

FILED
COURT OF APPEALS
DIVISION II

COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION TWO
No. 41931-9-II (Consolidated)

11 DEC 22 PM 3:09

STATE OF WASHINGTON
CLERK

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

and

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
Intervenors/Respondents

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

v.

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

REPLY BRIEF OF APPELLANTS

Timothy R. Gosselin WSBA #13730

Attorneys for Appellants
Gosselin Law Office, PLLC
1901 Jefferson Avenue, Suite 304
Tacoma, WA 98402
Phone: 253.627.0684

TABLE OF CONTENTS

Table of Authorities i

REPLY TO ARGUMENTS OF UNIVERSAL UNDERWRITERS .. 1

REPLY TO ARGUMENTS OF THE TOMYNS 4

CONCLUSION 11

Table of Authorities

Anderson Hay & Grain Co. v. United Dominion Indus., Inc.,
119 Wn. App. 249, 76 P.3d 1205 (2003) 9

Badgett v. Security State Bank, 116 Wn.2d 563, 807 P.2d 356 (1991) . . 6

Byrne v. Ackerlund, 44 Wn. App. 1, 719 P.2d 1363 (1986) 8

Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.,
86 Wn. App. 732, 935 P.2d 628 (1997) 7

Lonsdale v. Chesterfield, 99 Wn.2d 353, 662 P.2d 385 (1983) 6

Martinez v. Miller Indus., Inc., 94 Wn. App. 935,
974 P.2d 1261 (1999) 8

Metropolitan Park Dist. of Tacoma v. Griffith,
106 Wn.2d 425, 723 P.2d 1093 (1986) 6

Miller v. Othello Packers, Inc., 67 Wn.2d 842,
410 P.2d 33 (1966) 6

Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co.,
161 Wn.2d 903, 169 P.3d 1 (2007) 8

Ross v. Harding, 64 Wn.2d 231, 391 P.2d 526 (1964) 9

Rufer v. Abbott Laboratories, 154 Wn.2d 530, 114 P.3d 1182 (2005) . . 8

Sharbono v. Universal, docket no. 40245-9-II
(unpublished decision, July 19, 2011) 5

Shumway v. Payne, 136 Wn.2d 383, 964 P.2d 349 (1998) 10

State v. Trask, 91 Wn. App. 253, 273-74, 957 P.2d 791 (1998) 9

Wlasiuk v. Whirlpool Corp., 76 Wn. App. 250, 884 P.2d 13 (1994) . . . 11

RCW 4.56.110 8
RAP 12.7(a) 10

REPLY TO ARGUMENTS OF UNIVERSAL UNDERWRITERS

Universal makes much of the fact that the Sharbonos have not assigned error to the trial court's disbursement orders. The Sharbonos did not assign error to those orders because the orders were correct. Universal owed the disbursed amounts. The Tomyns through the Sharbonos were entitled to the disbursed amounts. The Sharbonos did not and do not object to the disbursal of those amounts. The Sharbonos object to, and therefore have appealed, the orders that describe the consequences of the disbursement. Universal has not cited any authority suggesting that the Sharbonos had to challenge the disbursement orders in order to challenge the satisfaction orders. Because disbursement was appropriate regardless of whether the judgments at issue were fully or partially satisfied, the disbursement orders will not be affected regardless of the outcome of the Sharbonos' appeal, and the Sharbonos were not required to assign error to the disbursement orders.

Universal's challenge to the Sharbonos' factual statements are largely addressed in this court's previous decisions. However, Universal's discussion of its settlement with the Sharbonos requires clarification. Contrary to the impression Universal creates, that settlement did not resolve all claims between the Sharbonos and Universal. Rather, by its terms, the settlement specifically excepted those claims that could support recoveries

of benefits to which the Tomyns would be entitled under the Tomyn/Sharbono settlement agreement. Brief of Respondent Universal, Appendix A at ¶ 4.¹

Universal agrees with the Sharbonos' appeal except to the extent that it urges reversing the full satisfaction of the judgment entered against Universal. First, Universal contends the Sharbonos did not preserve the issue for review by assigning error to that part of the trial court's orders. Universal contends this failure prevents the Sharbonos from arguing that "the trial court erred by relieving Universal from the obligations imposed by the Sharbono/Universal judgment without fully satisfying the Tomyn/Sharbono judgment. If the court would not order the Tomyn/Sharbono judgment satisfied, it should not have relieved Universal of further obligations to the Sharbonos." Brief of Universal at 5.

The argument confuses assignments of error with arguments supporting an assignment. The Sharbonos specifically assigned error to the trial court's entry of a full satisfaction of the Sharbono/Universal judgment.

1. Paragraph 4. states: "Pursuant to mediation, THE PARTIES have agreed to settle THE 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."

Brief of Appellants at 1, Assignment of Error 3.² That assignment fully supports the Sharbonos' arguments.

Universal also argues that since it paid the amount owing, entry of a full satisfaction of the judgment against it was proper. The argument misses the point. The Sharbono/Universal judgment required Universal to pay the amount of the unpaid balance of the Tomyn/Sharbono judgment.

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.*

(CP 228 (Emphasis added).) Therefore, Universal's payment could fully satisfy its obligation under the Sharbono/Universal judgment only if the payment fully satisfied the Tomyn/Sharbono judgment. If amounts remain owing on the Tomyn/Sharbono judgment, then by necessity Universal has not paid "the amount of the unpaid balance" of that judgment. If Universal has

2. Assignment of Error 3 states: "3. The trial court erred when it allowed full satisfaction of the judgment entered in Sharbono v. Universal, Pierce County Cause No. 01-2-07954-4, without fully satisfying the judgment entered in Tomyn v. Sharbono, Pierce County Cause No. 99-2-12800-7.

not paid the unpaid balance of the Tomyň/Sharbono judgment, it was not entitled to a full satisfaction of Sharbono/Universal judgment.

The trial court erred when it allowed full satisfaction of the judgment entered in Sharbono v. Universal, Pierce County Cause No. 01-2-07954-4, without fully satisfying the judgment entered in Tomyň v. Sharbono, Pierce County Cause No. 99-2-12800-7. The trial court should not have relieved Universal from the obligations imposed by the Sharbono/Universal judgment until the Tomyň/Sharbono judgment was fully satisfied. If the court would not order the Tomyň/Sharbono judgment satisfied, it should not have relieved Universal of further obligations to the Sharbonos.

REPLY TO ARGUMENTS OF THE TOMYNS

In thirty pages of factual statement, the Tomyňs largely attempt to disparage the Sharbonos' efforts on their behalf – through which the Tomyňs recovered over \$9 million – by criticizing the Sharbonos' settlement of some of their claims with Universal, and the Sharbonos' claim to some of the nearly 25% interest their judgment against Universal included. But this court already has largely addressed the Tomyňs criticisms. This court already has noted that the Tomyň/Sharbono settlement agreement “expressly states that its purpose is ‘to protect the assets, earnings and personal liability of [the Sharbono]s’ from a verdict in excess of the insurance coverage available to

them, ‘as well as to protect [the Sharbono]s from the expense and hardship of bankruptcy proceedings.’” The court also noted the Tomyn/Sharbono settlement assigned no claims or causes of action to the Tomyns, but only obligated the Sharbonos to “hand over particular enumerated proceeds to the Tomyns if the Sharbonos successfully sue Universal,” and that the Sharbonos’ settlement with Universal only involved “that part of the lawsuit that the Sharbonos had retained for themselves.” See *Sharbono v. Universal*, docket no. 40245-9-II (unpublished decision, July 19, 2011). Even if true, none of the conduct the Tomyns attribute to the Sharbonos was inappropriate.

Ultimately, despite thirty pages of factual statement, the Tomyns fail to dispute any of the facts material to this appeal. Those facts are that the Tomyns settled their claims against the Sharbonos for a consent judgment in the amount of \$4.525 million. As of the date of the last payment to the Tomyns, the judgment with its stated 12% interest had a face value of \$8,078,762.64. By virtue of the Sharbonos’ efforts the Tomyns received \$9,023,234.93, nearly \$1 million more than the judgment and the amount they agreed to settle for. The settlement obligated the Tomyns to apply the proceeds to the judgment and execute a full satisfaction of the judgment if the amount they recovered exceeded the value of the judgment. (CP 246, ¶ 2.) The Tomyns have taken the money and now refuse to honor their

promise. The trial court allowed that to occur.

In their eight pages of argument, the Tomyns contend that their obligation to fully satisfy the judgment is excused because the Sharbonos acted in bad faith by disagreeing with the Tomyns' claim that they were entitled to all of the nearly 25% interest the trial court awarded. Their argument has multiple critical flaws.

First, the facts on which they rely do not show that the Sharbonos breached the duty of good faith. The implied covenant of good faith and fair dealing imposes an "obligation by each party to cooperate with the other so that each may obtain the benefit of performance." *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385 (1983), quoting *Miller v. Othello Packers, Inc.*, 67 Wn.2d 842, 844, 410 P.2d 33 (1966). The duty does not prevent one party from asserting a legitimate dispute regarding the nature of its or the other party's obligations under the contract. See, e.g. *Badgett v. Security State Bank*, 116 Wn.2d 563, 807 P.2d 356 (1991) ("As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms."); *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn.2d 425, 723 P.2d 1093 (1986) (where concession agreement did not require County to accept other party's proposals for changes and improvements, county did not violate

implied covenant of good faith by refusing to consider other party's proposals for changes and improvements); *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 935 P.2d 628 (1997)(implied covenant of good faith and fair dealing did not require one party to accede to other party's demand to refrain from selling goods in other party's area).

Here, the Tomyns contended they were entitled to the all of the nearly 25% interest the trial court awarded. The Sharbonos contended that the Tomyn/Sharbono settlement agreement, the judgment, and the law entitled them to half of that interest. The Sharbonos' position was reasonably based in all three.³ While the trial court and the Court of Appeals disagreed with

3. The purpose of the Tomyn/Sharbono settlement agreement was to protect the Sharbonos assets, earnings and personal liability. Under that agreement, the Sharbonos were only obligated to pay the Tomyns certain limited benefits, the benefits of insurance coverage.

The defendants assign to plaintiffs all amounts awarded against or obtained from Universal for the following:

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.

. . . .
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 . . .

(CP 245-46(Emphasis added).) The agreement did not assign interest. The Sharbono/Universal judgment contained two provisions for post-judgment interest. The first was paragraph 1, which provided for interest on the Tomyn/Sharbono judgment:

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**

the Sharbonos position,⁴ no court ever concluded that the Sharbonos' position was frivolous or presented in bad faith. The Tomyns have not proved otherwise since then. Having not proved bad faith, the Tomyns were not entitled to avoid their obligation under the settlement agreement to satisfy the consent judgment.

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. The award of post-judgment interest was set forth in paragraph 7 of the judgment.

(CP 9 (Emphasis added).) The Sharbonos agreed the Tomyns were entitled to that interest because that interest was part of the Tomyn/Sharbono judgment, and payment of that judgment was a benefit of the Sharbonos' insurance coverage. The second provision was paragraph 7. It stated:

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.

(CP 10) The Sharbonos' contended this was statutorily required post-judgment interest on the principle amount of the judgment they obtained against Universal, and should not be paid to the Tomyns because it was not a "benefit payable under any liability insurance policy which, because of an act of bad faith, Universal was estopped to deny."

Under Washington law, a settlement agreement is a contract subject to principles of contract construction. *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 942, 974 P.2d 1261 (1999); *Byrne v. Ackerlund*, 44 Wn. App. 1, 5, 719 P.2d 1363 (1986). Citing *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Co.*, 161 Wn.2d 903 @ ¶ 33, 169 P.3d 1, 10 (2007), they argued that under Washington law, only the amount due on the Tomyn/Sharbono judgment was a "benefit payable under any liability insurance policy which, because of an act of bad faith, Universal was estopped to deny." And under Washington law, paragraph 7 post-judgment interest was intended to compensate the Sharbonos as Universal's judgment creditors. RCW 4.56.110; *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 552, 114 P.3d 1182 (2005).

4. The trial court awarded all 25% interest to the Tomyns. The Court of Appeals reduced the interest to 12% of the value of the Tomyn/Sharbono judgment from the date of the Sharbono/Universal judgment, then awarded all that interest to the Tomyns.

Second, even if the Tomyns had shown a breach, the breach did not allow them to avoid their obligation to satisfy the judgment. A non-breaching party to a contract is only relieved of its obligation if the breached promise was a condition precedent to that party's performance. *Anderson Hay & Grain Co. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 256, 76 P.3d 1205 (2003); *State v. Trask*, 91 Wn. App. 253, 273-74, 957 P.2d 791 (1998); *Ross v. Harding*, 64 Wn.2d 231, 236-37, 391 P.2d 526 (1964). Here, the only condition precedent to the Tomyns' obligation to satisfy the judgment was receipt of sufficient funds to pay the judgment. The Sharbonos caused the Tomyns to receive those funds. The condition was met, and the Tomyns were obligated to satisfy the judgment regardless of any other claim they claim to have.

Third, even if the Tomyns had shown a breach, they did not prove they suffered damages which could support an actionable claim. They were awarded all the interest that was generated on both judgments. The result was a payment of nearly \$1 million more than the face value of the judgment to which they agreed in their settlement with the Sharbonos. The only amount the Tomyns did not receive was additional interest the Court of Appeals determined the trial court had wrongly awarded – the difference between the 25% interest the trial court had awarded and the 12% the Court of Appeals awarded. Obviously, the Tomyns could not be harmed by not receiving

money this court held Universal was not obligated to pay.

Fourth, the Tomyns waived any claim they may have had that they did not receive all the interest to which they were entitled. If the Tomyns believed the Court of Appeals made an incorrect decision, they could have sought review by the Supreme Court. They did not. Instead, they allowed the mandate to issue, and the Court of Appeals' decision to become final. They are no more entitled to re-challenge that decision than Universal was to challenge the interest award. RAP 12.7(a); *Shumway v. Payne*, 136 Wn.2d 383, 964 P.2d 349 (1998).

The Tomyns did not prove the Sharbonos breached the duty of good faith and fair dealing. They also did not prove that even if the Sharbonos had, the breach either excused them from satisfying the consent judgment or caused harm. Even if they had proved any of these, the Tomyns waived their right to make that claim by accepting the Court of Appeals' decision without appeal. As a result, the Tomyns failed to provide any basis for the trial court to excuse them from satisfying the consent judgment after receiving nearly \$1 million more than the face value of the judgment as a result of the Sharbonos' efforts.

Finally, the Tomyns argue they should not be required to honor their promise and satisfy the consent judgment because it would "effectively render the confessed judgment final." Brief of Respondents at 41.

Satisfaction of the judgment, however, does not affect the finality of the judgment. A judgment is final if it finally determines the rights of the parties by fixing both liability and damages. *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 255, 884 P.2d 13 (1994). Thus, whatever preclusive effect the consent judgment may have already has occurred. The judgment's finality is not affected by its satisfaction.

The Tomyn/Sharbono settlement obligated the Sharbonos to pursue a lawsuit against Universal and pay certain proceeds of that lawsuit, if any, to the Tomyns. It obligated the Tomyns to do one thing: satisfy the consent judgment out of those proceeds. Over nearly ten years, the Sharbonos performed their part of the bargain. Their efforts resulted in the Tomyns receiving over \$9 million, nearly \$1 million more than the consent judgment to which they agreed. Now the Tomyns refuse to fulfill the one promise they made.

CONCLUSION

Neither Universal nor the Tomyns dispute the terms of their judgments. Nor do they dispute that the trial court's actions were contrary to those terms.

The partial satisfaction of judgement entered in the Tomyn/Sharbono matter shows that the Tomyns have received more than the face value of the judgment, which should mean the judgment is fully satisfied. Yet, the

document is captioned a “partial” satisfaction. And because the amount paid exceeds the amount owed, the judgment no longer reveals how it can be satisfied. The Tomyns have simply manufactured the contention that the Sharbonos can fully satisfy the judgment by paying them the money the Sharbonos received in the settlement of their personal claims with Universal, another \$2.35 million.

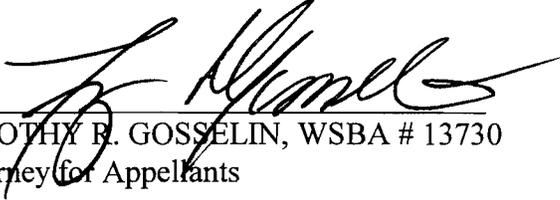
At the same time, the judgment entered in the Sharbono/Universal matter required Universal to pay the Tomyn/Sharbono judgment. Despite allowing the Tomyn/Sharbono judgment to remain only partially satisfied, the trial court allowed a full satisfaction of the Sharbono/Universal judgment. This means the asset which should have satisfied the Tomyn/Sharbono judgment – the Sharbono/Universal judgment – is no longer available.

The trial court erred by failing to order the Tomyns to satisfy the Tomyn/Sharbono judgment. Once the Tomyns received enough money to pay the face amount of their judgment, the court should have ordered them to satisfy the judgment. Alternatively, the trial court erred by relieving Universal from the obligations imposed by the Sharbono/Universal judgment without fully satisfying the Tomyn/Sharbono judgment. If the court would not order the Tomyn/Sharbono judgment satisfied, it should not have relieved Universal of further obligations to the Sharbonos.

The Sharbonos ask this court to reverse the trial court and remand

with instructions that the trial court either order the Clerk to show that the Sharbonos have fully satisfied the Tomy/Sharbono judgment, or withdraw the full satisfaction of the Sharbono/Universal judgment to show it has only been partially satisfied.

Dated this 28th day of December, 2011.

By: 

TIMOTHY R. GOSSELIN, WSBA # 13730
Attorney for Appellants

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

FILED
NOV 20 2019
BY _____

JAMES and DEBORAH SHARBONO,
individually and the marital community
composed thereof; CASSANDRA
SHARBONO, *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, *Respondents*
and
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,
Intervenors/Respondents

NO. 41931-9-II

DECLARATION OF
SERVICE OF REPLY
BRIEF OF APPELLANTS

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*
v.
CASSANDRA SHARBONO,
individually; JAMES and DEBORAH
SHARBONO, individually and the marital
community composed thereof, *Appellants*

I, TIMOTHY R. GOSSELIN, declare and state:

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

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 28th day of December, 2011, I did place in the United States Mail, first class postage affixed, the following documents:

1. REPLY BRIEF OF APPELLANTS

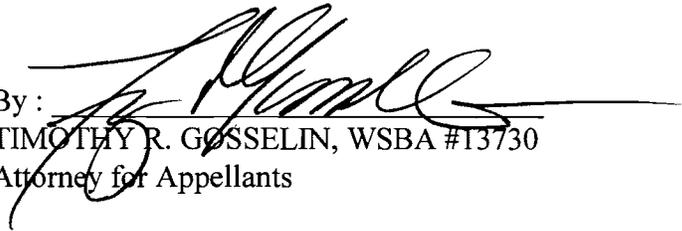
and this declaration directed to and to be delivered to:

Jacquelyn A. Beatty
KARR TUTTLE CAMPBELL
1201 Third Avenue, Suite 2900,
Seattle, WA 98101-3028

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

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

Signed this 28th day of December, 2011 at Tacoma, Washington.

By : 
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Appellants

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