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## **I. COUNTER-STATEMENT OF ISSUES ON CROSS-APPEAL**

1. Did the trial court err in interpreting its own Judgment when it found that the Intervenor Tomyns were entitled to the post-judgment interest generated from that portion of the Judgment assigned to them by the Sharbonos, when without dispute, it is undisputed that the funds which were generating the interest had been assigned to the Sharbonos by way of a pre-litigation Settlement Agreement?

2. Does the Doctrine of Invited Error preclude the Sharbonos from claiming entitlement to post-judgment interest generated from funds assigned to the Tomyns as part of a pre-litigation Settlement Agreement when the attorney who purports to be solely the counsel for the Sharbonos drafted the Judgment at issue?

3. Can the Judgment (assuming it has any ambiguity) be interpreted in a manner which would lead to a strained, unjust and absurd result, when the Sharbonos' attorney, under the terms of the parties' pre-litigation Settlement Agreement, had the obligation not only to represent the Sharbonos' interest, but also the Tomyns' interest in that litigation, and when the interpretation propounded by the Sharbonos would result in a breach of the pre-litigation Settlement Agreement, and would sanction the actions of an attorney who is clearly operating with an irreparable conflict of interest?

## **II. STATEMENT OF FACTS RELEVANT TO THE TOMYNS' RESPONSE TO CROSS-APPEAL**

It is undisputed that in 1998, Cynthia Tomy was killed in a tragic automobile accident, solely caused by the negligence of Cassandra Sharbono, James and Deborah

Sharbonos' then 16 year-old daughter. As a result of that automobile accident, the Estate of Cynthia Tomyne, for the benefit of her husband, Clint, and her three minor sons, brought a lawsuit against the Sharbonos under Pierce County Cause No. 99-2-12800-7, who brought claims for wrongful death against the Sharbonos.

During the course of efforts to negotiate a resolution of this matter, Universal Underwriters Insurance Company engaged in bad faith insurance practices, including the failure to release underwriting files to aid the parties in the *Tomyne/Sharbono* matter to determine the insurance coverages available to settle that lawsuit. Defendant Universal Underwriters' bad faith as a matter of law is well documented in this Court's opinion in *Sharbono v. Universal Underwriters*, 139 Wn.App 383, 161 P.3d 406 (2007), rev. denied, 163 Wn.2d 1056 (2008).

Despite Universals' intransigence and bad faith, the parties to the *Tomyne/Sharbono* matter nevertheless entered into a detailed Settlement Agreement designed to resolve the wrongful death claim set forth within Pierce County Cause No. 99-2-12800-7. The Settlement Agreement in the *Tomyne/Sharbono* litigation is attached hereto as Appendix No. 1. The proper title of the document is "SETTLEMENT AGREEMENT (INCLUDING COVENANTS AND ASSIGNMENTS OF RIGHTS)" (Emphasis added). Under the terms of the Settlement Agreement, the Tomyne were paid the \$250,000.00 policy limits of the Sharbonos' automobile liability insurance policy with State Farm Insurance Company. In addition, Universal Underwriters was to pay the amount of its admitted

umbrella (excess) coverage of \$1 million.<sup>1</sup>

The Agreement itself acknowledges at page 2, very specifically, “plaintiffs suffered damages as a result of the death of Cynthia Tomy” and concluded that the Defendants (the Sharbonos) faced a “real and substantial risk” that Judgment will be entered against them in excess of the \$1.25 million of admitted insurance coverage.

Under subsection 1 of the Settlement Agreement, a Confession of Judgment was to be entered for a total of \$4,525,000.00. This Confession of Judgment was in fact entered upon approval of the Court, with the payment of the above-referenced admitted insurance proceeds, leaving the remaining balance on that Confession of Judgment of \$3,275,000.00, with accrued interest thereon.

Numbered Paragraph 2 at page 2 of the Settlement Agreement, also very specifically provides for an “assignment of rights.” This provision provides as follows:

*Assignment of Rights: The Defendants assign to Plaintiff all amounts awarded against or obtained from Universal through to following; (A) benefits payable under any liability insurance policy in which Defendants have any interest for a covered loss that Universal has breached with respect to the claims arising out of the December 11, 1998 motor vehicle accident; (B) the benefits payable under any liability insurance policy which, because of an act of bad faith, Universal is estopped to deny or deemed to have sold to Defendant.”<sup>2</sup>*

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These payments were made.

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Paragraph 2 C of the Agreement dealt with a contingency of Universal failing to pay its admitted amount of coverage and the failure of State Farm to pay the policy limits of the automobile liability insurance policy. As both payments were made, this

Under the remainder of the recitations under section 2 of the contract, Plaintiffs were to apply the proceeds, if any, obtained by virtue of the assignments towards the Confessed Judgment set forth in paragraph 1, and agreed to execute full and partial satisfaction of judgments as were appropriate.

The Agreement also provided that “except as set forth in Paragraphs 2 A, 2 B and 2 C” the Defendants were retaining any other claims that they may have had available to them for claims they may have had against Universal.

Significantly, under the terms of the Settlement Agreement, the Sharbonos were obligated and had a duty to file suit against Universal to pursue the Tomyns’ interests, and to recover under those claims which were specifically assigned to the Tomyns. Paragraph 3 provides, under the heading “Suit Against Universal” the following:

- A. *The Defendants **will**, no later than April 30, 2001, initiate suit against Universal asserting such claims as are reasonable and prudent to establish a right to recover the amounts assigned in paragraphs 2(a) and 2(b), and, if necessary, 2(c) above. **Plaintiffs through their chosen counsel may participate and assist in the prosecution of those claims as they chose.***
- B. *In such suit, the Defendants **may** assert claims against additional parties - - **with the exclusion of Plaintiffs, their legal counsel, or the appointed Guardians Ad Litem** - - and assert additional claims against Universal as they deem prudent; and, as set forth in paragraph 2 above, Defendants retain unto*

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provision is inapplicable.

*themselves all rights of recovery from such claims.* <sup>3</sup>

- C. *The claims that give rise to right of recover amounts assigned in paragraphs 2 A and 2 B **will be settled only upon agreement by the Plaintiffs.** (Emphasis added).*

In consideration for the Sharbonos commitment to ensure payment of the \$1.25 million, and to pursue the remainder amounts due under the terms of the Confession of Judgment, the Tomyns agreed to enter into a “Covenant Not To Execute” for the benefit of James and Deborah Sharbono, and a “Covenant to Forebear Collection Efforts Against Cassandra Sharbono” until such time that there was a conclusion of the litigation the Sharbonos agreed to pursue. (See, Appendix No. 1, page 4, paragraphs 5 and 6). (CP 86-106).

In conformance with the promises set forth within the Tomyn/Sharbono Settlement Agreement (...and Assignment of Rights), the Sharbonos initiated this action under Pierce County Cause No. 01-2-07954-4. A copy of the Complaint filed by the Sharbonos is attached hereto as Appendix No. 2. (Supp CP \_\_\_\_\_).

At the time of the settlement negotiations, the Sharbonos were represented by the Burgess Fitzer law firm located in Tacoma, Washington. The Sharbonos’ trial and current counsel, Timothy R. Gosselin, as that time was a member of that law firm, and was intimately involved in the settlement negotiations therein. It is noted

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<sup>3</sup>

One of the obvious purposes of Paragraph 3 B, is to assure that a conflict of interest does not develop between the interests of the Tomyns and those of the Sharbonos. Under the terms of 3 B, the Sharbonos cannot assert claims against the Tomyns. It is suggested that their current cross-appeal must be construed as bringing a claim against the Tomyns, which is specifically prohibited by paragraph “B.”

that at page 5 of Appendix No.1, it was Mr. Gosselin who notarized the signatures of the parties to the Tomy/Sharbono Settlement Agreement, and is referenced as the Sharbonos' counsel in the Agreement.

The Sharbonos also selected Mr. Gosselin to act as their counsel in pursuing the promised litigation required under the Tomy/Sharbono Settlement Agreement.

<sup>4</sup> Following the filing of the Complaint, Mr. Gosselin represented the Sharbonos' and the Tomy's interests before the trial court successfully, despite tenacious opposition and having to withstand the challenges of multiple defense lawyers being thrown into the fray by Universal.

As memorialized by an "Order Regarding Presumptive Damages," which is attached hereto as Appendix No. 3, Mr. Gosselin, during the course of his representation before the trial court, was able to acquire a judgment as a matter of law on the issue of coverage by estoppel (which as its end product results in an award of presumptive damages). As referenced within Appendix No. 3, as a result of that directed verdict "judgment as a matter of law," the Court: "ordered, adjudged and decreed that Plaintiffs are entitled to and hereby awarded the unpaid portion of the Judgment by Confession in the matter of *Tomy v. Sharbono*, Pierce County Cause No. 99-2-12800-7, to wit \$3,275,000.00, together with interest that had accrued thereon since the date of entry, March 30, 2001, which as of May 13<sup>th</sup>, 2005 (4 years, 43 days at 12% yr. totals \$1,618,298.63 and together with interest that continues to

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Since the commencement of this litigation (so long ago), Mr. Gosselin has left the Burgess Fitzer firm, and has founded his own firm.

accrue thereon as said forth in said Judgment until said Judgment is paid.”

In addition to acquiring a judgment as a matter of law on the issue of coverage by estoppel, which resulted in the award of presumptive damages memorialized in the May 20, 2005 Judgment and Order, Mr. Gosselin was also able to acquire before a jury an award of \$4,500,000.00 in favor of the Sharbonos on their separate claims.

In order to memorialize both the Order on Presumptive Damages and the award provided to the Sharbonos, a Judgment was entered on March 20, 2005.<sup>5</sup> The Judgment on its face, in a number of instances, carefully delineates between those portions of the Judgment entered against Universal as a matter of law under a coverage by estoppel/presumed damages theory, and those amounts awarded to the Sharbonos on their own claims by the jury. A copy of the Judgment is attached hereto as Appendix No. 4. The Judgment, which is on the pleading paper of Mr. Gosselin’s law firm, and which was no doubt drafted by Mr. Gosselin, or at his behest, clearly delineates within its Judgment Summary, those amounts which were assigned to the Tomyns and needed to retire “the Judgment by Confession” in those amounts which were separately awarded by the jury to the Sharbonos. Paragraph 4 of the Judgment summary, under the title of “Principle Judgment Amount” provides the following:

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At the time of the entry of Judgment, the Tomyns had not intervened into this case. At that time, as required by the Settlement Agreement, the Tomyns’ interest, together with that of the Sharbonos, were being pursued by a single lawyer, Timothy R. Gosselin, or their joint counsel.

*\$9,393,298.63 plus interest accruing on the unpaid portion of the Judgment by Confession in the matter of Tomyn v. Sharbono, Pierce County Cause No. 99-2-12800-7 pursuant to the terms of said Judgment.* (Emphasis added).

The Judgment summary goes on to provide at number 7, under the heading of “Judgment Interest” the following:

*Post-judgment interest shall accrue on \$4,893,298.63 of the principle judgment amount, **and on such additional amounts as become due and owing under paragraph 1 below, at the rate of 12 % per annum.** Post-judgment interest shall accrue on \$4,500,000.00 of the principle judgment amount, and on attorney’s fees, costs and other recovery amounts at the rate of 5.125% per annum from the date of entry of this Judgment until such Judgment is paid.* (Emphasis added).

In other words, post-judgment interest was accruing at 12% only on those amounts (\$4,893,298.63) needed to pay the Tomyn Confession of Judgment, and which were assigned to the Tomyns under the terms of the Tomyn/Sharbono Settlement Agreement. On the other hand, the \$4,500,000.00 Judgment amount reflective of the jury verdict in favor of the Sharbonos (and other related matters), was to accrue at the then existing statutory rate of 5.125% per annum. Clearly, Mr. Gosselin, when crafting the Judgment summary, intended to create a clear separation between those amounts awarded which were assigned to and for the purpose of benefitting the Tomyns apart from the interests of the Sharbonos.

The language of the Judgment itself also is reflective of such a clear distinction, and at paragraphs 1 through 7 provides:

1. *Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company in the amount of the unpaid balance of the Judgment by Confession entered against plaintiffs in the matter of Tomyn v. Sharbono, Pierce County Cause No. 99-2-12800-7, to wit \$3,275,000.00, together with interest that has accrued thereon since the date of entry, March 30, 2001, which, as of May 13, 2005, (four years, 43 days @ 12% /yr.) Totals \$1,618,298.63, and together with interest that continues to accrue thereon as set forth in said judgment until said judgment is paid.*
2. *Judgment is hereby entered in favor of plaintiffs James and Deborah Sharbono and against defendant Universal Underwriters Insurance Company in the additional sum of \$4,500,000.00, as and for past and future general and special damages as found by the jury.*
3. *Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company for punitive damages pursuant to RCW 19.86.090 in the amount of \$10,000.00.*
4. *Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company in the additional sum of \$203,585.00 for actual attorney fees.*
5. *Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company in the additional sum of \$505.00 for costs.*
- ...
7. *Amounts awarded pursuant to paragraph 1 shall bear post-judgment interest pursuant to RCW 4.56.110 (4) and RCW 19.52.020 at the rate of 12 percent per annum. Amounts awarded pursuant to paragraphs 2 through 6 shall bear post-judgment interest pursuant to RCW 4.56.110 (3) at the rate of 5.125 percent per annum.*

Again, a clear distinction is being made with respect to the paragraph 1 monies, which were clearly for the benefit of the Tomyns, and those monies that were reflective in the jury verdict in favor of the Sharbonos. Again, as with the pre-judgment interest awarded under paragraph 1, under paragraph 7, post-judgment interest is also awarded at 12% per annum. <sup>6</sup>

Universal appealed this Judgment. As noted above, that appeal resulted in a published opinion set forth at 139 Wn.App 383, 161 P.3d 406 (2007). Unfortunately, for the Sharbonos, as a result of the published opinion in that case, the amounts awarded to the Sharbonos by the jury, and the Court in the form of attorney's fees and costs, was subject to vacation and reversal. However, that portion of the Judgment which benefitted the Tomyns and which were assigned to them (paragraph 1 and, in part, paragraph 7) were affirmed on appeal "because Universal

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As discussed in Intervenor's responding brief to the appeal filed by Universal, it is simply academic as to how the trial court determined the interest rate set forth upon the face of the Judgment, given the fact that Universal waived challenge to paragraphs 1 and 7 of the Judgment by its failure to assign error in the earlier appeal, as this Court has repeatedly ruled. See, *Sharbono v. Universal Underwriters*, supra. However, it is noted that the Sharbonos correctly point out at page 26 of their brief that "where coverage by estoppel applies, the amount of a covenant judgment is a presumptive measure of an insured's harm caused by an insurer's tortious bad faith, if the covenant judgment is "reasonable." Quoting, *Besel v. Viking Insurance Company of Wis.*, 146 Wn.2d 730, 738, 49 P.3d 887 (2002); *Kirk v. Mount Ari Insurance Co.*, 134 Wn.2d 558, 564, 595 P.2d 1124 (1998). In this case, a presumed measure of damages was the Tomyn/Sharbono Confessed Judgment, which accrued, and continues to accrue at 12% interest. (The Confessed Judgment has also repeatedly been found to be reasonable).

did not assign error to the directed verdict in the amount of \$3,275,000.00 together with interest, we affirm that Judgment and remand for further proceedings. (Emphasis added).

As discussed in the Sharbono's brief at pages 3 through 5, following the issuance of the Mandate by the Court of Appeals (after an unsuccessful Petition for Review to the Supreme Court), following the first appeal in this matter, this case has had a number of unusual twists. Initially, the Tomyns sought to intervene in order to protect their interests with respect to paragraphs 1 and 7 of the subject Judgment. (CP 72-84). Efforts were made to execute on the Appeal Bond filed by Universal Underwriters' surety, Ohio Casualty. In response, Universal had the audacity to argue that there was actually no Judgment affirmed on appeal, and that instead, based on a rather fanciful and baseless argument, contended that in actuality, the Court of Appeals had vacated the entirety of the Judgment. (CP 133). In the process, Universal challenged the award of post-judgment interest generated by the unappealed paragraph 7 of the Judgment, and generally challenged the Sharbonos' and Tomyns' calculation of interest due under paragraph 1 of the Judgment as well. (Despite the fact that clearly on the face of the Judgment, both were to accrue at 12%, and the interest rate was never subject to assignment of error in the prior appeal, as this Court has repeatedly ruled).

The trial court, in response, required the Plaintiff (and collaterally the Tomyns) to acquire expert calculation of the full amounts due and owing, under the terms of the Mandate. (CP 1-66; 162-166; 191-204; 268-95).

On October 3, 2008, the trial court rejected all of Universal's arguments, and the Court enforced the Judgment and Mandate, and ordered Universal's surety, Ohio Casualty, to pay the amounts due to the Tomyns by October 15, 2008. (Appendix No. 5) Those amounts then totaled \$8,594,222.03, with accrued interest. The total amount was comprised of \$6,240,265.75, due and owing under paragraph 1 of the Judgment, and additionally \$2,353,956.28 as the post-judgment interest generated under paragraph 7, i.e., the post-judgment interest generated from paragraph 1. The trial court, after hearing argument from counsel for the Sharbonos and Tomyns (and Universal), ordered that all the monies - both paragraph 1 (principle plus interest), as well as paragraph 7 (post-judgment interest) - be paid to the Intervenors Tomyn, who had been assigned such monies under the terms of the pre-litigation agreement entered into between the Sharbonos and the Tomyns. (See, October 3, 2008 Order Executing on Appeal Bond). (Appendix No. 5) (CP 332-334); (RP 10/03/08 p.1-34).

Thereafter, on October 7, 2008, Universal filed its second appeal and an Amended Notice of Appeal, dated October 15, 2008, addressing the denial of its procedurally defective and untimely CR 60 motion. On October 17, 2008, the Sharbonos' counsel, Timothy R. Gosselin, filed a Notice of Cross-Appeal of that part of the trial court's Order of October 3, 2008, requiring that the paragraph 7 post-judgment interest be paid to the Tomyns. The Sharbonos did so despite the fact that by doing so it placed Mr. Gosselin in a gross conflict of interest situation, and was violative of that portion of the Tomyn/Sharbono agreement which precluded the

Sharbonos from bringing claims adverse to the Tomyns. <sup>7</sup> (Supp CP \_\_\_\_).

Following the filing of the appeals in this matter, this Court, by ruling dated January 23, 2009 and as amended on February 4, 2009, substantially limited Universal's appeal in this matter that "Universal may challenge the trial court's calculation of post-judgment interest on appeal. It may not, however challenge the \$3.275 million Judgment, which this Court affirmed in the previous appeal."

Intervenor Tomyns have addressed Universal's rather strained position in Intervenor Tomyns' responding brief. This brief is limited solely to the issue of the Tomyns' obvious entitlement to all interest generated from the underlying balance of \$3,275,000,000 due and owing under the terms of the Tomyn/Sharbono agreement, whether or not such interest is characterized as pre-Judgment interest, post-Judgment interest, or as part and parcel of the presumptive damages, which were awarded in order to fund the amounts due and owing under the terms of the Tomyn/Sharbono agreement.

### III. ARGUMENT

#### A. The Trial Court Correctly Interpreted the Intent of Its Own Judgment.

It is respectfully suggested that the trial court is in the best position to

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In addition, it is noted that the position advocated by the Sharbonos, i.e., that **they** were entitled to the post-judgment interest generated from that portion of the Judgment expressly designed to fund the amounts due and owing under the Tomyn/Sharbono settlement, in that the Sharbonos were seeking to profit from funds expressly allocated to compensate the Tomyns for the untimely death of Cynthia Tomyn. In other words, the Sharbonos were advocating the absurd position that they were entitled to profit from the death of Cynthia Tomyn.

interpret its own Judgment. To hold otherwise, would simply be counter-intuitive and frivolous. Generally, the interpretation or construction of a trial court's Judgment by a reviewing court presents a question of law for the court. See, *Callan v. Callan*, 2 Wn.App 446, 448, 468 P.2d 456 (1970). If the judgment is unambiguous, there is no room for construction. *Id.* However, if a judgment is ambiguous, then the reviewing court seeks to ascertain the intentions of the court entering the judgment or decree. The general rules of interpretation and construction applicable to statutes, contracts or court rules also apply to a court's judgment. *Id.*

As discussed in detail in the *Callan* case, the rules include, the propositions that the intention of the court is to be determined from all parts of the instrument, and that the judgment must be read in its entirety, and must be construed as a whole, so as to give effect to every possible word or part. Further, any provision within the judgment which appear to be inconsistent must be harmonized, if at all possible, and it should not be assumed that a trial court intended to enter a judgment with contradictory provisions, thus impair the legal operation and effect of "so formal a document." *Id.*

In this case, when ascertaining the trial court's intentions when entering the Judgment of May 20, 2005, one need go no further than its October 3, 2008 Order which required payment of all amounts due and owing under paragraphs 1 and 7 (in pertinent part) of the Judgment to the Tomyns. (CP 332-334). Given the fact that the Court's own actions speak volumes as to its underlying intent, it would seem nonsensical at this point for the appellate court to review the underlying Judgment in

order to try to ascertain the intent of the trial court. That question was already clearly answered by the court's October 3, 2008 Order, and the trial court (who entered both Orders) is certainly in the best position to know its own mind, particularly after having been involved with this case for eight years. See also, *Prescott v. Matthews*, 20 Wn.App 266, 270-71, n. 8, 579 P.2d 407 (1978) (judgments are to be construed in a manner as will give effect to the intentions of the trial court and the reviewing court can consider orders from the trial court which serve to clarify its judgment).

Even if the reviewing court, for inexplicable reasons, were to ignore the clear intentions of the trial court as expressed in its October 3, 2008 Order, the Judgment of May 20, 2005, unambiguously and clearly within paragraph 7 tied the award of post-judgment interest directly to paragraph 1, which memorialized the trial court's Order on presumptive damages. The Judgment, by its very terms, allocates the paragraph 1 monies to payment of the Confession of Judgment in the underlying Tomyn case, which is specifically referenced by its cause number.

Further, even if the Sharbonos could overcome the clear expression of the trial court's intent within its October 3, 2008 Order, and the plain language of the May 20, 2005 Judgment, on proper application of the rules of interpretation and construction applicable to the interpretation of Judgments, the outcome is the same.

As indicated above, judgments like statues and contracts, must be interpreted as a whole. If one examines the structure of the May 20, 2005 Judgment "as a

whole,” clearly there was an attempt to delineate between those claims assigned to the Sharbonos (presumptive damages), and those monies awarded by the jury to the Tomyns. The underlying Confession of Judgment, which was entered in 2001, three (3) years before the amendment to RCW 4.56.110 (4), was at the then existing 12% interest rate applicable to both tort and contract judgments. Both paragraph 1, and that portion of paragraph 7, which continues to be at issue, are at the 12% interest rate applicable to the Tomyns’ Confession of Judgment. <sup>8</sup> See, *Jackson v. Fenix Underground*, 142 Wn.App 141, 173 P.3d 977 (2007). (Settlement agreements are contracts and either the contract interest rate applies or the interest rate set forth within the agreement).

In marked contrast, those portions of the Judgment specifically benefitting the Sharbonos, and reflective of the jury verdict in their personal claims against Universal, carry the interest rate of 5.125%, reflective of the floating interest rate that became affixed into perpetuity on the date of the Judgment, as required by the 2004 amendment to RCW 4.56.110 (4).

Further, the Judgment itself delineates between those claims which were assigned to the Tomyns to satisfy the Confessed Judgment as presumptive damages, and those claims “retained” and pursued by the Sharbonos before the trial court, which unfortunately were reversed on appeal. Like contracts and statutes, a

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Or alternatively, as suggested by the Sharbonos, the 12% interest rate is justified by the contractual nature of the claim, as well as Universal’s failing to assign error or object in the first appeal or when Judgment was entered in 2005. See, Sharbonos’ brief at p. 16.

Judgment should not be construed and interpreted in a manner which would give it a strained or forced meaning, or which would lead to a strained or absurd result. See, *Jackson v. Fenix Underground*, 142 Wn.App 141, 173 P.3d 977 (2007) (Statutes); *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987) (Contracts).

In this case, it would be absurd to separate paragraph 7's post-judgment interest from that portion of the Judgment which is its source; the principle Judgment amount. Such construction would make no sense, and would lead to the unjust and absurd result (which was clearly not intended by the parties at the time of the Tomyn/Sharbono agreement), by allowing the Sharbonos to directly profit from the tragic and untimely death of Cynthia Tomyn, Mr. Tomyn's high school sweetheart and the mother of three boys.

Further, it is noted that Mr. Gosselin, counsel for the Sharbonos, drafted the May 20, 2005 Judgment at a time when the Tomyns were not a party to this case and it was his obligation to pursue the Tomyns' interests in this litigation. Initially, it is noted that given the fact that the Sharbonos' attorney, Mr. Gosselin, drafted the subject Judgment, its terms must be construed against the Sharbonos who, through (according to the Sharbonos) their agent, Mr. Gosselin, drafted the document. See generally, *Santos v. Dean*, 96 Wn.App 849, 982 P.2d 632 (1990), *Lynott v. National Union Fire Insurance*, 123 Wn.2d 78, 871 P.2d 146 (1994) (contracts are construed against the drafter); (Mr. Gosselin also drafted the Tomyn/Sharbono Settlement Agreement). In addition, the Rules of Professional Conduct should be implied to be

part of contracts relating to legal services. See, *Cotton v. Kronenberg*, 111 Wn.App 258, 264, 44 P.3d 878 (2002); *Bar v. Day*, 124 Wn.2d 318, 879 P.2d 912 (1994).

Further, it is suggested that the interpretation of this Contract/Settlement Agreement in a method and manner which is advocated by the Sharbonos would be violative of the underlying Tomyn/Sharbono agreement, and violative of public policy, thus leading to an unjust and absurd result. See, *State v. Salavea*, 151 Wn.2d 133, 145, 86 P.3d 125 (2004).

In order to explain such a contention requires a review of the history of the agreement between the Tomyns and Sharbonos. As discussed above, under the terms of the Tomyn/Sharbono agreement, the Sharbonos were obligated to bring the underlying lawsuit for the purpose of acquiring the amounts necessary to pay the balance owing on the underlying Confessed Judgment. In order to pursue such a lawsuit, the Sharbonos were required to retain counsel for the purposes of pursuing the Tomyns' interest of payment of the underlying Confession of Judgment. The Agreement permissively allowed the Sharbonos to pursue whatever claims they may have had against their own insurance company, Universal. In order to meet their obligations under the Tomyn/Sharbono agreement, the Sharbonos made the determination to retain their current attorney, Timothy Gosselin, to pursue not only those claims expressly assigned to the Tomyns, but also whatever claims the Sharbonos may have had against their own insurance company, which now are characterized as "retained claims." Mr. Gosselin represented both interests through trial and through the first appeal in this case. Not only was he able to acquire those

portions of the Judgment which were assigned to the Tomyns (paragraphs 1 and 7), but also acquire a substantial result for the Sharbonos, which was unfortunately subject to reversal. <sup>9</sup>

Up until the point in time, the Sharbonos, through Mr. Gosselin, began asserting an entitlement to the post-judgment interest generated under paragraph 7, Mr. Gosselin was successful in representing the interests of the Tomyns and the Sharbonos, which were not conflicting. Unfortunately, once the Sharbonos asserted a claim for the paragraph 7 post-judgment interest, Mr. Gosselin's position became conflicting and as such untenable. He violated not only the terms of the Tomyn/Sharbono agreement, but also other requirements. It is exceedingly fortuitous that the Tomyns' counsel intervened when he did to protect the Tomyns' interests, which given the current cross-appeal had been grossly subverted by Mr. Gosselin, who apparently believed that he can walk an untenable tightrope, while trying to juggle interests which are conflicting. If one examines the Sharbonos' brief in this matter, the conflicting and schizophrenic nature of such efforts is self-evident. On the one hand, Mr. Gosselin for 22 pages of his brief argues in a manner which would preserve the Tomyns' entitlement to paragraph 1 and the 12% interest generated therefrom (and preserve paragraph 7) as required by the Tomyn/Sharbono agreement,

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Under the terms of the Tomyn/Sharbono agreement, it was optional for the Tomyns to have personal counsel during the course of the trial and appeal on this matter. The Tomyns' chosen counsel, Ben F. Barcus, who aided the Tomyns in reaching the underlying settlement, was extremely limited in his role as he was a witness at time of trial, and could not act as trial counsel, nor under CR 43 (g) could he act as both a witness and argue the case.

and then dedicates the remainder of his brief attempting to usurping paragraph 7 from the Tomyns. <sup>10</sup>

As discussed in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), the essence of an attorney/client relationship is whether the attorney's advice or assistance is sought and received on a legal matter. The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct.

*Id.* Further, whether fees are paid is not dispositive, and the existence of the relationship "turns largely on the client's subjective belief that it exists." *Id.* quoting, *In Re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attendant circumstances, including the attorney's words or actions. *Id.*

In this case, it can reasonably be argued that Mr. Gosselin had an attorney/client relationship with both the Sharbonos and the Tomyns, even though

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As indicated by other pleadings in this matter, Universal and the Sharbonos have since reached a purported secret agreement allegedly for the purposes of settling the Sharbonos' claims against Universal. (Supp. CP \_\_\_)(Appendix 6). Conveniently, the amount of that settlement is nearly identical to the amount of the paragraph 7 interest liquidated by the Court's October 3, 2008 Order, \$2.34 million. Under the terms of the settlement agreement, while the Sharbonos are allegedly being paid "new money," the Sharbonos are abandoning to Universal any further claims to the paragraph 7 monies. At this juncture, one can certainly question whether or not Mr. Gosselin's efforts continue to be for the benefit of the Tomyns. It would appear that currently Mr. Gosselin, is contractually bound to pursue this matter, **on behalf of Universal**. In other words, in this appeal, not only is Mr. Gosselin potentially representing the Tomyns' interest, and the Sharbonos' interest, but now apparently he is also representing Universal's interest given the Sharbono/Universal settlement agreement on file herein. The obvious conflicts of interest are without question.

the Sharbonos were the original named party to this suit. Under the terms of the Tomyln/Sharbono agreement, Mr. Gosselin, as the retained attorney, was obligated to pursue claims which were assigned to the Tomyns and as such provided assistance on a legal matter for the benefit of the Tomyns. The relationship in this instance is not formalized by a written attorney fee agreement per se, but rather the Tomyln/Sharbono settlement agreement, which delineates by its terms that not only are the Sharbonos' interests are to be pursued in this case, but also the substantial interests of the Tomyns (payment of the remaining balance of a Confessed Judgment of \$3,275,000.00 is a substantial interest). By its terms, the agreement is indicative of joint representation.

Thus, it can reasonably be said that any effort by Mr. Gosselin to act contrary to the Tomyns' interest, or reasonable legal positions, creates a conflict of interest violative of the attorney's duties to one client in favor of another. See, RPC 1.6 and 1.7 and 8.4 (a). In addition, the obvious complicity of Universal and its counsel also violates the RPC 8.4 (a).

Further, even if it cannot be said that there is a direct attorney/client relationship between the Tomyns and Mr. Gosselin, nevertheless, a conflict exists because clearly, the Tomyns were an intended third-party beneficiary of the attorney's actions and representation. Given the assignment of claims to the Tomyns, relating to coverage by estoppel and presumptive damages (which were successful), to the Tomyns, clearly they were unintended third-party beneficiary of Mr. Gosselin's representation in this matter. Thus, Mr. Gosselin not only owed a duty to the

Sharbonos, but also to the Tomyns. In *Bohn v. Cody*, supra, and as further refined in the seminal case of *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), the Supreme Court set forth a multi-factor balancing test to determine whether or not an attorney owes a duty of care to a non-client which is an intended third-party beneficiary of the attorney's representation. In making such a determination, the Court must balance such factors:

1. *The extent to which the transaction was intended to effect the plaintiffs;*
2. *The foreseeability of harm to the plaintiffs;*
3. *The degree of certainty that the plaintiffs suffered injury;*
4. *The closeness of the connection between the defendant's conduct and the injury;*
5. *The policy of preventing future harm; and*
6. *The extent to which the profession would be unduly burdened by a finding of liability.* <sup>11</sup>

In the case of *Karan v. Topliff*, 110 Wn.App 176, 338 P.3d 396 (2002), the appellate court examined and applied the various factors set forth in *Trask*, and found that an attorney had breached his duty to an intended third-party beneficiary of his services. In that case, a minor child's guardian brought a malpractice action against

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As a general proposition, the courts have an obligation to investigate potential attorney/client conflicts of interest if it knows or reasonably should know that a potential conflict exists. See generally, *State v. Regan*, 143 Wn.App 419, 425-26, 177 P.3d 783 (2008). Also, attorneys, such as those representing Universal, have an obligation not to aid and abet professional misconduct. RPC 8.4 (a).

the attorney who had been hired by the child's mother to create a guardianship order for the child's estate. In that case, the child's father died and left her \$50,000.00 of life insurance. The defendant attorney, James Topliff, petitioned the court that the child's mother should be made guardian of the child's estate, but neglected to place within the order granting the guardianship petition this requirement that a bond be posted, or that the life insurance proceeds be placed in a blocked account for the benefit of the minor. Even though it was the mother who hired the attorney, clearly the intended beneficiary of the services was the minor child for whom the guardianship was to be established. Unfortunately, the guardian mother embezzled a large portion of the funds, which should have been placed within a blocked account, as required by statute, and there was no recourse against the mother because there had been no requirement that a bond be posted. In finding the attorney liable to the minor under such circumstances, the court engaged in a detailed analysis of the *Trask* factors.

With respect to factor 1, i.e., who was the intended beneficiary, the court found that the primary reason for the establishment of the guardianship was to preserve the child's property and not for the benefit of others. Similarly, if one examines the Tomyn/Sharbono agreement, the primary purpose of the agreement was to pay the Sharbonos' debts to the Tomyns for the tragic and wrongful death of Cynthia Tomyn. The primary purpose of the lawsuit was to pay the Tomyns and only secondarily, during the course of such suit, the Sharbonos were permitted to pursue whatever separate claims they may have against Universal, which at the time

of the Tomyn/Sharbono settlement agreement were unliquidated. To find otherwise would be to simply ignore the language of the Agreement and the context and surrounding circumstances under which the Tomyn/Sharbono agreement was entered into. Obviously, the agreement would not have been entered without the untimely death of Cynthia Tomyn, and the substantial need of the Sharbonos to retire their debt to the Tomyns. Further, if the Tomyns were not an intended beneficiary of the lawsuit to be filed, there would have been no purpose in assigning any claims to the Tomyns. In fact, this suit would not have been brought at all.

On the second element: “the foreseeability of harm,” it is noted that for the vast majority of the underlying litigation in this case, both the Tomyns’ and Sharbonos’ interests were being solely represented by Mr. Gosselin, who under the Tomyn/Sharbono agreement, was obligated to pursue the interests of both. It was not until the Sharbonos, based on a rather fanciful construction of the May 20, 2005 Judgment, attempted to usurp the Tomyns’ entitlement to the interest generated from that portion of the Judgment reflective of their assigned claims (Paragraph 7 post-judgment interest designated to the Tomyns’ Judgment with paragraph 1), did a conflict arise. The potential for damages are self-evident and are limited only by one’s imagination. Some concerns simply cannot be stated because of the ongoing litigation with Universal. The mischief by such conduct has further been compounded by the recent Sharbono/Universal settlement agreement, which essentially, (through a not very well #1 camouflaged attempt at comprising the Tomyns’ entitlement to paragraph 7 funds), provides the Sharbonos and their counsel

an incentive to undercut the Tomyns' entitlement to paragraph 7 funds for the benefit of Universal, the Sharbonos' former adversary.<sup>12</sup> (Appendix 6).

With respect to the third element of "certainty plaintiff suffered injury," given the current posture of this case, full "certainty" will not exist until resolution of the appeal as it relates to all damages accrued due to the Sharbonos, Universal and their counsel's tortious misconduct. While the Tomyns are confident that ultimately they will prevail on all issues (including the cross-appeal, which they view as having **no merit**), the potential outcome of the Sharbonos' effort at cross-appeal could be extremely injurious to the Tomyns, who have suffered a grievous loss, and whose interests were to be protected by Mr. Gosselin, who drafted both the Judgment's language, which he now is trying to use in a manner deleterious to the Tomyns' easily definable interests, as well as the Tomyn/Sharbono Settlement Agreement.

The negative impact of Mr. Gosselin's conflict has already manifest itself, because the Sharbono/Universal Settlement Agreement requires a dismissal of the Sharbonos' claims, and the striking of the impending trial date, wholly underwriting any time pressure on Universal to resolve all claims. The settlement additionally waived any potential Insurer Fair Conduct Act claims, (RCW48.30.015) relating to Universal's post-mandate efforts, thus undermining additional incentive for

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Throughout the course of pre-trial proceedings and trial, and the first appeal and thereafter, there were frank communications between the Tomyns' personal counsel and trial counsel, Gosselin, with respect to strategies, settlement postures and evaluations. It is unknown to what extent the Tomyns' confidences to Mr. Gosselin were compromised during the course of the recent (and secret to the Tomyns) Sharbono/Universal settlement negotiations.

Universal to settle.

With respect to the fourth element: “connection between lawyer’s conduct and injury,” obviously, if Mr. Gosselin is successful in his representation of the Sharbonos, he will have furthered the Sharbonos’ interests (and now Universal’s) in a manner adverse to the Tomyns’ interests on an issue worth well over \$2.35 million; such an injury clearly would be direct and substantial.

With respect to the fifth element: “future harm,” as discussed in the *Karan* case, at page 85, this element relates to whether or not the attorney’s conduct at issue as a matter of policy should result in a finding of duty “in the interest of preventing future harm,” presumptively to others similarly situated. Clearly, what has occurred in this case should not be repeated. The Tomyn/Sharbono settlement agreement was a “joint representation agreement,” because it has the elements of such an agreement. Also, public policy favors settlement of disputes. See, *Seafirst Center Limited Partnership*, 127 Wn.2d 355, 365, 898 P.2d 299 (1995). Clearly, public policy favors the proposition that victims of tortious wrongs should receive reasonable and full compensation. *Thiringer v. American Motors Ins.*, 91 Wn.2d 215, 219-20, 588 P.2d 191 (1978); *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 845 P.2d 334 (1993).

As previously held by the Appellate Court, the method and manner in which the Tomyns and Sharbonos settled their initial dispute, was “reasonable” and was done in a method and manner in which public policy should favor. Further, the method and manner in which the settlement agreement was structured, at every level,

was beneficial to the public policy of the State of Washington. First, it was an effort to ensure that the Tomyns received full compensation for their grievous losses. At the same time, it allowed the Sharbonos to economically survive by not holding them fully responsible for immediate payment of the substantial damages suffered by the Tomyns, and provided a mechanism for the Sharbonos to maintain economic viability, maintain their status as tax payers, and did not reduce them to destitution. Further, the settlement agreement provided a mechanism in which both the Tomyns and Sharbonos, with common cause, could address the very real and serious injuries suffered by the bad faith misconduct of Universal, which is extremely important because matters involving insurance inherently involve significant matters of the public policy within the State of Washington. See, *Touchette v. NW Mut. Ins. Co.*, 80 Wn.2d 327, 335, 494 P.2d 479 (1972).

Also, the method in which this controversy developed is disturbing, and raises significant issues with respect to an attorney's duty once the interests of his joint clients, or client and/or intended third-party beneficiaries becomes conflicting. "Public policy" under such circumstances should suggest that the attorney recognize such conflict, appropriately advise the client and/or client and beneficiaries as such, and afford an opportunity for a waiver of conflict or the retention of fully independent and non-tainted counsel. See, RPC 1.7 and RPC 1.9.

Finally, and similarly, with respect to the sixth element: "the burden on the profession," as noted in the *Karan* case, it is not a burden on the profession to preclude a lawyer from representing clients with conflicts of interest. As stated in

that case, “a potential conflict of interest arises when the lawyer simultaneously represents clients with opposing interests.”

Here, finding that Mr. Gosselin had a duty to the Tomyns would not unduly burden the profession, because the rules of professional conduct already would preclude a lawyer from pursuing the interests of a client once a conflict has developed.

In sum, the trial court in this matter was in the best position to interpret the intent of its own Judgment. As is self-evident, the trial court Judge is in the best position to know its own mind. In addition, there is nothing within the Judgment which is either vague or ambiguous. It is a fanciful proposition that the Sharbonos are entitled to the post-judgment interest, which was clearly generated from paragraph 1 of the Judgment, which by the Sharbonos’ own admission was assigned to the Tomyns, and as part of the Tomyn/Sharbono Settlement Agreement is to compensate them for their grievous loss of Cynthia Tomyn.

Further, even if the Appellate Court was inclined to ignore the clarification provided by the October 3, 2008 Order, directing that paragraphs 1 and 7 funds be paid to the Tomyns, the Sharbonos cannot escape the “plain meaning” of the language used within the May 20, 2005 Judgment, which clearly, when construed as a whole, indicates that the interest generated from paragraph 7 is directly tied to the amounts owed to the Tomyns, as principle, under paragraph 1. This is self-evident by looking at the interest rates applicable to paragraph 1 and the relevant portion of paragraph 7 (12%), and the application of common sense. As is also self-evident,

that if there were no monies awarded under paragraph 1, the post-judgment interest generated under paragraph 7 would not exist.

Even if the Appellate Court were inclined to find the Judgment to be ambiguous (which it should not), thus subject to interpretation and construction, it is noted that the construction advocated by the Sharbonos would lead to an unjust and absurd result. In this case, Mr. Gosselin was representing both the interests of the Tomyns and the Sharbonos at the time of entry of Judgment. Because of the nature of the lawsuit, and the agreement of the parties', the Tomyns were not being represented, in this case, by anyone other than Mr. Gosselin at the time the Judgment was entered. Now, perhaps because that portion of the May 20, 2005 Judgment on the Sharbonos' "retained claims" was reversed on appeal, Mr. Gosselin has shifted his allegiance solely to the Sharbonos, to the detriment of the interests of the Tomyns. It is suggested that it would be incredibly "unjust" for the Court to provide the Sharbonos when the Judgment itself was drafted by an attorney who was jointly represented the Tomyns and the Sharbonos at the time in question, to the detriment of the Tomyns, who he has now abandoned.

Further, it would be absurd to award the Sharbonos the paragraph 7 monies, when to do so would be to place a stamp of approval on the actions of an attorney who was misguidedly operating with conflicting interests and divided loyalties.

B. The Judgment Has to Be Construed Against the Sharbonos as the Drafter, and/or the Invited Error Doctrine Should Be Deemed Applicable.

As previously discussed, as Mr. Gosselin was the drafter of the Judgment of

May 20, 2005, and now has taken a position adverse to the interests of the Tomyns, as such, any ambiguity within such a Judgment must be construed against the Sharbonos, and Mr. Gosselin, who claims to be solely their attorney.

In addition, to the extent that it could be determined at any level that the subject Judgment contains an ambiguity, and that it should have been read in a manner which indicated that the funds generated under paragraph 7 were for the benefit of the Sharbonos, arguments with respect to any ambiguity or absent language are foreclosed under the Invited Error Doctrine. An invited error result when the party's own actions during trial creates the error. See, *Shanlian v. Faulk*, 68 Wn.App 320, 843 P.2d 535 (1992). See also, *City of Bellevue v. Kravik*, 69 Wn.App 735, 739, 850 P.2d 559 (1993) ("the Doctrine of Invited Error prevents a party from complaining on appeal about an issue it created at trial.") (quoting: *State v. Young*, 63 Wn.App 824, 330, 818 P.2d 1375 (1991)).

In this case, to the extent that the Sharbonos now may complain about the method and manner in which the trial court interpreted the May 20, 2005 Judgment, the Sharbonos have no one to blame but themselves as to the content of that document.<sup>13</sup> Had the Sharbonos desired that the document to clearly state that they were entitled to any interest generated from paragraph 7 of the subject Judgment,

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It goes without saying that the Doctrine of Judicial Estoppel would preclude the Sharbonos and Mr. Gosselin from revising and/or taking a contrary position as to who Mr. Gosselin purports to represent. See, *Johnson v. Si-Cor, Inc.*, 107 Wn.App 902, 906-09, 28 P.3d 832 (2001) (Doctrine of Judicial Estoppel precludes a party from taking an inconsistent factual positions in litigation and attaches when the prior inconsistent position benefitted the litigant or was accepted by the Court). See also, *King v. Clodfelter*, 10 Wn.App 514, 518 P.2d 206 (1974).

they certainly had the power and the ability to say so. As indicated with previous pleadings before this Court, at the time the Judgment was entered, Universal did not say a thing. As such, the language selected within the May 20, 2005 Judgment solely was the result of the actions of Mr. Gosselin, who alleges that at the time, he was solely representing the Sharbonos' interests.<sup>14</sup>

C. The Sharbonos' Contractual Analysis Is Specious In That It Fails to Recognize the Fact That the Source of the Pre-Judgment Interest Referenced in Paragraph 7 Is the Judgment on Presumed Damages, Which Were Assigned to the Tomyns Under the Terms of the Tomyn/Sharbono Agreement.

As indicated above, the true issue in this matter is whether or not the trial court properly interpreted its own Judgment. This action was not, nor has ever been, a breach of contract action between the Tomyns and the Sharbonos, nor an action for declaratory relief.

Nevertheless, Intervenor Tomyns provide the following with respect to the Sharbonos' contractual analysis.

Initially, it is noted that generally the Intervenor agree with the Sharbonos' statement of the law concerning contractual interpretation and/or construction set forth at page 23 and 24 of the Cross Appeal Brief, however, the Sharbonos do very little analysis by way of applying the law. Further, as discussed above, the position taken by the Sharbonos in this matter is frivolous because if that portion of the Judgment set in paragraph 1, (the principle) which the Sharbonos agree the Tomyns own and are the real party in interest, did not exist, the interest generated under

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Paragraph 7, would not exist.

It is suggested that the intent and/or purpose of the subject Tomyn/Sharbono Settlement Agreement was two-fold: (1) if provided a vehicle from which the Tomyns could receive full compensation for the loss of Cynthia Tomyn above and beyond the State Farm automobile liability insurance coverage of \$250,000.00, and the \$1 million coverage admitted by Universal and (2) served to protect the financial interests of the Sharbonos because in the absence of settlement, they face a staggering liability.<sup>14 15</sup>

Yet the Sharbonos appear to ignore **that the purpose of this lawsuit clearly was for the primary benefit of the Tomyns and for the purposes of collecting what the Sharbonos characterized as the “assigned claims.”** Paragraph 3 A, at page 3 of the Settlement Agreement, provides that the Sharbonos “will” file this case for the purposes of collecting from Universal the unpaid balance of the Confessed Judgment. In marked contrast, under paragraph 3 B, at page 3 of the Settlement Agreement, it was left to the Sharbonos’ discretion (use of the term “may”) as to whether or not they would pursue any personal claims against Universal.

Amongst the assigned claims were those claims set forth at paragraph 2 B,

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<sup>14</sup>Under paragraph 5 at page 4 of the Tomyn/Sharbono Settlement Agreement, James and Deborah Sharbono, by bringing and funding this lawsuit, receive substantial protection because by providing the Tomyns the “assigned claims” served to extinguish any further liability to the Tomyns. In marked contrast, Cassandra Sharbono, the at-fault driver who killed Cynthia Tomyn, only received a “covenant to forebear” and at the conclusion of this lawsuit, potentially could have faced collection efforts on the remaining \$3.275million (plus interest), which remains unpaid under the Confession of Judgment, which was entered as part of the Settlement Agreement.

located at page 5 of the Settlement Agreement, which provides:

*The benefits payable under any liability insurance policy which, because of an act of bad faith, Universal is estopped to deny or deem to have sold to defendants.* (Emphasis added).

Thus, as conceded by the Sharbonos, any claims and/or monies generated under a coverage by estoppel theory were assigned and belong to the Tomyns. As candidly conceded by the Sharbonos, the end product of a determination of coverage by estoppel is an award of “presumptive damages” and “the amount of a covenant judgment.” See, page 14 and 15 of Sharbonos’ Reply Brief and Brief on Cross-Appeal, citing to *Kirk v. Mt. Airy Insurance Co.*, 134 Wn.2d 558, 564, 595 P.2d 1124 (1998); *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 739, 49 P.3d 887 (2002); *Safeco Insurance Co. Of America v. Butler*, 118 Wn.2d 383, 390, 823 P.2d 499 (1992).

Thus, under the terms of the Tomyne/Sharbono Settlement Agreement, the Tomyns were assigned, are the real party in interest, and owned any award of presumptive damages resulting from this lawsuit against Universal.

On May 20, 2005, the Court entered an Order awarding such presumptive damages, and further memorialized that Order within paragraph 1 of its Judgment of May 20, 2005, which was affirmed on appeal. <sup>15</sup>

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Again, it is noted that unfortunately, those claims which were retained by the Sharbonos, and which are clearly and severely delineated in the May 20, 2005 Judgment, under paragraphs 2, 3, 4, 5 and that portion of paragraph 7 which provides: “amounts awarded pursuant to paragraphs 2 through 6 shall bear post-judgment interest pursuant to RCW 4.56.110 (3) at the rate of 5.125% per annum,” was reversed on appeal. Paragraphs and 1 that portion of 7, which provides: “amounts awarded pursuant to paragraph 1 shall bear post-judgment interest pursuant to RCW 4.56.110 (4) and RCW 19.52.020 at the rate of 12% per annum” were

Clearly, those funds awarded under paragraph 1 of the trial court's affirmed May 20, 2005 Judgment are the amounts which were assigned to the Tomyns, and is reflective of the amounts, based on the assignment and Confession of Judgment, were due and owing to the Tomyns.

Further, it is noted that a fatal flaw in the Sharbonos' analysis is the notion that the Sharbonos ever had any entitlement to the funds set forth within paragraph 1. These were not funds that the Sharbonos were entitled to collect, but rather are reflective of the Sharbonos' debt to the Tomyns. As suggested by the Sharbonos at page 25 of its brief: "the purpose for requiring the defendant to pay interest on a Judgment is to compensate the plaintiff for the lost value of money when it was properly attributed to the plaintiff, but in the defendants' possession." (Quoting, *Rufer v. Abbott Laboratories*, 154 Wn.2d 540, 552, 114 P.3d 1182 (2005)). As adroitly pointed out by the Sharbonos: "the purpose of post-judgment interest is to compensate the successful plaintiff for being deprived of compensation for the time between the ascertainment of the damage and the payment by the defendant." *Id.* at 553.

In this case, it was the Tomyns who suffered the losses, compensated by Paragraph 1, and not the Sharbonos. At no time were the Sharbonos ever entitled to receive those amounts reflective in paragraph 1 of the May 20, 2005 Judgment. That was the amount of money that the Sharbonos owed to the Tomyns under the Settlement Agreement and Confession of Judgment. In other words, it was the

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affirmed.

Tomyns who were denied use of funds, to which they were entitled to, in order to compensate them for their loss of their loved one. At no time would the Sharbonos, under any theory of this case, have an entitlement to those funds. Thus, to deny them post-judgment interest generated from those funds has deprived them of nothing to which they have an entitlement. Further, under the terms of the Settlement Agreement at page 2, the Sharbonos only reserve to themselves other “claims” that were not otherwise assigned to the Tomyns under paragraphs 2 A and 2 B. As discussed above, the post-judgment interest under paragraph 7 is part and parcel of the claim assigned to the Tomyns under paragraph 2 B of the Settlement Agreement. Post-judgment interest (at least under the circumstances of this case) is not a stand alone claim which can be brought by **any party**. In other words, post-judgment interest, by its very nature, cannot exist unless it is tied to some other source as principle. Here, that source, of course, is paragraph 1 of the May 20, 2005 Judgment, which is owned by the Tomyns.

While the Sharbonos, in an apparent effort to try to suggest that such a result would be “unjust,” such a result would be far less “unjust” than permitting the Sharbonos to profit from the post-judgment interest generated from monies specifically ear-marked for the purposes of compensating the Tomyns for the grievous loss of their loved one. Such a result would not only be “unjust,” but would be absurd.

Also, to the extent that the Paragraph 7, post-judgment interest could be characterized as “a claim”, under Paragraph 3B of th Tomyn/Sharbono Agreement,

the Sharbonos are precluded from asserting “claims” against the Tomyns. It would be absurd to construe the parties agreement in a manner while permits the breach of its terms.

Given the trial court, in its October 3, 2008 Order, clearly clarified that it never intended to “award to the Sharbonos” the post-judgment interest, the Sharbonos’ contention that “however, nothing in the Settlement Agreement entitles the Tomyns to the amount awarded to the Sharbonos as post-judgment interest,” is factually inaccurate, unsupported by the record, and the intentions of the trial court. Frankly, it is indicative of “chutzpah,” which in the 9<sup>th</sup> Circuit case of *Embury v. King*, 361 F.2d 562 (9<sup>th</sup> Cir.2004), was noted as having the following definition:

*The classic definition of chutzpah is of course this:  
Chutzpah is the quality enshrined in a man who  
having killed his mother and father, throws himself on  
the mercy of the court because he is an orphan.*

#### **IV. CONCLUSIONS**

For the reasons discussed above, the position taken by the Sharbonos on their cross-appeal have no merit. The trial court was in the best position to interpret its own Judgment, and it interpreted that Judgment as having an intent to award all monies generated by paragraph 1 and paragraph 7 of its May 20, 2005 Judgment awarded to the Intervenors, the Tomyn family. Given the October 3, 2008 Order awarding such amounts to the Tomyns, the trial court’s Judgment requires no interpretation.

Further, to the extent that there may be any question as to what was intended

by the May 20, 2005 Judgment, any ambiguity within its terms must be construed against the Sharbonos because Mr. Gosselin, who now purports to have solely been representing their interests throughout this litigation (despite a contractual obligations to the contrary) was the drafter of the document. Further, the Invited Error Doctrine is clearly implicated and bars the Sharbonos' contentions.

Additionally, to the extent that the Court is inclined to review the Tomyn/Sharbono Settlement Agreement, it is noted that a rational construction of its terms would compel an affirmance of the trial court's decision. Finally, and sadly, there are substantial policy considerations which preclude the Sharbonos from receiving the relief that they request in their cross-appeal.

For the reasons stated above, and in all other pleadings before this Court relating to this matter since the issuance of the Court's Mandate in August, 2008, the Judgment of the trial court allocating funds to the Tomyns must be affirmed.

DATED this 6 day of November, 2009.



PAUL A. LINDENMUTH, WSBA#15817  
Attorney for Intervenor Tomyns  
The Law Offices of Ben F. Barcus & Assoc.  
4303 Ruston Way  
Tacoma, WA 98403  
253-752-4444

# **APPENDIX 1**

SETTLEMENT AGREEMENT  
(INCLUDING COVENANTS AND ASSIGNMENT OF RIGHTS)

PARTIES

The parties to this agreement are the plaintiffs and defendants in Pierce County Superior Court Cause No. 99-2-12800-7. The plaintiffs are Clinton Tomyn; the Estate of Cynthia Tomyn, by and through Clinton Tomyn, his personal representative; Nathan Tomyn, by and through David Bushell, his guardian ad litem; Aaron Tomyn, by and through Stanley J. Rumbough, his guardian ad litem; and Christian Tomyn, by and through John Combs, his guardian ad litem. They will be referred to collectively as plaintiffs and individually by their individual names. The defendants are Cassandra Sharboro; James Sharboro, individually and on behalf of his marital community; and Deborah Sharboro, individually and on behalf of her marital community. They will be referred to collectively as defendants and individually by their individual names.

PURPOSE OF AGREEMENT  
**COPY**

The purpose of this agreement is to protect the assets, earnings and personal liability of defendants from a verdict in excess of the limits of primary insurance acknowledged as applicable by State Farm Automobile Insurance Company (hereafter State Farm) and umbrella insurance acknowledged as applicable by Universal Underwriters Insurance Company (hereafter Universal), as well as to protect defendants from the expense and hardship of bankruptcy proceedings.

Plaintiffs have filed suit against defendants in Pierce County Superior Court under cause number 99-2-12800-7 for damages suffered from a car accident that occurred on December 11, 1998. This accident resulted in the death of Cynthia Tomyn, the wife of Clinton Tomyn, and the natural mother of Nathan, Aaron and Christian Tomyn.

Defendants have primary liability insurance in the amount of \$250,000.00 with State Farm. Defendants have umbrella liability insurance with Universal. The amount of insurance Universal provides is disputed. Universal contends and therefore acknowledges that it provides \$1 million in insurance coverage. Universal has denied any further obligation. Defendants contend Universal is obligated to provide at least \$3 million in insurance coverage. Defendants also contend that in the event Universal provides only \$1 million in insurance coverage, the coverage Universal sold to

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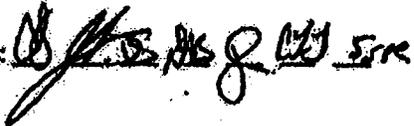
defendants was sold through fraud, misrepresentation, negligence or other misconduct on the part of Universal, the selling agent or others.

Plaintiffs suffered damages as a result of the death of Cynthia Tomya. The parties, by and through their respective attorneys, have conducted independent investigations and evaluations of the plaintiffs' claims against the defendants and concluded that defendants face a real and substantial risk that judgment will be entered against defendants in excess of the \$250,000 insurance provided by State Farm and the \$1 million insurance Universal acknowledges. Universal's denial of additional insurance has left the defendants' property, earnings and personal assets exposed to substantial risk of attachment to satisfy any such judgment.

Therefore, in an effort to settle all of plaintiffs' claims against defendants in a way that offers some protection of defendants' assets; eliminates or reduces the risk that any defendant must file bankruptcy to protect their personal financial well-being; as a consequence of the extreme severe adverse financial impact of a judgment which is likely to exceed all available insurance coverages and Defendants' net assets; and preserves the ability to challenge any wrongful conduct by Universal or others with regard to the insurance available to defendants, the parties have agreed to settlement on the following terms and conditions.

**TERMS AND CONDITIONS**

1. **Confession of Judgment:** The defendants will comply with and take all steps needed to confess judgment pursuant to RCW ch. 4.60 in the amount of \$4,525,000. The signature of defendants and their attorneys on a confession of judgment in the form attached hereto and marked as attachment 1 will be deemed full compliance with this paragraph.
2. **Assignment of Rights:** The defendants assign to plaintiffs all amounts awarded against or obtained from Universal for the following:
  - A. The benefits payable under any liability insurance policy in which Defendants have any interest for a covered loss that Universal has breached with respect to claims arising out of the December 11, 1998 motor vehicle accident.
  - B. The benefits payable under any liability insurance policy which, because of an act of bad faith, Universal is estopped to deny or deemed to have sold to Defendants.
  - C. If one or both insurers fail immediately to tender the undisputed

Attain:  Eric

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Page 2 of 5

liability coverage amounts, any and all causes of action against such insurers resulting from such failure of tender, including claims for the lost use of such monies, bad faith insurance practices, violation of Washington's Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duties, negligence, non-feasance, misfeasance, malfeasance, or other such similar causes of action.

Plaintiffs will apply the proceeds, if any, they obtain by virtue of this assignment towards the judgment referred to in paragraph 1. above, and execute full or partial satisfaction of said judgment as is thereby appropriate.

Except as set forth in paragraphs 2A., 2B and 2.C. above, defendants retain unto themselves and do not assign any other rights, claims, causes of action or awards against Universal or any other person or entity, including but not limited to claims or awards for bad faith, violation of Washington's Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duty, negligence, non-feasance, misfeasance, malfeasance, or similar conduct.

3. **Suit Against Universal:** A. The defendants will, no later than April 30, 2001, initiate suit against Universal asserting such claims as are reasonable and prudent to establish a right to recover the amounts assigned in paragraphs 2.A. and 2.B., and, if necessary, 2.C., above. Plaintiffs, through their chosen counsel, may participate and assist in the prosecution of those claims as they choose.

B. In such suit, the defendants may assert claims against additional parties -- with the exclusion of Plaintiffs, their legal counsel or the appointed Guardians ad Litem -- and assert additional claims against Universal as they deem prudent; and, as set forth in paragraph 2. above, Defendants retain unto themselves all right of recovery from such claims.

C. The claims that give rise to a right to recover amounts assigned in paragraphs 2.A. and 2.B. above will be settled only upon agreement by plaintiffs.

D. Each party will pay the attorney fees, costs and expenses they incur in the prosecution of the suit; *provided that* in the event defendants obtain a court award of costs or attorney fees (such as an award under the rule in *Olympic Steamship v. Centennial Ins. Co.*, Washington's Consumer Protection Act, general bad faith law, etc.), the award shall be applied to those costs and attorney fees for which the award is made, with only the balance paid by the party who incurs them; *and provided further that* in the event defendants successfully assert claims that result in plaintiffs recovering under the assignments set forth in paragraphs 2.A. and 2.B. above, costs and fees not satisfied by a court award of costs and fees will be shared by plaintiffs and defendants in the proportion that plaintiffs' recovery on the assigned claims bears

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to the total damages awarded in the suit.

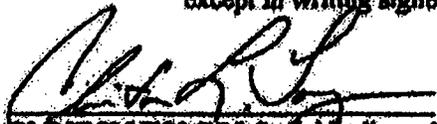
4. **Court Approval:** Plaintiffs may request a judicial determination that this settlement is reasonable under RCW 4.22.060, and/or that the settlement is in the best interests of the minor plaintiffs under SPR 98.16W, and/or such other proceedings to obtain the same or similar results. Defendants will make themselves reasonably available and provide truthful, accurate testimony or evidence for such proceedings.
5. **Covenant not to Execute:** In consideration of the foregoing, the plaintiffs agree and covenant not to execute or enforce the judgment referred to in paragraph 1 above against the defendants James and Deborah Sharbono, their successors, heirs or assigns, that they will not proceed against those defendants' personal assets, earnings or property, and that as to those defendants they shall confine collection of the remaining balance of the judgment to the funds obtained pursuant to the assignment set forth in paragraph 2 above. Regardless of the result, upon final resolution of the suit referred to in paragraph 3 above, plaintiffs will execute a full satisfaction of judgment in favor of defendants James and Deborah Sharbono.
6. **Covenant to Forebear:** In consideration of the foregoing, the plaintiffs agree and covenant to forbear from executing or enforcing the judgment referred to in paragraph 1 above against the defendant Cassandra Sharbono, her successors, heirs or assigns until final resolution of the suit referred to in paragraph 3 above, and that until such time plaintiffs will not proceed against that defendant's personal assets, earnings or property in collection of said judgment. Plaintiffs further agree and covenant not to execute or enforce the judgment against any assets, proceeds or awards Cassandra Sharbono recovers other than those described in paragraphs 2.A. and 2.B above.
7. **Condition Precedent:** This agreement, and all acts taken in furtherance of it as set forth herein is conditioned upon the immediate tender of the undisputed liability coverages from the Defendants' carriers; to-wit State Farm -- \$250,000.00, and Universal -- \$1,000,000.00. This agreement is voidable upon notice from any party within five days of either carrier's failure to pay. In the event a party declares the agreement void, all parties will take such acts as are necessary to return the parties to the status quo ante.
8. **Satisfaction of Liens and Claims:** Plaintiffs will satisfy and discharge all liens and rights of subrogation of any type which have or may attach to the proceeds of this agreement. Plaintiffs further agree to indemnify defendants and their attorneys and hold them harmless from any and all claims and causes of action for such liens or subrogation interests. This agreement includes all lien claims for services rendered pursuant to public or private obligation, contract or statute.

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Page 4 of 5

- 9. **Resolution of All Claims:** The parties intend that this agreement fully and finally resolve all claims among them. In the event any such claim is not specifically provided for herein, the parties agree it is compromised, fully released and finally discharged.
- 10. **Advice and Counsel:** Plaintiffs have executed this agreement after advice and counsel by their attorneys, Ben F. Barous and Peter Kram. Defendants have executed this agreement after advice and counsel by their attorneys, Timothy R. Gosselin and Dennis J. La Porte. Regardless, the parties agree they have read, understood and voluntarily accepted the terms of this agreement for the purposes set forth above, including the full and final resolution of all claims among them.
- 11. **Entire Agreement:** This agreement contains the entire agreement of the parties with respect to the subject matter hereof, and shall not be modified or amended in any way except in writing signed by the parties hereto.

  
 CLINTON TOMYN, Individually and as  
 Personal Representative of the Estate of  
 Cynthia Tomyn

  
 DAVID A. BURALINI, WSBA #8262  
 Guardian ad Litem of Nathan Tomyn

  
 STANLEY J. KUMBALOUGH, WSBA #3980  
 Guardian ad Litem for Aaron Tomyn

  
 JOHN B. DOMBS, WSBA #13721  
 Guardian ad Litem for Christian Tomyn

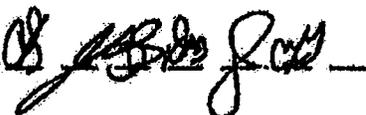
  
 CASSANDRA SHARBONO

  
 JAMES SHARBONO, Individually and  
 on behalf of his marital community

  
 DEBORAH SHARBONO, Individually  
 and on behalf of her marital community

Subscribed and sworn to before me this 30<sup>th</sup> day of MARCH, 2001.

  
 Print Name: Timothy R. Gosselin  
 Notary Public in and for the State of Washington  
 Residing at Tacoma WA 98407  
 My Commission Expires: 9-6-03

Initials: 

# **APPENDIX 2**



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FILED  
IN COUNTY CLERK'S OFFICE  
A.M. MAY 10 2001 P.M.  
PIERCE COUNTY, WASHINGTON  
BY TED RUTT, COUNTY CLERK  
DEPUTY

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  
composed thereof; CASSANDRA SHARBONO,

Plaintiffs,

vs.

UNIVERSAL UNDERWRITERS INSURANCE  
COMPANY, a foreign insurer; LEN VAN DE  
WEGE and "JANE DOE" VAN DE WEGE,  
husband and wife and the marital community  
composed thereof,

Defendants.

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NO.

COMPLAINT

ORIGINAL

COME NOW the plaintiffs above named, and for their cause of action, allege as  
follows:

THE PARTIES

I.

Plaintiffs James and Deborah Sharbono (hereafter the Sharbonos) are husband and  
wife and residents of Pierce County, Washington. Cassandra Sharbono is the natural

BURGESS FITZER, P.S.

ATTORNEYS AT LAW  
1501 MARKET STREET, SUITE 300  
TACOMA, WASHINGTON 98402-3333  
(253) 572-5324 FAX (253) 627-8928

6 MAY 11 2001

1 daughter of James and Deborah Sharbono and, at all times resided with her parents in Pierce  
2 County, Washington.

3 **II.**

4 Defendant, Universal Underwriters Insurance Company (hereafter Universal), is a  
5 foreign insurer conducting business in Pierce County, Washington.

6 **III.**

7 Len Van De Wege and "Jane Doe" Van De Wege are husband and wife and reside  
8 in King County, Washington. At all times material hereto Len Van De Wege was an  
9 employee of Universal and was conducting business in Pierce County, Washington. All acts  
10 of Len Van De Wege were taken within the course and scope of his employment and for and  
11 on behalf of his marital community.

12 **FACTS**

13 **IV.**

14  
15 On or about December 11, 1998, Cassandra Sharbono was involved in a head-on  
16 motor vehicle collision which resulted in the death of Cynthia Tomy. Cassandra Sharbono's  
17 negligence was the sole proximate cause of the accident. At the time she was operating a  
18 family-owned vehicle. Ms. Tomy was 34 years old, a mother of three boys and actively  
19 involved in their life and school, married to her high school sweetheart, employed at a local  
20 hospital, and well liked in the community. The reasonable value of the civil claims of her  
21 estate and those of her survivors against Cassandra and her parents was well in excess of  
22 \$4.525 million.

23 **V.**

24 At the time of the accident and at all times material hereto, the Sharbonos were the  
25 sole shareholders of All Automotive, Inc., a Washington corporation d/b/a/ All Transmission  
26 & Automotive. They were the majority shareholders of Parkland Transmission, Inc. and  
27

28 COMPLAINT - 2

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(253) 572-5324 FAX (253) 627-8928

1 Trans-Plant, Inc., which also are Washington corporations. All are located and doing  
2 business in Pierce County, Washington. All are automotive repair businesses.

3 VI.

4 Universal provides insurance to, among others, businesses in the automotive and  
5 automotive repair industry. Beginning in approximately 1994, Universal provided insurance  
6 to All Transmission & Automotive, Trans-Plant, and Parkland Transmission under policy  
7 numbers 115279, 115278 and 136697 respectively. These policies included liability  
8 insurance. During this period and in conjunction with these business policies, Universal also  
9 provided personal insurance, including life insurance to James and Deborah Sharbono.

10 VII.

11 During this same period the Sharbonos maintained personal property and liability  
12 insurance including homeowners and automobile coverages through State Farm Insurance  
13 Company. Their personal insurance package included personal umbrella liability insurance  
14 with limits of \$2 million per occurrence over and above the limits of their primary auto and  
15 homeowners liability insurance. This insurance applied to them as well as their daughter,  
16 plaintiff Cassandra Sharbono.

17 VIII.

18 In 1997, James and Deborah Sharbono desired to increase some of the levels of their  
19 personal insurance protection, including their life insurance. Because Universal was  
20 providing life insurance for them, they discussed their desires with defendant Van De Wege.  
21 During these discussions, Van De Wege advised the Sharbonos that as part of their business  
22 coverages Universal could provide them and their co-owners with personal umbrella liability  
23 insurance like that which the Sharbonos were purchasing from State Farm and the premium  
24 could be declared as a business expense for tax purposes. At the time, Universal already was  
25 providing umbrella liability coverage for the Sharbono's businesses with limits of \$3 million.  
26 To enhance their insurance protection, the Sharbonos requested personal umbrella liability  
27

1 coverage in the same amount, \$3 million. Defendant Van De Wege represented that such  
2 coverage could be obtained, as well as coverage for the co-owners of Parkland Transmission  
3 and Trans-Plant , if the Sharbonos purchased three \$1 million policies, one each on each of  
4 the three businesses.

5 IX.

6 Based on the representations and advice of defendant Van De Wege, the Sharbonos  
7 agreed to purchase personal umbrella liability insurance from the Universal in July, 1997.  
8 The Sharbonos and their co-owners provided defendant Van De Wege with all information  
9 he requested necessary to secure that coverage. After confirming with defendant Van De  
10 Wege that he had in fact secured the personal umbrella liability insurance, the Sharbonos  
11 cancelled their \$2 million personal umbrella policy with State Farm Insurance Company,  
12 with the understanding that they were purchasing \$3 million in personal coverage through  
13 Universal. Thereafter, the Sharbono's paid all premiums billed to them.

14 X.

15 Unbeknownst to plaintiffs and contrary to his representations, defendant Van De  
16 Wege had not secured the requested coverage, and in fact never did. Instead, defendants, and  
17 each of them, engaged in a variety of wrongful and deceptive acts designed to, and which in  
18 fact did, deceive the Sharbonos and deprive them of the insurance they had asked for,  
19 expected and paid for, including but not limited to the following:

- 20 1. On or about December 5, 1997, over five months after the Sharbonos  
21 originally authorized the issuance of personal umbrella liability  
22 insurance in the amounts set forth above, Universal issued such  
23 coverage on policy number 115278 (the Trans-Plant policy). The  
24 coverage issued, however, had limits of \$2 million, less than the  
25 amount requested and sold to the Sharbonos. Moreover, the coverage  
26 issued failed to list the Sharbono's automobile insurance as

1 underlying insurance and therefore has allowed Universal to contend  
2 that it did not apply to the accident described above. If, indeed, the  
3 coverage would not have applied to the accident described above, the  
4 coverage was not comparable to the coverage issued by State Farm as  
5 requested.

6 2. On or about October 13, 1998, defendant Van De Wege approached  
7 the Sharbonos requesting that they sign a personal umbrella  
8 application in the amount of \$1 million with regard to All-  
9 Transmission, representing that he was "tying up loose ends". At or  
10 about the same time, he secured similar applications in the same  
11 amounts with regard to Trans-Plant and Parkland Transmission,  
12 creating the impression that \$3 million coverage had been issued  
13 through three \$1 million policies.

14 3. On or about December 31, 1998, over two weeks after the accident,  
15 defendants notified the Sharbonos that they had unilaterally and  
16 without prior notice to plaintiffs cancelled the personal umbrella  
17 liability coverage previously issued on policy number 115278 (the  
18 Trans-Plant policy) in the amount of \$2 million. The cancellation  
19 purported to be effective November 24, 1998, three weeks before the  
20 accident.

21 4. At or about the same time, defendants notified the Sharbonos that they  
22 had, without prior notice, caused personal umbrella liability coverage  
23 in the amount of \$1 million to be added to policy number 115279 (the  
24 All-Transmission policy).

25 5. Despite the personal umbrella applications secured by defendant Van  
26 De Wege in October and/or November, 1998, defendants never added  
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personal umbrella liability coverage to any policy other than the All-Transmission policy.

**XI.**

In compliance with the policy conditions, the Sharbonos promptly notified Universal of the accident of December 11, 1998, and the subsequent lawsuit (hereafter the underlying lawsuit) against them which was filed in Pierce County Superior Court under cause no. 99-2-12800-7 on or about November 10, 1999. Following these notices, Universal would acknowledge only that it provided up to \$1 million in personal umbrella liability coverage contained in policy number 115279 (the All-Transmission policy). Universal wrongly and without reasonable justification denies any liability for additional amounts, denies coverage under any other part of any policy, and denies it provided personal umbrella liability coverage under any other policy.

**XII.**

In an effort to determine the true amount of insurance available to the plaintiffs for the claims asserted in the underlying lawsuits, and in order to facilitate negotiations to settle the underlying lawsuit, the plaintiffs requested information, including underwriting files, with respect to the insurance they had purchased through Universal. Universal wrongly and without reasonable justification refused to provide this information.

**XIII.**

Because of Universal's refusal to provide the information plaintiffs requested, the plaintiffs in the underlying suit steadfastly refused to accept the undisputedly available insurance as full settlement of their claims, and instead demanded additional concessions that placed plaintiffs' financial assets and security in jeopardy.

**XIV.**

Ultimately plaintiffs and plaintiffs in the underlying suit reached agreement on settlement. The settlement required plaintiffs to accept substantial personal liability and

1 included a confession of judgment by the plaintiffs in the sum of \$4.525 million. Universal  
 2 expressly authorized plaintiffs' agreement. Moreover, the settlement was expressly  
 3 conditioned upon Universal's payment of its \$1 million undisputed liability limits, and  
 4 Universal could have prevented settlement by refusing to pay. Universal paid \$1 million, and  
 5 the payment served as partial satisfaction of the judgment, which together with amounts paid  
 6 by other insurers leaves \$3.275 million of the judgment unsatisfied. Universal continues to  
 7 maintain the plaintiffs are entitled to nothing more than it has paid.

8  
 9 **FIRST CAUSE OF ACTION:**  
**BREACH OF CONTRACT**  
 10 **XV.**

11 By engaging in the acts described above, Universal breached the terms of the  
 12 contracts of insurance and deprived the plaintiffs of the full benefit of their insurance  
 13 policies.

14 **XVI.**

15 As a direct and proximate result of Universal's breach, the plaintiffs sustained general  
 16 and special damages in an amount to be proven at trial.

17 **SECOND CAUSE OF ACTION:**  
**VIOLATION OF CONSUMER PROTECTION ACT**

18 **XVII.**

19  
 20 By engaging in the acts described above, defendants committed unfair methods of  
 21 competition and unfair and deceptive acts prohibited by and in violation of Washington's  
 22 Consumer Protection Act, RCW 19.86.

23 **XVIII.**

24 As a direct and proximate result of defendants' violation of Washington's Consumer  
 25 Protection Act, the plaintiffs sustained damages in an amount to be proven at trial.

1 **THIRD CAUSE OF ACTION:**  
 2 **NEGLIGENCE AND NEGLIGENT MISREPRESENTATION**

3 **XIX.**

4 At all times material hereto, defendants undertook to advise and counsel the  
 5 Sharbonos on the need for and the availability of personal umbrella insurance in particular  
 6 amounts for particular risks, and to procure and issue the insurance so recommended. Upon  
 7 defendants' advice and representations the Sharbonos cancelled a \$2 million umbrella policy  
 8 with State Farm Insurance Company.

9 **XX.**

10 Defendants negligently and wrongly advised and counseled the Sharbonos,  
 11 negligently and wrongly represented the insurance they would and did provide, and  
 12 negligently and wrongly failed to procure the insurance requested.

13 **XXI.**

14 As result of defendants' negligence plaintiffs sustained general and special damages  
 15 in an amount to be proven at the time of trial.

16 **FOURTH CAUSE OF ACTION:**  
 17 **BAD FAITH**

18 **XXII.**

19 By engaging in the acts described above defendant Universal acted in bad faith..

20 **XXIII.**

21 As a direct and proximate result of Universal's bad faith, the plaintiffs sustained  
 22 general and special damages, including emotional distress, in an amount to be proven at trial.

23 **FIFTH CAUSE OF ACTION:**  
 24 **BREACH OF QUASI-FIDUCIARY DUTY**

25 **XXIV.**

26 By engaging in the acts described above Universal placed its own interests above  
 27

28 **BURGESS FITZER, P.S.**

1 those of its insureds in violation of its quasi-fiduciary duties to them.

2 **XXV.**

3 As a direct and proximate result of Universal's breach of quasi-fiduciary duty, the  
4 plaintiffs sustained general and special damages in an amount to be proven at trial.

5 **SIXTH CAUSE OF ACTION:  
6 BREACH OF FIDUCIARY DUTY  
7 XXVI.**

8 By engaging in the acts described above Van De Wege acted in violation of his  
9 fiduciary duties to plaintiffs.

10 **XXVII.**

11 As a direct and proximate result of Van De Wege's breach of fiduciary duty, the  
12 plaintiffs sustained general and special damages in an amount to be proven at trial.

13 **SEVENTH CAUSE OF ACTION:  
14 REFORMATION**

15 **XXVIII.**

16 The insurance contracts should be reformed to comport with the terms under which  
17 the policies were represented and sold to the Sharbonos.

18 **WHEREFORE**, plaintiffs pray for judgment as follows:

- 19
- 20 1. Awarding their general and special damages in an amount to be proven at the  
21 time of trial;
  - 22 2. Awarding their attorney's fees;
  - 23 3. Awarding their costs and disbursements as allowed by law;
  - 24 4. Awarding them pre-judgment interest at the rate allowed by law;
  - 25 5. Awarding them treble damages to the full extent allowed under RCW  
26 19.86.090; and

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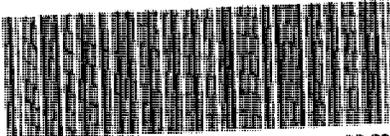
6. Awarding them such other and further relief as the court deems just and equitable.

DATED: May 10, 2001.

BURGESS FITZER, P.S.

By:   
TIMOTHY R. GOSSELIN, WSB #13730  
Attorneys for Plaintiffs

# **APPENDIX 3**



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*The Honorable Rosanne Buckner*  
TRIAL DATE: MARCH 28, 2005

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  
composed thereof; CASSANDRA SHARBONO,

Plaintiffs,

vs.

UNIVERSAL UNDERWRITERS INSURANCE  
COMPANY, a foreign insurer; LEN VAN DE  
WEGE and "JANE DOE" VAN DE WEGE,  
husband and wife and the marital community  
composed thereof,

Defendants.

NO. 01 2 07954 4

**ORDER REGARDING  
PRESUMPTIVE DAMAGES**

Presentment Hearing, ~~6~~ <sup>20</sup> ~~MARCH~~ <sup>MAY</sup> 20, 2005



This matter was tried to a jury beginning March 28, 2005. Before trial began the court ruled that Universal Underwriters Insurance Company had acted bad faith as a matter of law for refusing to provide the plaintiffs with underwriting files and compelling plaintiffs to institute litigation to get them. The court also ruled that the settlement between the plaintiffs on one hand and the Estate of Cynthia L. Tomy, Clinton L. Tomy, Nathan Tomy, Aaron Tomy, and Christian Tomy on the other, which included a Judgment by Confession, was reasonable. During trial, plaintiffs proposed a jury instruction and special verdict form that instructed the jury to award the unpaid portion of the Judgment that had been confessed by

ORDER REGARDING PRESUMPTIVE DAMAGES  
Page 1 of 2

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**BURGESS FITZER, P.S.**

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1501 MARKET STREET, SUITE 300  
TACOMA, WASHINGTON 98402-3333  
(253) 572-5324 FAX (253) 627-8928

1 plaintiffs. Plaintiffs provided authority for those instructions, and such presumptive damages,  
2 in their trial brief and with the instructions. Before submitting the case to the jury, the court  
3 considered those authorities, and heard argument of counsel for both sides on the  
4 appropriateness of the proposed instructions. The court concluded that, as a matter of law,  
5 plaintiffs were entitled to an award of the unpaid portion of the judgment as presumptive  
6 damages, that the court would direct a verdict in that regard, but that it would be improper to  
7 instruct the jury to make that award. Accordingly, it is now, hereby

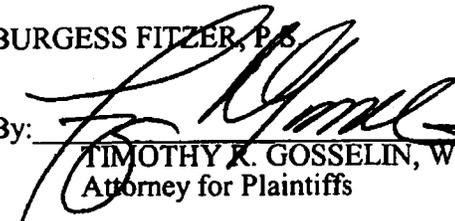
8 ORDERED, ADJUDGED AND DECREED that plaintiffs are entitled to and are  
9 hereby awarded the unpaid portion of the Judgment by Confession entered in the matter of  
10 Tomyn v. Sharbono, Pierce County Cause No. 99-2-12800-7, to wit \$3,275,000.00, together  
11 with interest that has accrued thereon since the date of entry, March 30, 2001, which, as of  
12 May 13, 2005, (four years, 43 days @ 12%/yr.) totals \$ 1,618,298.63, and together with  
13 interest that continues to accrue thereon as set forth in said judgment until said judgment is  
14 paid.

15 Signed this 20 day of May, 2005.

16  
17   
18 HONORABLE ROSANNE BUCKNER

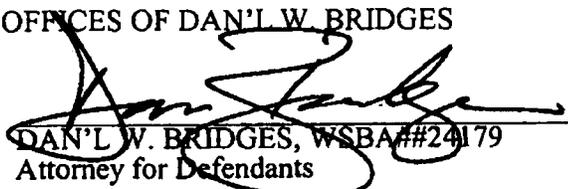
18 PRESENTED BY:

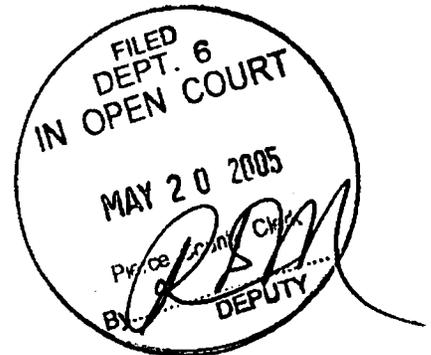
19 BURGESS FITZER, P.S.

20  
21 By:   
22 TIMOTHY R. GOSSEIN, WSBA #13730  
23 Attorney for Plaintiffs

23 APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED.

24 LAW OFFICES OF DAN'L W. BRIDGES

25 By:   
26 DAN'L W. BRIDGES, WSBA #24179  
27 Attorney for Defendants



28 ORDER REGARDING PRESUMPTIVE DAMAGES

Page 2 of 2

S:\WP\CASES\2181 Sharbono v. Universal PLEADINGS\Order on presumptive damages.wpd

BURGESS FITZER, P.S.

ATTORNEYS AT LAW

1501 MARKET STREET, SUITE 300  
TACOMA, WASHINGTON 98402-3333  
(253) 572-5324 FAX (253) 627-8928

# **APPENDIX 4**

01-2-07954-4 23091987 JD 05-23-05

FILED  
IN COUNTY CLERK'S OFFICE

A.M. MAY 20 2005 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, COUNTY CLERK  
DEPUTY

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*The Honorable Rosanne Buckner*  
TRIAL DATE: MARCH 28, 2005

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  
composed thereof; CASSANDRA SHARBONO,

Plaintiffs,

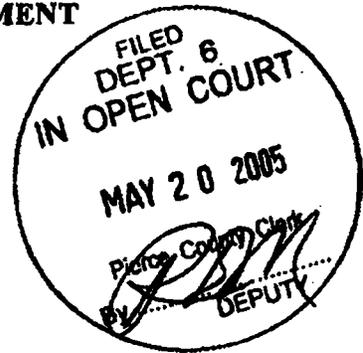
vs.

UNIVERSAL UNDERWRITERS INSURANCE  
COMPANY, a foreign insurer; LEN VAN DE  
WEGE and "JANE DOE" VAN DE WEGE,  
husband and wife and the marital community  
composed thereof,

Defendants.

NO. 01 2 07954 4

JUDGMENT



I. JUDGMENT SUMMARY

- 1. Judgment Creditors: James Sharbono, Deborah Sharbono and Cassandra Sharbono (currently known as Cassandra Barney)
- 2. Attorney for Judgment Creditor: Timothy R. Gosselin, Burgess Fitzer, P.S., 1501 Market Street, Suite 300, Tacoma, Washington 98402
- 3. Judgment Debtor: Universal Underwriters Insurance Company
- 4. Principle Judgment Amount: \$9,393,298.63, plus interest accruing on the unpaid portion of the Judgment by Confession entered in the matter of Tomyn v. Sharbono, Pierce County Cause No. 99-2-12800-7 pursuant to the terms of said judgment.

JUDGMENT - Page 1 of 4

S:\WP\CASES\2181\Sharbono v. Universal\PLADINGS\Judgment.wpd

BURGESS FITZER, P.S.

ATTORNEYS AT LAW  
1501 MARKET STREET, SUITE 300  
TACOMA, WASHINGTON 98402-3333  
(253) 572-5324 FAX (253) 627-8928

ENZ



1 court hereby enters judgment against Universal Underwriters Insurance Company as follows:

2 1. Judgment is hereby entered in favor of plaintiffs and against defendant Universal  
3 Underwriters Insurance Company in the amount of the unpaid balance of the Judgment by Confession  
4 entered against plaintiffs in the matter of Tomya v. Sharbono, Pierce County Cause No. 99-2-12800-7,  
5 to wit \$3,275,000.00, together with interest that has accrued thereon since the date of entry, March 30,  
6 2001, which, as of May 13, 2005, (four years, 43 days @ 12 %/yr.) totals \$ 1,618,298.63, and together  
7 with interest that continues to accrue thereon as set forth in said judgment until said judgment is paid.

8 2. Judgment is hereby entered in favor of plaintiffs James and Deborah Sharbono and  
9 against defendant Universal Underwriters Insurance Company in the additional sum of \$4,500,000.00,  
10 as and for past and future general and special damages as found by the jury.

11 3. Judgment is hereby entered in favor of plaintiffs and against defendant Universal  
12 Underwriters Insurance Company for punitive damages pursuant to RCW 19.86.090 in the amount of  
13 \$ 10,000.00.

14 4. Judgment is hereby entered in favor of plaintiffs and against defendant Universal  
15 Underwriters Insurance Company in the additional sum of \$ 203,585.00 for actual attorney fees.

16 5. Judgment is hereby entered in favor of plaintiffs and against defendant Universal  
17 Underwriters Insurance Company in the additional sum of \$ 505.00 for costs.

18 ~~6. Judgment is hereby entered in favor of plaintiffs James and Deborah Sharbono and~~  
19 ~~against defendant Universal Underwriters Insurance Company in the additional sum of~~  
20 ~~\$ \_\_\_\_\_ to compensate said plaintiffs for the increased income tax due and owing as a~~  
21 ~~result of receipt of payment of damages in a lump sum.~~

22 7. Amounts awarded pursuant to paragraph 1 shall bear post-judgment interest pursuant  
23 to RCW 4.56.110(4) and RCW 19.52.020 at the rate of 12 percent per annum. Amounts awarded  
24 pursuant to paragraphs 2 through 6 shall bear post-judgment interest pursuant to RCW 4.56.110(3) at  
25 the rate of 5.125 percent per annum.

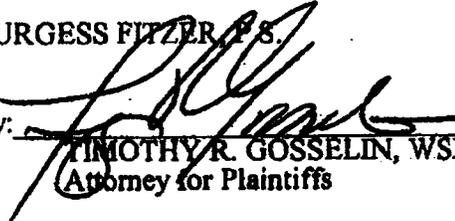
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Signed this 20<sup>th</sup> day of May, 2005.

  
HONORABLE ROSANNE BUCKNER

PRESENTED BY:

BURGESS FITZER, P.S.

By:   
TIMOTHY R. GOSSEIN, WSBA# 13730  
Attorney for Plaintiffs

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED.

LAW OFFICES OF DAN'L W. BRIDGES

By:   
DAN L W. BRIDGES, WSBA# 24179  
Attorney for Defendants

FILED  
DEPT. 8  
IN OPEN COURT  
MAY 20 2005  
Plaza County Clerk  
  
DEPUTY

# **APPENDIX 5**



01-2-07954-4 30854154 ORG 10-08-08

The Honorable Rosanne Buckner

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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  
composed thereof; CASSANDRA  
SHARBONO,

Plaintiffs,

vs.

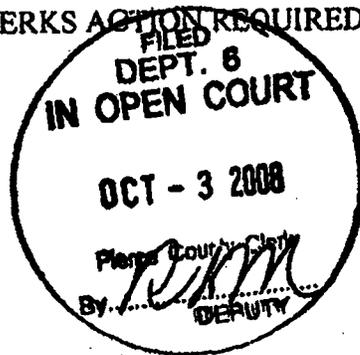
UNIVERSAL UNDERWRITERS  
INSURANCE COMPANY, a foreign  
insurer; LEN VAN DE WEGE and "JANE  
DOE" VAN DE WEGE, husband and wife  
and the marital community composed  
thereof,

Defendants.

NO. 01-2-07954-4

ORDER GRANTING MOTION TO  
EXECUTE ON APPEAL BOND

CLERKS ACTION REQUIRED



COPY ORIGINAL

This matter having come on duly and regularly before the undersigned judge of the above entitled court on the Plaintiffs' Motion to Execute on Appeal Bond, and the court having reviewed the files and records herein, having heard argument of counsel, including counsel for intervenor Clinton Tomy, et al., and being duly advised in the premises, and having concluded that in its decision filed June 27, 2007, Division Two of the Washington Court of Appeals affirmed that part of the judgment awarded at Page 3, ¶ 1 of the Judgment entered by this court on May 20, 2005, together with interest thereon awarded pursuant to ¶ 7 of said judgment, that Plaintiffs are entitled

Order on Plaintiffs' Motion to  
Execute on Appeal Bond Page - 1

GOSSELIN LAW OFFICE, PLLC

1901 JEFFERSON AVENUE, SUITE 304  
TACOMA, WASHINGTON 98402  
OFFICE: 253.627.0684 FACSIMILE: 253.627.2028

EN 5

iv to execute on said judgment, and that Ohio Casualty Insurance Company issued Appeal Bond no.  
2 3-883-836-6, assuring payment of said judgment, it is now, hereby

3 ORDERED, ADJUDGED AND DECREED that, in execution of paragraph 1 of the  
4 judgment entered in this matter on May 20, 2005, Ohio Casualty Insurance Company shall, on or  
5 before October 15, 2008, pay the sum of ~~624,245.75~~ <sup>624,245.75</sup> to and pursuant to instructions of the  
6 plaintiffs in Pierce County cause no. 99-2-12800-7 or their attorneys of record on behalf of such  
7 plaintiffs, whom the judgment creditors James and Deborah Sharbono have designated to receive  
8 such payment; and it is further

TAC  
AS

9 ORDERED, ADJUDGED AND DECREED that, in execution of the first sentence of  
10 paragraph 7 of the judgment entered in this matter on May 20, 2005, Ohio Casualty Insurance  
11 Company shall, on or before October 15, 2008, pay the sum of \$2,353,956.28 to and pursuant to  
12 ~~instructions of the judgment creditors James and Deborah Sharbono or their attorneys of record on~~  
~~behalf of them;~~ and it is further

~~Plaintiffs in Pierce County Cause No. 99-2-12800-7 or their attorneys of record on~~  
~~behalf of them; plaintiffs & defendants~~ TAC AS

14 ORDERED, ADJUDGED AND DECREED that pursuant to Civil Rule 65.1, the Clerk of  
15 the Court shall immediately, forthwith and without delay, give notice by fax and overnight mail of  
16 this order to Ohio Casualty Insurance Company as set forth in Appeal Bond no. 3-883-836-6, or if  
17 said bond does not contain instructions for notice, then to such location as may reasonably  
18 determined by the Clerk to provide Ohio Casualty with notice of this order; and it is further

19 ORDERED, ADJUDGED AND DECREED that upon payment described above, those  
20 portions of the judgment described above – paragraph 1 and the first sentence of paragraph 7 – shall  
21 be satisfied in full; and it is further

22 //  
23 //  
24 //  
25 //

ORDERED, ADJUDGED AND DECREED that upon payment described above, Appeal Bond no. 3-883-836-6 and Ohio Casualty Insurance Company shall be fully exonerated and released from further obligation.

Dated this 3<sup>rd</sup> day of October, 2008

*Rosanne Buckner*  
HONORABLE ROSANNE BUCKNER

Approved as to form,  
Presented by:

*[Signature]*  
GOSSELIN LAW OFFICE, PLLC

*[Signature]*  
TIMOTHY R. GOSSELIN, WSB #13730  
Attorneys for Plaintiffs

Copy received; Approved as to form.

MCGAUGHEY BRIDGES DUNLAP

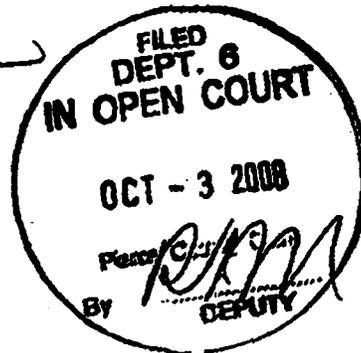
~~*[Signature]*~~  
~~DAN L. W. BRIDGES, WSB #24179~~  
~~Attorney for Defendants~~

KARR TUTTLE CAMPBELL

*[Signature]*  
JACQUELYN A. BEATTY, WSB #17567  
Attorney for Defendants

*[Signature]*  
LAW OFFICES OF BEN F. BARCUS

*[Signature]*  
BEN F. BARCUS  
Attorney for Intervenor



# **APPENDIX 6**

**SETTLEMENT AGREEMENT**

1. The Parties to this agreement are James and Deborah Sharbono and Cassandra (Sharbono) Barney (hereafter THE SHARBONOS) on one hand, and the Defendants in Pierce County Cause No. 01-2-07954-4 (hereafter UNIVERSAL) on the other. Collectively, THE SHARBONOS and UNIVERSAL will be referred to herein as THE PARTIES.

2. THE PARTIES make this settlement agreement with specific reference to the agreement entitled "Settlement Agreement (Including Covenants and Assignment of Rights)" which is attached hereto as Exhibit #1 and hereafter is referred to as THE SHARBONO/TOMYN SETTLEMENT. THE SHARBONO/TOMYN SETTLEMENT was entered into between THE SHARBONOS, referred to as "Defendants" therein, and THE TOMYNS, referred to therein as the Plaintiffs. The SHARBONO/TOMYN SETTLEMENT is dated March 30, 2001.

3. THE SHARBONO/TOMYN SETTLEMENT states in part that "the amount of insurance Universal provides is disputed. Universal contends ... that it provides \$1 million in insurance coverage. ... Defendants contend Universal is obligated to provide at least \$3 million in insurance coverage." It also states that "in an effort to settle all of plaintiffs' claims against defendants in a way that offers some protection of defendants' assets ... and preserves the ability to challenge any wrongful conduct by Universal ... the parties have agreed to settlement on the following terms and conditions."

The "Terms and Conditions" of the SHARBONO/TOMYN SETTLEMENT include the following:

1. Confession of Judgment: The defendants will comply with and take all steps needed to confess judgment ... in the amount of \$4,525,000. ...

2. Assignment of Rights: The defendants assign to plaintiffs all amounts awarded against or obtained from Universal for the following:

A. The benefits payable under any liability insurance policy in which Defendants have any interest for a covered loss that Universal has breached ... .

B. The benefits payable under any liability insurance policy which, because of an act of bad faith, Universal is estopped to deny or deemed to have sold to Defendants.

The so-called "Assignment of Rights" under paragraphs 2.A. and 2.B. are hereinafter referred to as "THE ASSIGNED BENEFITS."

The SHARBONO/TOMYN SETTLEMENT further provides:

Except as set forth in paragraphs 2.A., 2.B., and 2.C. above, defendants retain unto themselves and do not assign any other rights, claims, causes of action or awards against Universal or any other person or entity, including but not limited to claims or awards for bad faith, violation of Washington's Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duty, negligence, non-feasance, misfeasance, malfeasance, or similar conduct.

The rights, claims, causes of action, etc., referred to in this latter paragraph, are hereinafter referred to as "THE SHARBONOS' RETAINED CLAIMS." These claims are or were to have been the subject of the trial to be held following remand of this case from the Court of Appeals on or around September 21, 2009.

4. Pursuant to mediation, THE PARTIES have agreed to settle THE SHARBONOS' RETAINED CLAIMS, without impairing, releasing or affecting THE ASSIGNED BENEFITS. THE PARTIES also intend and agree that neither this agreement in its entirety, nor any part thereof, shall be interpreted so as to give rise to or result in a breach of THE SHARBONOS' obligations to THE TOMYNS under THE TOMYN SETTLEMENT.

5. In exchange for the consideration described below in paragraph 7, THE PARTIES further agree that this agreement rightfully entitles UNIVERSAL to a full and complete release from THE RETAINED CLAIMS, to wit: all rights, claims, causes of action or awards against Universal that were brought, or could have been brought in the action, whether known or unknown, in Pierce County Superior Court Cause Number, 01-2-07954-4, by the Sharbonos, including but not limited to claims or awards for bad faith, violation of Washington's Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duty, negligence, non-feasance, misfeasance, malfeasance, or similar conduct. This release does not release any claims supporting the award of \$3.275 million under Paragraph 1. of the May 20, 2005 Judgment, which is currently the subject of an appeal over the measure of interest due on that award. The aforementioned claim is not included in the RETAINED CLAIMS, and therefore is not presently released. The release extends to Universal, its employees, managers, carriers, attorneys, affiliates, subsidiaries, successors in interest, and Len VanDeWege (individually and his marital community comprised thereof).

6. THE PARTIES expressly agree this release does not apply to the calculation and award of pre- and post- judgment interest as respects the May 20, 2005 Judgment in this case, that is presently on appeal in the Washington Court of Appeals, Division Two, Case Number 38425-6-II. It is the understanding and agreement of THE PARTIES that the issues contained in that appeal shall continue to judicial resolution (if not settled by agreement). THE SHARBONOS will continue to prosecute their cross-appeal of the trial court's order allowing the Tomyns' to collect post-judgment interest in this case, consistent with THE SHARBONOS' briefing in the trial court and their notice of cross appeal, in a good faith effort to prevail.

However, and also in consideration of the payment described in paragraph 7 below, THE SHARBONOS promise that to the extent the cross-appeal results in the payment or award to THE

D... 7 of 7 

SHARBONOS, THE SHARBONOS shall forego the collection of same. THE PARTIES further agree that any security posted to guarantee such payment can and shall be returned to Universal when the decision in said appeal becomes final.

7. The CONSIDERATION to be paid by Universal for the agreement, promise, and release provided by THE SHARBONOS as described in paragraphs 5. and 6., above, is the amount of \$2,350,000 (two-million three-hundred fifty-thousand dollars) payable to James and Deborah Sharbono and one dollar (\$1.00) to Cassandra (Sharbono) Barney.

8. In further consideration of the payments described above, THE SHARBONOS agree to save and hold UNIVERSAL harmless and indemnify UNIVERSAL, including the payment of all attorney's fees and costs of suit, from all claims, known and unknown, of any and all persons known and unknown, from any claim of damages arising out of the incident described above, *except any claims asserted by the Tomyns, their heirs, attorneys and representatives.* As of the date of this agreement, UNIVERSAL is unaware of any claims to which it does or will claim that this hold harmless/indemnification agreement applies.

9. At the immediately succeeding Friday following receipt of UNIVERSAL'S payment, counsel for THE SHARBONOS shall cause to be presented the original of a stipulation for and order of dismissal with prejudice and no costs awarded as attached hereto as Exhibit #2, dismissing all THE RETAINED CLAIMS which were or could have been asserted in Pierce County Superior Court Cause Number 01-2-07954-4 with the exception of the claims that support the ASSIGNED BENEFITS and the potential RETAINED CLAIM being asserted on appeal regarding the entitlement to interest under paragraph 7, which is currently pending resolution by Court of Appeals Cause Number 38425-6-II filed in Division Two.

10. By their signature on this agreement, THE SHARBONOS affirmatively represent that they have no agreements with THE TOMYNS which are in addition to the settlement agreement contained in Exhibit #1 attached hereto.

11. Severability. If any provision of this agreement is found to be in violation of law or public policy, that provision shall be severed and shall not affect the enforcement of the remaining terms provided the remaining terms are sufficient to constitute an exchange for valuable consideration.

12. Dispute Resolution. THE PARTIES agree that if a disagreement or dispute over the enforcement of this agreement shall arise, that it shall be resolved by retired Judge Michael Spearman of Judicial Dispute Resolution. His determination shall not be subject to appeal. THE PARTIES shall bear their own attorney's fees in such a proceeding and shall be jointly responsible for the cost of arbitration however the prevailing party shall be entitled to an award of the cost its arbitrator professional (JDR) fees.

13. This Agreement contains the entire agreement between THE PARTIES. The terms of this Agreement are contractual and not mere recitals.

14. The Parties state they have carefully read the agreement, know the contents thereof, have had the advice of counsel, and sign the same as their own free and voluntary act and deed.

15. Separate Execution. THE PARTIES' separate execution of this agreement shall be deemed valid.

CAUTION - READ BEFORE SIGNING

Dated this 8<sup>th</sup> day of October, 2009.

*James Sharbono*  
James Sharbono

STATE OF WASHINGTON )

:ss.

County of KING )

On this date appeared before me James Sharbono, to me known to be the individual who signed the above and foregoing release and hold harmless agreement and who declared to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Dated this 9<sup>th</sup> day of October, 2009.

*JoAnne C. Richard*

[Printed Name] JoAnne C. Richard

NOTARY PUBLIC in and for the State of

Washington residing at: Seattle

My Commission Expires: 05/29/2012



Deborah Sharbono  
Deborah Sharbono

STATE OF WASHINGTON )

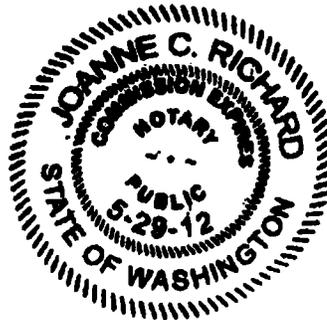
:ss.

County of KING )

On this date appeared before me Deborah Sharbono, to me known to be the individual who signed the above and foregoing release and hold harmless agreement and who declared to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Dated this 5th day of October, 2009.

JoAnne C. Richard  
[Printed Name] JoAnne C. Richard  
NOTARY PUBLIC in and for the State of  
Washington residing at: Seattle  
My Commission Expires: 05/29/2012



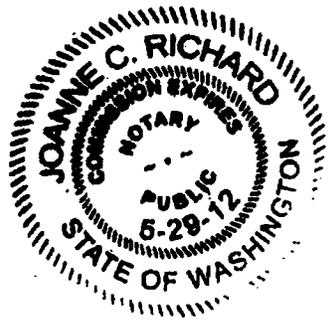
  
Cassandra \_\_\_\_\_ (formerly Sharbono)

STATE OF WASHINGTON )  
:ss.  
County of KING )

On this date appeared before me Cassandra Barney, to me known to be the individual who signed the above and foregoing release and hold harmless agreement and who declared to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Dated this 5th day of October, 2009.  
Joanne C. Richard  
[Printed Name] Joanne C. Richard  
NOTARY PUBLIC in and for the State of  
Washington residing at: Seattle  
My Commission Expires: 05/29/2012

///  
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///  
///



UNIVERSAL UNDERWRITERS INSURANCE COMPANY

By: \_\_\_\_\_ (name), \_\_\_\_\_ (position)

STATE OF KANSAS )

:ss.

County of \_\_\_\_\_ )

On this date appeared before me \_\_\_\_\_, to me known to be the individual who signed the above and foregoing release and hold harmless agreement and who declared to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
[Printed Name]

NOTARY PUBLIC in and for the State of  
Kansas residing at: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

09 NOV -6 PM 4:36

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

JAMES and DEBORAH SHARBONO,  
individually and the marital community  
comprised thereof, CASSANDRA  
SHARBONO,

Respondents/Appellants,

vs.

UNIVERSAL UNDERWRITERS  
INSURANCE COMPANY, a foreign  
insurer; LEN VAN DE WEGE and  
"JANE DOE" VAN DE WEGE,  
husband and wife and the marital  
community composed thereof,

Appellant,

CLINTON L. TOMYN, individually  
and as Personal Representative of the  
Estate of CYNTHIA L. TOMYN,  
deceased; and as Parent/Guardian of  
NATHAN TOMYN, AARON  
TOMYN, and CHRISTIAN TOMYN,  
minor children,

Respondents/Intervenors.

**No: 38425-6-II**

**DECLARATION OF  
SERVICE**

ORIGINAL

On November 6, 2009, a true and correct copy of **INTERVENORS'**

**REPLY TO CROSS-APPEAL**, was served on the following by e-mail,

facsimile and legal messenger to:

Phillip A. Talmadge, Esq.  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630

Dan'L W. Bridges, Esq.  
McGaughey Bridges Dunlap, PLLC  
325 118<sup>th</sup> Ave SE, Suite 209  
Bellevue, WA 98005-3539

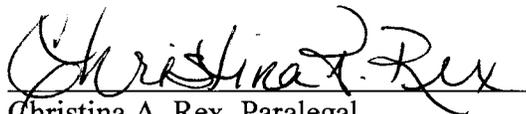
Timothy R. Gosselin, Esq.  
Gosselin Law Office PLLC  
1901 Jefferson Ave, Suite 304  
Tacoma, WA 98402-1611

Jacquelyn A. Beatty, Esq.  
Karr Tuttle Campbell  
1201 3<sup>rd</sup> Ave, Suite 2900  
Seattle, WA 98101-3284

Original filed via hand delivery:  
Court of Appeals, Division II  
Clerk's Office  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 6<sup>th</sup> day of November, 2009.



Christina A. Rex, Paralegal  
The Law Offices of Ben F. Barcus  
& Associates, P.L.L.C.  
4303 Ruston Way  
Tacoma, WA 98403  
253-752-4444

Declaration of Service