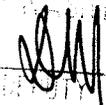


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STATE OF WASHINGTON

BY  \_\_\_\_\_  
Clerk

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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RESPONDENTS/CROSS APPELLANT'S REPLY BRIEF  
ON CROSS APPEAL

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The Sharbonos have cross-appealed two rulings of the trial court: (1) the trial court's dismissal of their negligence claim against their insurance broker, Len van de Wege (*Brief of Respondents/Cross Appellants at pages 90-94*) and (2) the trial court's failure to calculate a lodestar figure when it awarded the Sharbonos their attorney fees (*id. at pages 94-98*). The Sharbonos submit the following reply brief in support of their cross-appeal.

**A. The Sharbonos have a valid negligence claim against van de Wege, even if this Court affirms the trial court's rulings on coverage and stacking.**

On the issue of the Sharbonos' negligence claim against van de Wege, Universal offers the single argument that the Sharbonos suffered no harm from the trial court's dismissal of their claims against van de Wege because the Sharbonos received sufficient coverage for the Tomy judgment as a result of the trial court's rulings on coverage and stacking. *Reply Brief of Appellants/Cross-Respondents at page 48*. Universal's argument ignores the entire basis for the Sharbonos' cross-appeal on this issue and ignores relevant law.

The Sharbonos are cross-appealing the trial court's dismissal of their

negligence claim against van de Wege because the trial court's rulings on coverage do not preclude the Sharbonos from recovering damages against van de Wege for his negligence. Universal professes to be unable to follow the logic of the Sharbonos' argument. *Reply Brief of Appellants at page 47*. But the Sharbonos cited and analyzed legal authority which holds that an insured's claim against an insurance broker is separate and independent from the insured's claim against his insurer. *See Brief of Respondents/Cross-Appellants at pages 92-93* (citing *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC*, 26 Cal. Rptr. 3d 452 (2005)). The Sharbonos also cited a Washington appellate decision holding that an insurance broker whose negligence leads to inadequate insurance coverage is liable to the insured for **money damages** for the resulting loss. *Id. at page 92* (citing *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)). Universal does not acknowledge these authorities, make any attempt to distinguish them, or cite any contrary authorities.

The Sharbonos' damages resulting from van de Wege's failure to properly and adequately procure umbrella coverage were not limited solely

to the amount of the underlying judgment. Universal does not dispute this. Instead, Universal suggests that either it or van de Wege can be held liable for the Sharbonos' damages, but not both. An insurance broker's liability for negligence and an insurer's liability for bad faith are not "either/or" causes of action. The question of whether van de Wege's negligence proximately caused injury to the Sharbonos is not dependent upon or subsumed by the trial court's rulings on coverage. If this Court remands these proceedings on matters affecting the merits, this Court should also reinstate the Sharbonos' negligence claim against van de Wege.

**B. The trial court abused its discretion by failing to calculate a lodestar figure, not by failing to apply a multiplier.**

Universal misunderstands the Sharbonos' cross-appeal argument on the trial court's award of fees. The Sharbonos do not contend the trial court abused its discretion by failing to apply a multiplier to its award of fees. Rather, the Sharbonos' cross-appeal on this issue is based on the trial court's failure to independently calculate a lodestar figure. *Brief of Respondents/Cross-Appellants at page 97-98.*

Universal does not appear to dispute that a trial court, in making an

award of attorney fees, must calculate a lodestar figure, which represents the hours reasonably expended in the litigation multiplied by each attorney's reasonable hourly rate of compensation. *Pham v. City of Seattle*, 124 Wn. App. 716, 721, 203 P.2d 827 (2004). In its "Order and Judgment Regarding Attorney's Fees, Costs, and Treble Damages", however, the trial court specifically excluded any reference to a lodestar figure. (CP 2423) The trial court crossed out the reference to a reasonable hourly rate and simply awarded the Sharbonos the amount of fees actually charged. (*Id.*) This is contrary to law.

The calculation of a lodestar figure is to be based on objective criteria, including both a reasonable number of hours and a reasonable hourly rate. *See, e.g., Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993) ("the foundation of the award is built upon objective criteria"). In particular, the Washington Supreme Court has specifically held that an attorney's usual fee is not conclusively a reasonable fee. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

In this case, the trial court did not make an independent, objective assessment of a reasonable hourly rate and it did not calculate a lodestar

figure when it awarded the Sharbonos their attorney fees. By failing to do so, the trial court abused its discretion. The Sharbonos ask that this Court remand this matter to the trial court for recalculation consistent with the authorities cited above and in their opening brief.

Respectfully submitted this 29<sup>th</sup> day of September, 2006.

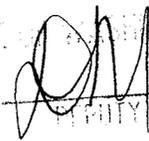
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JEANNE L. LYON

WITNESS my hand and official seal this 29th day of September,  
2006.



Print Name: DIANA MARSILLO

Notary Public in and for the State of Washington

Residing at: Tacoma

My Commission Expires: 9-6-07