney fees and costs under RCW 19.86.090 and *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). The trial court granted that motion, awarding the Sharbonos attorney fees in the amount of \$203,585.00. (CP 2423) The number of hours expended by counsel for the Sharbonos, the reasonableness of that number,

or the Sharbonos' entitlement to an award of attorney fees was conceded by Universal and are not at issue in this appeal. (CP 2398; 2399) With their cross-appeal, the Sharbonos contend the trial court erred in failing to calculate a lodestar figure and by concluding that counsel's actual fees billed would be the award.

In calculating an award of attorney fees, the trial court must "independently determine what are reasonable attorneys' fees, beginning first by calculating a lodestar figure." *Pham v. City of Seattle*, 124 Wn. App. 716, 721, 203 P.3d 827 (2004). "The lodestar method is grounded in the market value of the lawyer's services, and is determined by multiplying the hours reasonably expended in the litigation by each attorney's reasonable hourly rate of compensation." *Id.* (citing *Steele v. Lundgren*, 96 Wn. App. 773, 780, 982 P.2d 619 (1999)). An award of attorney fees is reviewed for an abuse of discretion. *Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 808, 98 P.3d 1264 (2004).

A lodestar figure is the product of the hours reasonably expended in the litigation **multiplied by a reasonable hourly rate**. *Id.* at 726. Although their attorneys' average billable hourly rate was \$158.50, the Sharbonos

requested that the lodestar figure be set at \$200.00 per hour, a more reasonable hourly rate that reflected the current market value for similar work in Pierce County during the relevant times in question. (CP 2327) To that end, counsel for the Sharbonos stated his familiarity with the hourly rates charged by attorneys practicing insurance and general civil litigation in the Pierce County area. (CP 2325-326) He also presented evidence of an attorney fee award in another, similar case in Pierce County where the trial court was presented with evidence of reasonable hourly rates of \$150.00 to \$200.00 per hour for similar attorney services. (CP 2325-326; 2336-364) The trial court was also advised that, in that case, the lodestar figure was calculated at \$175.00 per hour to which the trial court applied a 20 percent multiplier, resulting in a reasonable hourly rate of \$210.00 per hour. (CP 2326; 2337) This evidence was neither disputed nor controverted by Universal.

Despite this evidence and in spite of its obligation to calculate a lodestar figure by independently determining a reasonable hourly rate, the trial court calculated the attorney fee award by simply awarding the Sharbonos the amount of fees actually charged. (CP 2423) The trial court

abused its discretion in doing so, because the trial court failed to independently calculate a reasonable hourly rate, a condition precedent to determining the lodestar figure.

Certainly, an attorney's established hourly billing rate should be presumptively reasonable; it is not, however, conclusively reasonable. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). To be sure, appellate courts have suggested trial courts may consider additional factors apart from the attorney's usual billing rate in independently determining an objectively reasonable hourly rate, including the skill required for the representation, the time required, the experience and reputation of the attorneys, the undesirability of the case, and awards in similar cases. *Id.* at 596-97. A trial court's consideration of these criteria necessarily requires that the court look beyond the actual hourly rate billed. "[T]he trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount of attorney fees." Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

In this case, the trial court made no such independent decision.

Instead, the court merely awarded the amount of fees actually charged, without making any determination as to what constituted a reasonable hourly fee for the work performed by the Sharbonos' counsel in this litigation. Using an attorney's current billing rate at the time of the award of fees is **only one way** to properly adjust a lodestar fee. *Pham*, 124 Wn. App. at 726. It is not, however, the only way and is not a substitute for calculating a lodestar figure. The trial court abused its discretion in failing to calculate a reasonable hourly fee and in failing to calculate a lodestar figure when it awarded the Sharbonos their attorney fees. The Sharbonos respectfully request that this Court remand for a determination of attorney fees consistent with the above authorities.

### **REQUEST FOR ATTORNEY FEES**

Pursuant to RAP 18.1(a) and (b), the Sharbonos ask this Court to award them their attorney fees for defending this appeal. As a general rule, if applicable law allows the trial court to grant attorney fees, that law is also interpreted as allowing fees to the prevailing party on appeal. *Lindsay v. Pacific Topsoils, Inc.*, 129 Wn. App. 672, 685, 120 P.3d 102 (2005).

An insured is entitled to recover his actual attorney fees when his insurer compels him to pursue legal action in order to obtain the full benefit of the insurance contract. McGreevy v. Oregon Mut. Ins. Co., 128 Wn.2d 26, 33, 904 P.2d 731 (1995). Washington Consumer Protection Act, RCW 19.86.090 provides that a prevailing plaintiff is entitled to recover actual damages sustained by a violation of the CPA, “together with the costs of the suit, including a reasonable attorney’s fee.” Reasonable attorney’s fees and costs are mandatory for prevailing plaintiffs. State v. Black, 100 Wn.2d 793, 804-05, 676 P.2d 963 (1984).

RAP 18.1(a) authorizes an award of attorney fees on appeal “[i]f applicable law grants to the party the right to recover reasonable attorney fees or expenses on review[.]” The Sharbonos are entitled to an award of their attorney fees on appeal and respectfully ask that this Court so order. RCW 19.86.090; McGreevy, 128 Wn.2d at 40; Carr v. Blue Cross of Washington & Alaska, 93 Wn. App. 941, 954, 971 P.2d 102 (1999).

The Sharbonos also ask that they be awarded their costs under RAP 14.

## CONCLUSION

For the foregoing reasons, Respondents ask that the judgment be affirmed in its entirety, and the case remanded for recalculation of Plaintiffs' fee award.

DATED: June 11, 2006.

BURGESS FITZER, P.S.



TIMOTHY R. GOSSELIN, WSB #13730  
Attorneys for Respondents/Cross-Appellants

# **APPENDIX A**



01-2-07954-4 22889842 VRDP 04-18-05

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

JAMES and DEBORAH SHARBONO, )  
individually and the marital community ) NO. 01-2-07954-4  
composed thereof; CASSANDRA SHARBONO, )  
Plaintiffs, )  
vs. )  
UNIVERSAL UNDERWRITERS INSURANCE )  
COMPANY, a foreign insurer, )  
Defendant. )

SPECIAL VERDICT FORM



We the jury answer the questions submitted by the court as follows:

#1: Was the defendant's action in not producing its underwriting file the proximate cause of damage to the plaintiffs?

Answer: YES (write "yes" or "no")

Answer Question Number 2.

#2: Was the defendant's action in compelling plaintiffs to litigation the proximate cause of damage to the plaintiffs?

Answer: yes (write "yes" or "no")

If both of your answers to Questions Numbers 1 and 2 were "no," answer Question Number 4. If either of your answers were "yes," answer Question Number 3.

#3: What is the total amount of plaintiffs' damages which you indicated above were proximately caused by the defendant's action(s).

Answer (a) For Past Economic Damages	\$ <u>1,750,000</u>
Answer (b) For Future Economic Damages	\$ <u>1,750,000</u>
Answer (c) For Non-economic Damages to Plaintiff James Sharbono	\$ <u>500,000</u>
Answer (d) For Non-economic Damages to Plaintiff Deborah Sharbono	\$ <u>500,000</u>

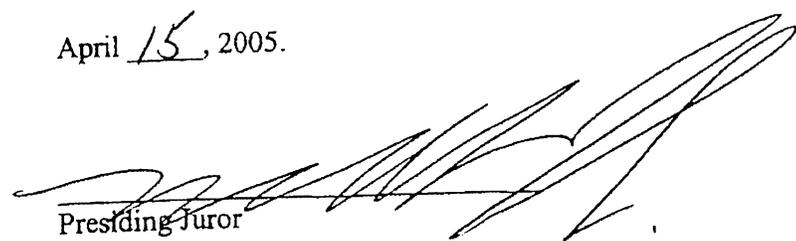
Answer Question Number 4.

#4: Was the defendant's failure to produce its underwriting files to the plaintiffs the proximate cause of the plaintiffs' confession of judgment to the Tomyns?

Answer: yes (write "yes" or "no")

SIGN, DATE, AND RETURN THIS VERDICT FORM.

April 15, 2005.

  
 Presiding Juror

# **APPENDIX B**

August 5, 1999

Via Fax &amp; US Mail

Jack Peckinpaugh  
 Claims Manager  
 Universal Underwriters Group  
 6840 Fort Dent Way, #375  
 Seattle, WA 98188

RE: Tomy'n Estate v. Sharbono  
 Date of Loss: 12/11/98  
 Our Clients: Mr. and Mrs. Sharbono  
 Cassandra Sharbono  
 Our File No.: MIS-2181

Dear Mr. Peckinpaugh:

This letter is to advise you that I have been retained by James and Deborah Sharbono as their personal attorney regarding claims arising from the December 11, 1998 automobile accident in which Cynthia Tomy'n, age 34, was killed. I am writing this letter to demand that Universal Underwriters Group participate in the upcoming mediation in good faith and to offer the policy limits of \$3 million, if necessary, to settle all claims asserted against my clients in order to protect their personal assets from any potential liability.

It is my understanding that the Sharbonos' daughter, Cassandra Sharbono, was driving the family's Ford F-150 pickup truck traveling northbound on SR-7. The Ford pickup lost control after trying to avoid colliding with other vehicles that were stopped in the roadway waiting for a vehicle to make a left turn onto 276th Street East. The Ford pickup traveled across the center lane and collided with a Ford Taurus driven by the decedent, Cynthia Tomy'n.

August 5, 1999

Page 2

The claimant in this matter, the Tomyn Estate, is represented by Ben Barcus. Mrs. Tomyn was married with three children at the time of the accident. The Estate has forwarded a \$5 million demand for settlement of this case. The Estate's economic evaluation places the economic loss to Mrs. Tomyn's Estate at \$1,050,228.00 as a result of her death.

The Sharbonos carried personal automobile insurance with State Farm Insurance Company which carries at \$250,000 per person limit of liability. State Farm has retained Dennis LaPorte of Krillich, LaPorte, West & Lockner, P.S. to defend the Sharbonos with respect to the estate's claim. Bill McCabe, independent adjuster, has been retained by Universal Underwriters Group to handle the field investigation of this matter for Universal Underwriters Group. I have been advised that Mr. McCabe reports to you regarding his investigation.

The Sharbonos have maintained separate insurance policies with Universal Underwriters Group for their three businesses, Parkland Transmission, All Transmission & Automotive, and Trans-Plant, for over four years. The policies were written by your agent, Len Van De Wege. Sometime in 1997, Mr. Van De Wege advised the Sharbonos that Universal Underwriters could provide them with personal liability umbrellas under each of their three business policies. The policies would provide the Sharbonos with three separate \$1 million personal umbrella policies for a total of \$3 million dollars in personal coverage. The Sharbonos agreed to Mr. Van De Wege's proposal and canceled a two million dollar personal umbrella policy they had maintained with another carrier for years.

I have been advised by the Sharbonos, however, that Universal Underwriters Group has verbally accepted coverage for the loss under one of the personal umbrellas, the umbrella issued with the All Transmission and Automotive business policy, while verbally denying the existence of any personal umbrella coverages under the policies issued to Parkland Transmission and Trans-Plant. Universal Underwriters Group has not provided the Sharbonos with any such acceptance or denial in writing.

Discussions are currently taking place to arrange a mediation on August 19, 1999 in an attempt to resolve the matter short of litigation. In light of the Tomyn Estate demand, it is clear that the Sharbonos face considerable personal exposure. Without waiving any of the Sharbonos rights, and on behalf of the Sharbonos, demand is hereby made that Universal Underwriters Group agree, in writing, to pay the full umbrella policy limits of \$3 million if necessary, towards settlement of this matter. \$3 million in coverage is what the Sharbonos believed they purchased as represented by Mr. Van De Wege.

August 5, 1999  
Page 3

In light of the upcoming proposed mediation tentatively scheduled for August 19, 1999, I ask that the complete underwriting files for the Sharbonos' three businesses be forwarded to me as soon as possible and in no event later than Wednesday, August 11, 1999. If it is necessary for someone from my office to pick up the files, we will be happy to do so.

I will be on vacation during the week of August 8, 1999 and therefore, I would greatly appreciate your response tomorrow. I await your response to the above.

Very truly yours,

MAUREEN M. FALECKI

MMF:kab

cc: Mr. and Mrs. Sharbono  
Sharon Beilke

SAWP\CASES\2181\PECK.LTI

August 6, 1999

Via Fax & US Mail

Len Van De Wege  
 Universal Underwriters Group  
 6840 Fort Dent Way, #375  
 Seattle, WA 98188

RE: Tomy'n Estate v. Sharbono  
 Date of Loss: 12/11/98  
 Our Clients: Mr. and Mrs. Sharbono  
 Cassandra Sharbono  
 Our File No.: MIS-2181

Dear Mr. Van De Wege:

This letter is to advise you that I have been retained by James and Deborah Sharbono as their personal attorney regarding claims arising from a December 11, 1998 automobile accident involving the Sharbonos' daughter, Cassandra, in which Cynthia Tomy'n, age 34, was killed. Ms. Tomy'n's estate and surviving family members have forwarded a \$5 million demand for settlement of this case.

The Sharbonos have advised me that you offered, on behalf of Universal Underwriters Group, to provide them with three separate \$1 million personal umbrella policies on three separate business policies which insure the Sharbonos' three businesses, for a total of \$3 million in umbrella coverage. The Sharbonos accepted your offer and canceled a \$2 million umbrella policy with another carrier which they had maintained for years.

Universal Underwriters Group has verbally advised the Sharbonos that they do not have the coverage you represented, but instead, carried only a single \$1 million policy. Universal Underwriters Group has verbally accepted coverage under the single umbrella policy for the above mentioned accident, but has verbally denied coverage under the remaining policies.

**EXHIBIT 21**

August 6, 1999  
Page 2

At this time, given the potential that the Sharbonos' personal assets may be subject to liability for any judgment which may be imposed against them for the accident, and given the issues regarding your representations to the Sharbonos regarding the coverage they were to receive, please advise your error and omissions' carrier of a potential claim.

If you have any questions, please feel free to give me a call.

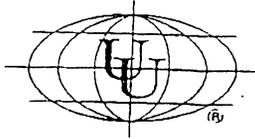
Very truly yours,

MAUREEN M. FALECKI

MMF:kab

cc: Mr. and Mrs. Sharbono  
Jack Peckinpaugh

SAWP\CASES\218 (WEGE.LT)



# UNIVERSAL UNDERWRITERS GROUP

REGIONAL OFFICE — 6840 Fort Dent Way, Suite 375 • Seattle, Washington 98188-2559 • 206-241-1077 • FAX: 206-243-6946

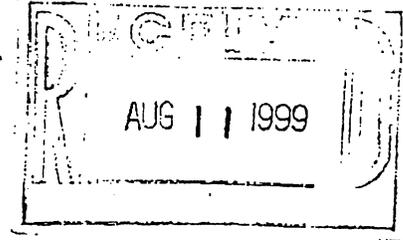
## MEMBER COMPANIES

UNIVERSAL UNDERWRITERS INSURANCE COMPANY  
UNIVERSAL UNDERWRITERS SERVICE CORPORATION

UNIVERSAL UNDERWRITERS LIFE INSURANCE COMPANY  
UNIVERSAL UNDERWRITERS OF TEXAS

August 10, 1999

Maureen M. Falecki  
BURGESS FITZGER, P.S.  
1501 Market Street, Suite 300  
Tacoma, WA 98402



RE:            Insured    :    ALL TRANSMISSION  
                 Claim No.:    925 0000718  
                 Loss Date :    12/11/98  
                 Claimant:    Cynthia Lee Tomy

Dear Ms. Falecki:

I have your letter of August 5, 1999 that was faxed to us on August 6, 1999.

You have raised a number of issues to which I will try to respond.

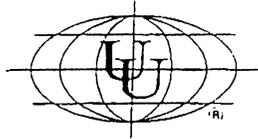
First, you have written a separate letter to Len Van De Wege. As Mr. Van De Wege is an employee of Universal Underwriters rather than an independent agent, you will not be receiving a separate response from him.

Next, you have stated that Universal Underwriters has only orally accepted Personal Umbrella Coverage in the amount of \$1,000,000. I have enclosed a copy of a letter to the attorney representing the Estate of Tomy dated March 8, 1999 advising that we have a \$1,000,000 limit. I have also enclosed a copy of a letter signed by Deb Sharbono dated February 18, 1999 giving us permission to disclose the policy limit.

You next raise in issue regarding the amount of the limit under the Personal Umbrella and stating that there had been no response from us about the potential for limits in excess of \$1,000,000. There had been no response as I was not aware that there was a question about the limit of coverage available. My review of the coverage clearly shows that the Personal Umbrella limit that applies to this loss is \$1,000,000. I have enclosed a copy of the Personal Umbrella Application signed by Deborah Sharbono dated October 13, 1998 requesting the \$1,000,000 limit. We wrote the Personal Umbrella as requested by the Sharbono's.

**EXHIBIT 19**

A member of the  Zurich Financial Services Group  
976



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### MEMBER COMPANIES

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UNIVERSAL UNDERWRITERS OF TEXAS

There is also apparently a claim that there should have been a \$1,000,000 Personal Umbrella for the Sharbono's on 3 separate commercial policies. That claim makes no logical sense as the personal exposure covered by a Personal Umbrella is unrelated to the business exposure covered by the commercial policies. Three Personal Umbrellas could not be stacked to provide more coverage than one Personal Umbrella. There may be some confusion about the policy limit as the Commercial Umbrella does have a \$3,000,000 limit but that coverage would not apply to this loss.

You have also requested copies of our underwriting files. Those files are located in our Foster City, CA office and could not be reproduced and be made available by August 11, 1999 as you requested. In any event, I am not aware of any authority that will give you access to those records at this time. If you know of such authority, please advise.

To restate our position, we have a \$1,000,000 Personal Umbrella available that would apply to this loss in excess of the underlying State Farm policy. We have written that coverage as requested by the Sharbono's. It is our intent to attend the mediation set for August 19, 1999 in a good faith effort to get this case settled within the policy limit. As you know, to date we have had no opportunity to settle the case within the policy limit.

Please advise if you have questions.

You have

Yours very truly,

Jack Peckenpaugh  
Regional Claims Manager

enc.

JP/ge

August 27, 1999

Via Fax & US Mail

Jack Peckinpaugh  
Claims Manager  
Universal Underwriters Group  
6840 Fort Dent Way, #375  
Seattle, WA 98188

RE: Tomy Estate v. Sharbono  
Date of Loss: 12/11/98  
Our Clients: Mr. and Mrs. Sharbono  
Cassandra Sharbono  
Our File No.: MIS-2181

Dear Mr. Peckinpaugh:

Thank you for your correspondence dated August 10 and August 13, 1999.

With regard to my request for the Sharbono's underwriting files for the past five years, I cannot provide you with specific legal authority which requires you to produce the files at this time. However, there is a genuine and bonafide dispute over the amount of coverage Mr. Van De Wege represented he would provide the Sharbonos via the umbrella policies. The Sharbonos have consistently maintained that Mr. Van De Wege approached them with an offer to provide them with three separate personal umbrellas providing \$1,000,000 in coverage for a total of \$3,000,000 personal coverage per occurrence. Based upon Mr. Van De Wege's representations the Sharbonos canceled a \$2,000,000 personal umbrella with another carrier and accepted Universal Underwriters offer of coverage.

While those of us who have worked in the insurance industry for years are aware, anti-stacking provisions are common in such policies, nonetheless, the pertinent issue in this particular case is that Mr. Van De Wege affirmatively represented that Universal

August 27, 1999

Page 2

Underwriters could and would provide the Sharbonos with \$3,000,000 in personal umbrella coverage.

In addition, review of the Sharbonos' declaration pages on their businesses for the past four years raises yet another compelling and potentially explosive coverage issue. The declaration pages reveal that on or before October 1, 1997 Mr. Van De Wege provided the Sharbonos with a \$2,000,000 Personal Umbrella Policy, Policy # 115278E. Records further indicate that this personal umbrella was canceled as of November 24, 1998, *less than three weeks prior to the fatal accident*. The Sharbonos have advised that they did not cancel this umbrella policy. Nor did they receive notice of cancellation from Universal Underwriters.

Given the various coverage issues, I will ask again that you provide me with the Sharbonos underwriting files. If you are unwilling to cooperate with the coverage investigation and provide the files voluntarily, the only other avenue I have is to file suit and subpoena the files. Resolution of the coverage issues is imperative in light of the demands being made by the Tomyns' attorney and the clear potential for excess exposure.

Moreover the Sharbonos, who were named insureds under the \$2,000,000 Personal Umbrella Policy, did not cancel the umbrella. Universal Underwriters is obligated to advise us who requested and authorized the cancellation of the \$2,000,000 Personal Umbrella Policy. In that regard, please forward to me any and all documents in Universal Underwriters' possession which relate in any way to cancellation of this policy, including but not limited to documents which provide the name of the person who requested and authorized the cancellation, and the date the cancellation was requested. If the policy was canceled by Universal Underwriters, please forward all documents which establish proof of notice of cancellation. If Universal Underwriters cannot or does not provide the requested information voluntarily, please be advised that we will file suit immediately in order to obtain this information by subpoena.

Please also be advised that it is our position that the \$2,000,000 Personal Umbrella Policy was inappropriately and ineffectively canceled by Universal Underwriters and that the Sharbonos are entitled to, at the least, \$2,000,000 in personal umbrella coverage. Demand is hereby made that these monies be made available for the upcoming mediation. This demand is made without waiving any demands or rights previously asserted.

Time is of the essence. As you know, mediation was undertaken last Thursday, August 19, 1999, in an attempt to resolve the Tomyn claims. The mediation did not resolve

August 27, 1999  
Page 3

the claims asserted by the Mrs. Tomyn's estate and her husband and three children. A follow up mediation is tentatively scheduled for October 1, 1999. Ben Barcus, the Tomyn's attorney, is seeking financial information from the Sharbonos as he values the death of Mrs. Tomyn in excess of the policy limits of the State Farm policy and the \$1,000,000 Personal Umbrella Policy purportedly issued by Universal Underwriters. The Sharbonos do not have the means to advance funds required to effect a settlement of the Tomyns' claims. They will be forced into bankruptcy should the mediation fail.

In addition to your forwarding to me any and all documents relating to the purported cancellation of the \$2,000,000 Personal Umbrella Policy, Policy # 115278E, I ask again that Universal Underwriters cooperate in the coverage investigation and also provide me with the Sharbonos complete underwriting files well in advance of the upcoming scheduled mediation. If Universal Underwriters does not wish to cooperate, I may be forced to bring these coverage matters to the attention of the Tomyns' attorney which could lead to significant exposure for Universal Underwriters.

Thank you in advance for your cooperation.

Very truly yours,

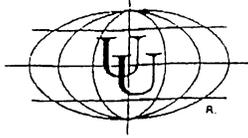
*Sent unsigned to avoid delay.*

MAUREEN M. FALECKI

MMF:kab

cc: Mr. and Mrs. Sharbono  
Glenn Reid

SAWP\CASES\2181\PECK.LT2



## UNIVERSAL UNDERWRITERS GROUP

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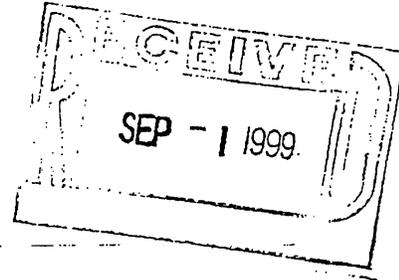
### MEMBER COMPANIES

UNIVERSAL UNDERWRITERS INSURANCE COMPANY  
UNIVERSAL UNDERWRITERS SERVICE CORPORATION

UNIVERSAL UNDERWRITERS LIFE INSURANCE COMPANY  
UNIVERSAL UNDERWRITERS OF TEXAS

August 31, 1999

Maureen M. Falecki  
BURGESS FITZER, P.S.  
1501 Market Street, Suite 300  
Tacoma, WA 98402-3333



RE:            Insured    :    ALL TRANSMISSION  
                 Claim No.:    925 0000718  
                 Loss Date :    12/11/98  
                 Claimant:    Cynthia Lee Tomy

Dear Ms. Falecki:

I have your letter of August 27, 1999 in which you have misstated the facts and sequence of events in this case.

The actual facts are that as part of the renewal process, Mr. Van De Wege was asked to provide \$3,000,000 in personal umbrella coverage. However, that coverage was to have been written on 3 separate policies to cover the Sharbono's for \$1,000,000 on the All Transmission policy, Clarence and Claudia Ray on the Trans Plant policy for \$1,000,000 and Robert and Debra Huke on the Parkland Transmission policy for \$1,000,000. I have enclosed copies of the signed Personal Umbrella Applications that clearly demonstrate the intent of the parties to have \$1,000,000 limits on the 3 separate policies.

You further state that there is an issue of improper cancellation. There was no cancellation. The policies were simply being amended as requested by the insureds. In addition, the \$2,000,000 umbrella written on the Trans Plant policy that you refer to did not even cover the "Auto" exposure so its existence or non existence is not relevant to this case.

For your reference, I have enclosed a copy of the declaration pages from the Trans Plant policy that show the Personal Umbrella is written in excess of the homeowners exposure only. I have also enclosed copies of our policy pages that state under Exclusion (h) of the Personal Umbrella section on page 65 that there would be no coverage for the "Auto exposure as there was no "Underlying Insurance" scheduled in the declarations. The definition of "Underlying Insurance" is found on page 63.



## UNIVERSAL UNDERWRITERS GROUP

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### MEMBER COMPANIES

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UNIVERSAL UNDERWRITERS SERVICE CORPORATION

UNIVERSAL UNDERWRITERS LIFE INSURANCE COMPANY  
UNIVERSAL UNDERWRITERS OF TEXAS

While your clients seem to be determined to establish some wrong doing on the part of Mr. Van De Wege, the fact is that without his diligence in protecting their interests they would not have the \$1,000,000 in protection they have under the policy we write for them.

Our position remains the same. We have a \$1,000,000 Personal Umbrella limit in excess of the State Farm limit available to try and settle this case. As you know, we offered our full limit in settlement at the mediation that was held on August 19, 1999. Our offer remains open. Your clients are free to contribute over and above the available limits to a settlement offer if they feel their exposure is in excess of the available coverage.

Please advise if you have questions.

Yours very truly,

Jack Peckenpaugh  
Regional Claims Manager

enc.

JP/ge

October 4, 1999

Jack Peckenpaugh  
Regional Claims Manager  
Universal Underwriters Group  
6840 Fort Dent Way, #375  
Seattle, WA 98188

RE: Tomyn Estate v. Sharbono  
Date of Loss: 12/11/98  
Our Clients: Mr. and Mrs. Sharbono  
Cassandra Sharbono  
Our File No.: MIS-2181

Dear Mr. Peckenpaugh:

As you know, a second mediation in this case occurred on October 1, 1999. The case did not settle. A principle reason for the failed mediation is that there are unresolved Universal Underwriters' coverage issues.

I have, in previous letters to you, set forth the Sharbonos' position with respect to the representations and coverages Universal Underwriters' agent, Len Van De Wege, represented your company would provide to the Sharbonos. In a nutshell, Mr. Van De Wege represented that the Sharbonos were bound with \$3 million in personal umbrella coverage which would have applied to the above referenced loss. Apparently, Mr Van De Wege failed to bind the appropriate coverage as agReid to by the Sharbonos.

Also in my previous letters to you, I requested copies of the underwriting and agent's files concerning the Sharbonos. In response, you indicated that no authority existed which required you to voluntarily produce those files to me. At today's mediation, Universal Underwriters was represented by Glenn Reid. We advised Mr. Reid of the need to review the previously requested underwriting and agent's files before a settlement of the Tomyns' claims could be resolved. That

October 4, 1999  
Page 2

request was again refused. We were advised that the Sharbonos will have to file suit to obtain copies of those documents. Prior to filing suit, I am, at this time, asking once again for production of the needed files.

Please be advised that, not only is review of those files necessary to analyze the facts surrounding the Sharbonos coverage, but review by the Tonym children's guardian ad litem will be required before they and the court could even accept any proposed settlement. In any case, those records are directly relevant to the action and will be reviewed in order to effect a settlement in this case. The question becomes whether Universal Underwriters intends to produce those files voluntarily, or whether your insureds will be forced to file suit to obtain the nonprivileged records. If forced to file suit, the Sharbonos will assert bad faith claims against Universal Underwriters as well.

We ask that Universal Underwriters cooperate and provide us with the complete underwriting and agent's files. We look forward to your response.

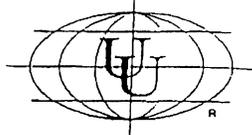
Very truly yours,

MAUREEN M. FALECKI

MMF:kab

cc: Mr. and Mrs. Sharbono  
Glenn Reid

S:\WP\CASES\2111\FALECKI.T3



# UNIVERSAL UNDERWRITERS GROUP

REGIONAL OFFICE — 6840 Fort Dent Way, Suite 375 • Seattle, Washington 98188-2559 • 206-241-1077 • FAX: 206-243-6946

## MEMBER COMPANIES

UNIVERSAL UNDERWRITERS INSURANCE COMPANY  
UNIVERSAL UNDERWRITERS SERVICE CORPORATION

UNIVERSAL UNDERWRITERS LIFE INSURANCE COMPANY  
UNIVERSAL UNDERWRITERS OF TEXAS

October 7, 1999

Maureen Falecki  
BURGESS FITZER, P.S.  
1501 Market Street, Suite 300  
Tacoma, WA 98402

OCT - 8 1999

RE:            Insured    :    ALL TRANSMISSION  
                 Claim No.:    925 0000718  
                 Loss Date :    12/11/98  
                 Claimant:    Cynthia Lee Tomyn

Dear Ms. Falecki:

I have your letter of October 4, 1999.

In reviewing the correspondence on this case, all we have from you and your clients to date are self serving statements that in retrospect there should be more insurance coverage available to cover this accident.

I, however, have provided you with documentation that unequivocally establishes that we have provided the coverage we were asked to provide.

Further, you have so far failed to provide us with any authority that would require us to produce our business records and have now seemed to have concluded that there is no such authority. We have been unable to find such authority through our own research.

I must advise that your stated intention of filing law suit for the sole purpose of obtaining documents you have no right to obtain would result in our examining our right to file an action for abuse of process or malicious prosecution.

Again, if you want copies of documents created by your clients from our business records or have specific evidence relating to your coverage claim that you would like to have us examine, please advise.

Yours very truly,

  
Jack Peckenpaugh  
Regional Claims Manager

JP/ge

**EXHIBIT 24**

A member of the  Zurich Financial Services Group  
1002



## THE LAW OFFICES OF BEN F. BARCUS

4303 Ruston Way, Tacoma, WA 98402  
 Telephone (253) 752-4444  
 Facsimile (253) 752-1035

### ATTORNEYS

BEN F. BARCUS  
 KARI I. LESTER  
 PAUL A. LINDENMUTH

### LEGAL ASSISTANTS

CHERYL A. GORDER  
 KEMBERLY R. OWENS  
 CARLA M. SANTELLI

October 12, 1999

Universal Underwriters Group  
 Attn; Mr. Jack Peckenpaugh  
 Regional Claims Manager  
 6840 Fort Dent Way, Ste. 375  
 Seattle, WA 98188-2559

RE: Our Clients : The Estate Of Cynthia Lee Tomyn &  
 Clinton, Aaron, Nathan and Christian Tomyn

Your Insured : James O. Sharbono  
 Date of Loss : 12/11/98

Dear Mr. Peckenpaugh:

As I am sure you are aware, the undersigned represents Clinton Tomyn as well as his three minor children and the Estate of Clinton Tomyn, as a result of the automobile collision that occurred on December 11, 1998, when your insured caused the death of Mrs. Cynthia Tomyn. We have previously forwarded our economic loss analysis as a result of Mrs. Tomyn's passing that sets forth a net economic loss of \$1,050,000.00; I trust you are in possession of Dr. Parks' economic analysis that was previously forwarded to Universal through Mr. McCabe.

In addition, it has been represented that the Sharbonos carried primary auto liability insurance through State Farm in the amount of \$250,000.00. It has also been represented that there is a total of \$1,000,000.00 umbrella liability coverage applicable to this loss. However, we have now learned that there is apparently a coverage dispute that has arisen between Universal Underwriters and its insured, the Sharbonos. Our understanding is that there is other potential coverage available and applicable to this loss, but that Universal claims that such coverage was canceled within weeks of the loss occurring. Although a request has been made for full and complete file materials to determine the existence of such coverage, it is our understanding that Universal has denied disclosure of that information/documentation.

OCT 14 1999

October 12, 1999  
Page 2

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As I am sure you are aware, Washington Law requires the production of any and all insurance information/documentation that may be applicable to a loss. The insurer is compelled to produce such documentation through litigation discovery. See CR 26(b)(2) which provides:

(2) *Insurance Agreements.*

A party may obtain discovery and production of:

(i) The existence and contents of any insurance agreement under which any person carried on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(ii) Any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. . . .

Therefore, at this time we must request that you provide any and all information referencing all coverages held by the Sharbonos that may be applicable to this loss, including but not limited to any documents affecting coverage, denying coverage, extending coverage or reserving rights. Should this information not be forthcoming within five (5) days from the date of this letter, we will have no other alternative but to institute legal action against your insureds.

As I am sure you are further aware, we have refrained from initiating litigation against your insureds in an attempt to resolve this matter in a good faith, amicable manner. However, your intransigence in providing the information that will obviously be required to be produced through litigation discovery, will only serve to prejudice your insureds and expose their personal assets. Failure to provide the requested insurance coverage information would clearly violate the Washington Administrative Code, as well as statutory authority as it relates to good faith insurance practices. We trust that you will therefore see the wisdom in providing the requested information without delay so as not to adversely effect your insured's interests.

Moreover, as there is no dispute whatsoever as to the existence of the State Farm primary liability coverage of \$250,000.00 as well as the initially disclosed \$1,000,000.00 umbrella coverage through Universal, and there appears to be no dispute that this claim far and away exceeds those amounts, we must request your willingness to deposit the undisputed \$1,000,000.00 liability policy into an interest bearing trust account which will accrue to the

October 12, 1999

Page 3

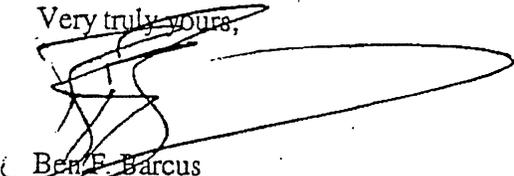
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benefit of the Tomyns. By copy of this letter, a similar request is being made of State Farm with regard to their primary auto liability policy of \$250,000.00.

Finally, this will reiterate our prior offer of settlement in the amount of \$5,000,000.00. At the first mediation, it was represented that the then known liability policies totaling \$1,250,000.00 were offered for settlement at that time. As there is no credible dispute that this claim far and away exceeds those coverages, as has been confirmed by the State Farm UIM adjuster who has previously tendered our client's UIM coverage limits, there is no reason why the undisputed liability coverage should not be released, or at least placed in an interest bearing trust account for the benefit of the claimants.

We will look forward to discussing this matter with you further within the time frame as set forth above. Should the information/documentation not be forthcoming, and if we are unable to resolve the above-referenced issues, we will have no other alternative but to initiate litigation against your insureds.

Very truly yours,



Ben F. Barcus

BFB:cg

cc: Clinton Tomyn  
Dennis J. Laporte, Esq.  
Kindra Kirk  
Ross Burgess, Esq.

## SONNENSCHN NATH &amp; ROSENTHAL

THE MONADNOCK BUILDING  
 885 MARKET STREET  
 6TH FLOOR  
 SAN FRANCISCO, CALIFORNIA 94106

(415) 882-5000  
 FACSIMILE  
 (415) 543-5472

**Michael A. Barnes**  
 (415) 882-5007  
 mzb@sonnenschein.com

November 15, 1999

Ben F. Barcus, Esq.  
 LAW OFFICES OF BEN F. BARCUS  
 4303 Ruston Way  
 Tacoma, WA 98402

RE: CLAIM NO. - 925 0000718  
 INSURED - SHARBONO (ALL TRANSMISSION)  
 MATTER - ESTATE OF CYNTHIA LEE TOMYN

Dear Mr. Barcus:

Universal Underwriters Insurance Company has retained us in connection with the Sharbono/Tomyn matter. While we are still in the process of reviewing the file, we wanted initially to respond to your letter of October 12, 1999, which was forwarded to us. In that letter, you requested (1) copies of Universal's files related to the Sharbonos' insurance coverage, and (2) deposit of one million dollars into an interest-bearing account for the benefit of your clients.

First, Universal must respectfully decline to release its files. As we are sure you understand, these files are confidential business records belonging to Universal, and are not shared outside the company. We are unaware of any authority indicating that Universal must disclose its confidential records in connection with your clients' claim. Your citation to Washington rules of civil discovery is inapposite, as the matter is not in litigation. If you are aware of any other authority, please let us know immediately so that we may consider your request.

If you would like to obtain copies of any documents generated by the Sharbonos, you may do so by contacting their attorney, Maureen Falecki. Those documents have been released to her. If you prefer, you may send us a signed authorization from Mr. and Mrs. Sharbono so that we can send those documents to you.

Your letter of October 12 also requested that Universal deposit one million dollars into an interest-bearing account for the benefit of your clients. Again, Universal must respectfully decline this unusual request as we are unaware of any legal authority supporting it. Universal's

## SONNENSCHN NATH &amp; ROSENTHAL

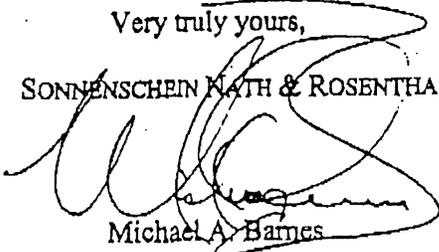
Ben F. Barcus, Esq.  
Claim No. 925 0000718  
November 15, 1999  
Page 2

policy, moreover, obligates it to pay sums the Sharbonos "legally must pay" as "damages:" the policy says nothing about escrowing funds into an interest-bearing account for the benefit of third parties. Again, if you are aware of any relevant legal authority, please let us know promptly so that we may analyze your request further.

Feel free to contact me with any questions you may have.

Very truly yours,

SONNENSCHN NATH & ROSENTHAL



Michael A. Barnes

FILED  
COURT OF APPEALS  
DIVISION II

06 JUN 12 AM 9:08

STATE OF WASHINGTON

BY  \_\_\_\_\_  
TIMOTHY

No. 33379-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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

Respondents/Cross-Appellants

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY; a foreign  
insurer;

Appellant/Cross-respondent

and

LEN VAN DE WEGE and "JANE DOE" VAN DE WEGE, husband and  
wife and the marital community composed thereof,

Cross-Respondents.

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AFFIDAVIT OF MAILING/DELIVERY

---

Timothy R. Gosselin WSBA #13730

*Attorneys for Respondents/Cross Appellants*

**Burgess Fitzer, P.S.**  
1145 Broadway, Suite 400  
Tacoma, WA 98402  
Phone: 253.572.5324



Mr. Dan'L Bridges  
Attorney at Law  
11100 NE 8<sup>th</sup> Street, Ste. 300  
Bellevue, WA 98004

*U.S. Mail*  
Via: ~~Hand~~ Delivery *J*

*Jeanne L. Lyon*  
\_\_\_\_\_  
JEANNE L. LYON

WITNESS my hand and official seal this 13<sup>th</sup> day of June, 2006.

*Diana Marsillo*  
\_\_\_\_\_  
Print Name: DIANA MARSILLO  
Notary Public in and for the State of Washington  
Residing at: Tacoma  
My Commission Expires: 9-6-07