

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

JAMES and DEBORAH SHARBONO, individually and the marital
community comprised 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

BRIEF OF RESPONDENTS

Ben F. Barcus, WSBA # 15576
Paul A. Lindenmuth, WSBA# 15817
The Law Offices of Ben F. Barcus & Associates, PLLC
4303 Ruston Way
Tacoma, WA 98402
253-752-4444

ORIGINAL

I. TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii-iv

I. COUNTER-STATEMENT OF ISSUES.....1

II COUNTER-STATEMENT OF THE CASE/FACTS.....2

 A. INTRODUCTION.....2

 B. THE SHARBONO V. UNIVERSAL CASE.....9

 C. POST-MANDATE PROCEEDINGS.....12

 D. SECRET NEGOTIATION AND SEPARATE
 SETTLEMENT.....19

 E. MOTION FOR TEMPORARY RESTRAINING ORDER
 TO MAINTAIN STATUS QUO.....25

III. ARGUMENT.....30

 A. STANDARD OF REVIEW AND RELEVANT BURDENS
 OF PROOF.....30

 B. THE SHARBONOS VIOLATED THE IMPLIED
 COVENANT OF GOOD FAITH AND
 FAIR DEALING.....34

 C. UNTIL OUTSTANDING ISSUES REGARDING
 BREACH/PERFORMANCE BY THE SHARBONOS
 HAVE BEEN RESOLVED, THE TOMYNS SHOULD
 NOT BE REQUIRED TO PROVIDE THE SHARBONOS
 A FULL SATISFACTION OF JUDGMENT.....40

CONCLUSION.....41

TABLE OF CASES AND AUTHORITIES

I. Washington Cases

| | |
|---|----|
| <i>Asher v. Allyn</i> , 132 W. App. 371, 378, 131 P.3d 339 (2009)..... | 37 |
| <i>Blair v. Ta-Seattle East No. 176</i> , 171 Wn.2d 342, 348, 254 P.3d 797 (2011)..... | 31 |
| <i>Balise v. Underwood</i> , 62 Wn.2d 195, 199, 381 P.2d 966 (1963) | 32 |
| <i>Bjurstrom v. Campbell</i> , 27 W. App. 449, 618 P.2d 533 (1980)..... | 38 |
| <i>Daugert v. Pappas</i> , 104 Wn.2d 254, 258-60, 704 P.2d 600 (1985)..... | 39 |
| <i>Davis v. Davis</i> , 71 Wn.2d 607, 609, 134 P.2d 464..... | 37 |
| <i>Do v. Farmer</i> , 127 W. App. 180, 189, 110 P.3d 840 (2005)..... | 41 |
| <i>Ducolon Mechanical, Inc. v. Shinstein/Forness, Inc.</i> , 77 W. App., 707, 893 P.2d 1127 (1995)..... | 34 |
| <i>Edmonson v. Pop Choi</i> , 155 W. App. 376, 386, 228 P.3d 780 (2010)..... | 34 |
| <i>Hadley v. Maxwell</i> , 144 Wn.2d 306, 308, 27 P.3d 600 (2001)..... | 32 |
| <i>Howard v. Royal Specialty Underwriting, Inc.</i> , 121 Wn. App. 372, 379, 89 P.3d 265 (2004)..... | 30 |
| <i>Lonsdale v. Chesterfield</i> , 99 Wn.2d 353, 357, 662 P.2d 385 (1983)..... | 34 |
| <i>McGuire v. Bates</i> , 169 Wn.2d 185, 188-89, 234 P.3d 205 (2010)..... | 32 |

| | |
|--|----|
| <i>Minehart v. Morning Star Boys Ranch, Inc.</i> , 156 Wn. App. 457, 463, 232 P.3d 591 (2010)..... | 31 |
| <i>Right-Price Recreation, LLC v. Connells Prairie Community Council</i> , 146 Wn.2d 370, 381, 460 P.3d 789 (2000)..... | 32 |
| <i>Roberson v. Perez</i> , 156 Wn.2d 33, 41, 123 P.3d 844 (2005)..... | 37 |
| <i>Ross v. Harding</i> , 64 Wn.2d, 231, 237, 391 P.2d 526 (1964) | 32 |
| <i>Sharbono v. Universal Underwriters Ins. Co.</i> , 163 Wn. 2d 1055, 187 P. 3d 752 (2008)..... | 2 |
| <i>Sharbono v. Universal Underwriters Ins. Co.</i> 139 Wn. App. 383, 161 P.3d 406 (2007)..... | 3 |
| <i>Sharbono v. Universal Underwriters Ins. Co.</i> 158 Wn. App. 963, 247 P.3d 430 (2001) | 3 |
| <i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 507, 745 P.2d 858 (1987)..... | 41 |
| <i>State v. Barberio</i> , 121 Wn.2d 48, 846 P.2d 519 (1993)..... | 38 |
| <i>State v. Bauers</i> , 25 Wn.2d 925, 930, 172 P.2d 279 (1946)..... | 37 |
| <i>State v. Bradfield</i> , 29 W. App. 679, 630 P.2d 494 (1981),..... | 37 |
| <i>State v. Kilgore</i> , 141 W. App. 817, 172 P.3d 373 (2007) | 38 |
| <i>State v. Schwab</i> , 163 Wn.2d 664, 672, 185 P.3d 1151 (2008)..... | 37 |

| | |
|--|----|
| <i>State v. Trask</i> , 91 Wn. App. 253, 273-74, 957 P.2d 781 (1998)..... | 33 |
| <i>Stevens County v. Futurewise</i> , 146 W. App. 493, 502, 192 P.3d Page 1 (2008)..... | 41 |
| <i>Thomas v. Bremer</i> , 88 W. App. 728, 949 P.2d 800 (1997)..... | 38 |
| <i>Walter Implement, Inc. v. Focht</i> , 107 Wn.2d 553, 557, 703 P.2d 1340 1987)..... | 32 |
| <i>Wilson v. Horsley</i> , 137 Wn.2d 500, 505, 974 P.2d 316 (1990)..... | 31 |

II. Court Rules

| | |
|---------------|--------|
| CR 56 | 32 |
| CR 8..... | 33 |
| MAR 7.3..... | 41 |
| PCLR 3..... | 19 |
| PCLR 16..... | 19 |
| RAP 8.1..... | 17, 21 |
| RAP 2.5..... | 37 |
| RAP 12.2..... | 38 |

I. COUNTER-STATEMENT OF ISSUES

1. Did the Trial Court err and/or abuse its discretion by failing to require the intervenor Tomyns to provide the Sharbonos a full satisfaction of judgment when there remained outstanding issues as to whether or not the conditions precedent for the entry of a full satisfaction of judgment had been satisfied?

2. Did the Trial Court err and/or abuse its discretion by refusing to direct the Tomyns to satisfy a confessed judgment entered into as a part of a settlement agreement when there were outstanding issues of fact as to whether or not the underlying settlement agreement had been fully complied with and/or breached?

3. Whether the Trial Court correctly recognized that the satisfaction of the judgment in the case of *Sharbono v. Universal* involved different questions and issues in comparison to the conditions and the requirement for entry of a full satisfaction of the *Tomyn v. Sharbono* judgment?

4. What standard of review is applicable to a Trial Court's decision requiring only the entry of a partial satisfaction of judgment versus a full satisfaction of judgment when the entitlement to a full satisfaction of judgment is predicated on unresolved issues relating to compliance with an underlying settlement agreement?

II. COUNTER-STATEMENT OF THE CASE/FACTS

A. INTRODUCTION

This is an extraordinary complex case that has already been before this Court a number of times. It involves what this Court has previously observed to be a unique relationship between the Sharbonos and the Tomyns, who are currently on opposite sides within this appeal. Within the Court's unpublished opinion set forth at 160 Wn. App. 1036 (2001 WL 986043) (March 22, 2011), this Court observed

Here, the Sharbonos were involved in a unique contractual relationship with the Tomyns arising out of the Tomyn-Sharbono settlement agreement. Because the Sharbonos were suing Universal to satisfy the confessed judgment they owed to the Tomyns, the Sharbonos were not merely representing their own interest in this proceeding; it appears that they also had some duty to protect the Tomyns' interest as well (emphasis added).

(Appendix No. 1).

The nature of such a relationship was discussed in more detail in the Court's most recent unpublished opinion relating to whether or not Mr. Gosselin, the Sharbonos' attorney, owed an attorney's duty to the Tomyns, given this "unique contractual relationship." See, *Sharbono v. Universal Underwriters Ins. Co.*, 162 Wn. App. 1050 (2011 WL 2848801) (July 19, 2011). (Appendix No. 2). In that opinion, while rejecting the

Tomyns' position that Mr. Gosselin had an attorney's duty towards the Tomyns, the Court did observe that the relationship between the Tomyns and the Sharbonos was contractual in nature, and under a "third-party beneficiary" analysis, the Tomyns' interest otherwise were adequately protected under the terms of the contract and the implied covenant of good faith and fair dealing:

Moreover, any expectation or foreseeability of harm to the Tomyns arising out of Gosselin's conduct in acting at the Sharbonos' attorney is low, because his performance on behalf of the Sharbonos must be in **good faith in accordance with the obligation imposed under the Sharbono/Tomyn settlement agreement or the Sharbonos would be liable for breach of the agreement and could face personal liability.** This is in every contract an implied covenant of good faith and fair dealing, which obligates the party to cooperate with each other so that each may obtain the full benefit of performance. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). (Emphasis added)

The trial judge, the Honorable Roseanne Buckner, rejected the Sharbonos' demand for a "full satisfaction of judgment" finding:

I will be denying the request for full satisfaction, but granting your request for a partial satisfaction of judgment, because, again, I see that with regard to that cause of action, the first one, that were issues that were – decisions that I made that were reversed by the Court of Appeals. So I think there would have been more money here for the Tomyns under these circumstances. (RP of March 4, 2011, Page 16).

As will be discussed in more detail below, there **are, outstanding issues as to whether or not the Sharbonos breached the Tomyln/Sharbono settlement agreement thus impacting their entitlement to a “full satisfaction of judgment” emanating from that agreement.** Further, and more particularly, there were substantial outstanding issues as to whether or not the conduct of the Sharbonos during the course of the *Sharbono v. Universal* litigation served to breach the implied covenant of good faith and fair dealing which otherwise attached to the Tomyln/Sharbono settlement agreement. It is for these reasons, that the Trial Court clearly was within its prerogative, and well within its discretion in denying the request for a full satisfaction of judgment when, under these particular and unique circumstances, the Sharbonos had failed to establish or meet their burden that in fact there was such an entitlement.

A copy of the LINX readout from the Pierce County Superior Court regarding this case is attached hereto as Appendix No. 3. As indicated within the LINX readout there has been at a minimum nine efforts in the underlying case to invoke appellate jurisdiction, inclusive of filings of notices of appeals, motions for discretionary review and the like. To date, such efforts have culminated in the two above-referenced unpublished opinions, as well as two published opinions under the heading

of *Sharbono v. Universal Underwriters Ins. Co.* which can be found at both 139 Wn. App. 383, 161 P.3d 406 (2007) and at 158 Wn. App. 963, 247 P.3d 430 (2001) (Appendix No. 4). The below factual discussion is predicated on those matters found within those opinions, as well as matters within the Superior Court's file and of which the trial judge would have been well aware of when making her determination that the Sharbonos, under the unique circumstances of this case were only entitled to, at this time, a "partial satisfaction of judgment".

In order to understand what has transpired in this case, requires some explanation of the underlying factual background. This matter initially arose, due to the tragic and untimely death of Cynthia Tomyn, the wife of Clint Tomyn and the mother of Nathan, Erin and Christian Tomyn, who were all minors at the time of their mother's passing. This event occurred on December 11, 1998.

This death occurred on December 11, 1998. On that date James and Debra Sharbono's daughter, Cassandra, who was a minor, and who was driving a family car, crossed the centerline of the "Mountain Highway" – SR7 at a high rate of speed, and struck the automobile driven by Cynthia Tomyn. As a result of this tragic accident, Cynthia Tomyn lost her life.

Cynthia Tomyne was born on July 28, 1965, and was 33 years old at the time of her death. She met her husband, Clint, while they were in high school. They had been married for 15 years. Mrs. Tomyne was a high school graduate and prior to her death had been employed at Tacoma General Hospital for 5½ years. Cynthia and Clint had three children during their marriage, Nathan, Erin and Christian. At the time of Cynthia's death, Nathan was 8 years old, Erin was 14 years old and Christian was 17 years old. Cynthia had volunteered extensively at her children's school and was a loving wife, a devoted mother and an overall fine person.

After this tragic event, Mr. Tomyne hired Ben F. Barcus at the Law Offices of Ben F. Barcus and Associates PLLC, for the purposes of pursuing claims on behalf of himself, his children and his deceased wife's estate. Initially efforts were made to resolve the case prior to filing suit. Unfortunately, pretrial mediation efforts were unsuccessful, primarily because Universal Underwriters Company was allegedly not affording the Sharbonos the insurance coverage that they believed they had purchased. At that time the Sharbonos owned interests in three automobile transmission repair businesses, and it was believed that they had purchased three separate policies of insurance with respect to such businesses, as well as and in addition, had their own personal automobile

liability coverages with State Farm Insurance Company. Unfortunately, Universal took the position that only one policy was applicable to the losses claimed by the Tomyns, and as a result, the Sharbonos hired personal counsel, the Burgess Fitzer Law Firm, located in Tacoma, Washington. They were initially represented by Ross Burgess, a principal in that law firm, as well as Mr. Gosselin, who was a partner within that firm at the time, and another colleague.

Due to Universal's intransigence in providing Underwriter's documents to determine the Sharbonos' actual coverage, the Tomyns filed a lawsuit against the Sharbonos under Pierce County Cause No. 99-2-12800-7. (Appendix No. 5).

After suit was filed in the Superior Court, the Tomyns requested customary discovery including insurance coverage information which Universal had refused to provide prior to the filing of the lawsuit. When information was not forthcoming regarding insurance, a subpoena was issued to Universal Underwriters, in an effort to compel production of such information. Universal filed a motion to quash the insurance-related subpoena, which was denied by the Trial Court. Universal sought discretionary review of the Trial Court's denial of their motion to quash, and a Commissioner of the Appellate Court accepted discretionary review. In the meantime, the Tomyns and the Sharbonos, through their counsel,

continued to engage in extensive negotiations which resulted the above-referenced settlement agreement, which was entered into on or about March 30, 2001. A copy of that Tomyne/Sharbono settlement agreement is attached as Appendix No. 6.

The settlement agreement, among other provisions, required the Sharbonos to bring suit against their insurer Universal by a date certain. Under the terms of the agreement at Paragraph 2 under the heading of "assignment of rights", the defendants (the Sharbonos) "assigned to the plaintiff all amounts awarded against or obtained from Universal" regarding the claims referenced within Paragraphs A and B within the provision. In addition, at Paragraph 3 the Sharbonos were obligated under the heading of "suit against Universal" to initiate a lawsuit against Universal for the purposes of recovering "the amount assigned in Paragraphs 2(A) and 2(B)." Under Provision 3(B), within such suit, the Sharbonos were permitted to bring claims against additional parties "with the exclusion of plaintiffs, (the Tomyne) their legal counsel or the appointed guardians ad litem ..."

As a result of the Tomyne/Sharbono settlement agreement, the Tomyne were paid the one million dollars from Universal's admitted coverage, plus the Sharbonos' automobile liability insurance policy limits of \$250,000.00. As part of the settlement agreement, the Sharbonos

confessed judgment in the amount of \$4,525,000.00, with covenants not to execute, and a forbearance. After payment of the \$1,250,000.00 of the admitted insurance coverages, an amount of \$3,275,000.00 remained due and owing under the terms of the confessed judgment. As indicated by the LINX readout on April 17, 2001, the Trial Court entered an Order Approving the terms of the Tomyn/Sharbono settlement.

B. THE SHARBONO V. UNIVERSAL CASE

As previously indicated, under the terms of the Tomyn/Sharbono settlement agreement, the Sharbonos retained Mr. Gosselin as counsel and filed the lawsuit required under the terms of the settlement agreement. As indicated by the attached LINX printout, the *Sharbono v. Universal* lawsuit was hotly contested and heavily litigated. Significantly, as a result of various pretrial motions and a determinations made during the course of a jury trial, on or about May 20, 2005, a judgment was entered against Universal for amounts totaling \$9,393,298.63. (Supp. CP) (Appendix No. 7). Significantly, under the terms of that judgment, within Paragraphs 1 and 7, amounts were expressly set forth which were to go toward payment of the underlying confessed judgment entered into in the *Tomyn v. Sharbono* case, Pierce County Cause No. 99-2-12800-7. Paragraph 1 of the judgment specifically provided:

1. Judgment is hereby entered in favor of plaintiff 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 at 12 percent/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.

Also significant, the May 20, 2005, judgment also had a separate provision, Paragraph 7, which specifically addressed the continuing accrual of "post judgment interest" on the amounts set forth within Paragraph 1 of the judgment. That provision specifically provided:

7. Amounts awarded pursuant to Paragraph 1 [underlying Tomyn Judgment] shall bear post judgment interest pursuant to RCW 4.56.110(4) and RCW 19.52.02 at the rate of 12 percent per annum. Amounts awarded pursuant to Paragraph 2 through 6 [Sharbono Judgment] shall bear post judgment interest pursuant to RCW 4.56.110(3) at the rate of 5.125 percent per annum.

The judgment of May 20, 2005, was entered **without objection** by Universal's trial counsel, even though it contained on its face, two provisions for the generation of interest relating to the *Tomyn v. Sharbono* confessed judgment.

Universal retained former Supreme Court Justice Philip Talmadge, who filed a Notice of Appeal with respect to such judgment. That appeal ultimately culminated in the Washington State Court of Appeals, Division 2, opinion in *Sharbono v. Universal Underwriters Insurance Company* 139 Wn. App. 383, 161 P. 3d 406 (2007). Mr. Talmadge, on behalf of Universal, sought discretionary review with the Washington State Supreme Court of that opinion, which was denied. See, *Sharbono v. Universal Underwriter Insurance Company* 163 Wn. 2d 1055, 187 P. 3d 752 (2008).

Unfortunately, under the terms of the first Court of Appeals' opinion in this case, those portions of the judgment of May 20, 2005, which specifically related to claims brought by the Sharbonos on their own behalf, were subject to reversal, primarily due to instructional error. However, and what is pertinent to this matter, is that those portions of the judgment of May 20, 2005, (Paragraph 1 and Paragraph 7), which were for the Tomyns' benefit, were affirmed by the Court of Appeals, due to Universal and Mr. Talmadge's failure to assign error to those portions of the judgment:

In conclusion, we affirm the trial court's ruling that the Tomyn-Sharbono settlement is reasonable and that Universal acted in bad faith, as a matter of law, when it refused to produce its underwriting files. We reversed the trial court's summary judgment ruling that umbrella

coverage Part 980 provided personal liability coverage to the Sharbonos and the trial court's determination that Universal violated the CPA. We also reverse the trial court's summary judgment dismissal of Sharbonos' negligence claim against Len Van de Wege. **Finally we vacate the damage Award of \$4,500,000.00 [in favor of the Sharbonos] based on the jury verdict. Because Universal did not assign error to the directed verdict in the amount of \$3,275,000.00, [Tomy principle underlying judgment amount] together with interest, we affirm that judgment and remand for further proceedings.** (Emphasis added).

C. POST-MANDATE PROCEEDINGS

In other words, those portions of the judgments which were specifically designed to compensate the Tomyms for their losses were affirmed on appeal, while the personal claims of the Sharbonos were not. Unfortunately, the Sharbonos then commenced an extremely misguided effort to resurrect victory from defeat by asserting that they were entitled to that which clearly was owed/owned by the Tomyms. (Supp. CP) (Appendix No. 8). Even prior to the filing of the mandate with the Superior Court, (which occurred on August 29, 2008), Mr. Gosselin, on behalf of the Sharbonos, filed a "Motion to Execute" on the appeal bond, which had been undertaken by Universal during the pendency of the appeal. Even prior to the filing of the motion, Mr. Gosselin made it known that the Sharbonos would be taking the rather fanciful position that the post-judgment interest generated from Paragraph 7 of the May 20,

2005, judgment, was the property of the Sharbonos, despite the fact that under the terms of the judgment, the interest accruing under Paragraph 7, directly related to the principal amount owed to the Tomyns under the terms of Paragraph 1, and their prior settlement agreement. As such, personal counsel for the Tomyns had little alternative but to seek intervention on behalf of the Tomyns, into the *Sharbono v. Universal Underwriters* case, in order to protect the Tomyn's interest in the May 20, 2005, judgment, and to ensure compliance with the Tomyn/Sharbono settlement agreement. Ironically, Universal Underwriters resisted such efforts to intervene, contending that the Tomyns' interests, among other things, were being adequately protected by Mr. Gosselin. Despite Universal's opposition on September 5, 2008, Judge Buckner granted the Tomyns' Motion to Intervene.

Thereafter, Judge Buckner addressed the issue of execution on the Tomyns' Judgment and addressed the issue in an order executing on the appeal bond, and who was entitled to what funds from that portion of the judgment of May 20, 2005, which had been affirmed by the Court of Appeals.

Judge Buckner delayed resolution of the interest calculation issue and directed the parties to provide expert CPA analysis with respect to such calculations. Ultimately, on October 3, 2008, Judge Buckner entered

an order setting forth the Trial Court's interest calculations, and rejected Mr. Gosselin's contention that the Sharbonos had an entitlement to any of the interest generated from Paragraphs 1 and 7 of the subject judgment. A copy of this Order is attached as Appendix No.9. (Supp. CP). Despite the fact that a mandate had already issued in the case, **quite significantly, Mr. Gosselin on behalf of the Sharbonos - despite the terms of the Tomyln/Sharbono settlement agreement, filed a "notice of cross appeal" on Judge Buckner's determination that the Tomyns had entitlement to both Paragraph 1 and Paragraph 7 issues or interest, and despite the fact that the interest generated by Paragraph 7, was based on the principal set forth within Paragraph 1 which the Sharbonos agreed, belonged fully to the Tomyns.**

Clearly, from the perspective of the Tomyns, Mr. Gosselin's actions and efforts to acquire funds, to which the Tomyns clearly had an entitlement, raised serious concerns about whether or not the Sharbonos were acting in a manner violative of not only the implied covenant of good faith and fair dealing, but also the express terms of the Tomyln/Sharbono settlement agreement, which precluded the Sharbonos from asserting adverse claims against the Tomyns.

As will become clear below, it cannot be overemphasized that under the terms of Judge Buckner's October 3, 2008, Order, which

confirmed the Tomy's entitlement to those judgment amounts, which were affirmed on appeal, (Paragraph 1 and Paragraph 7), that the accrued interest under Paragraph 7, at that time, totaled \$2,353,956.28. **This is almost an identical amount to what was paid to the Sharbonos under the dubious terms of the Sharbono/Universal settlement agreement which will be discussed below.**

Additionally, Mr. Gosselin's efforts to file a cross-appeal regarding that issue were extremely injurious to the Tomyns' position within the litigation. The two interest generating provisions within the May 20, 2005, judgment appear upon its face. That aspect of the judgment, as indicated within the first Court of Appeals opinion in this case, was not challenged within the first appeal, nor was it an issue raised before the trial court at the time of entry of judgment. Thus, it reasonably could be argued that any challenge to the presence of two interest generating provisions within the judgment had been waived by failing to timely raise such issues within the first appeal. Mr. Gosselin's filing of a notice of a cross-appeal invited the appellate court to exercise its discretion, and review issues which were otherwise waived and/or procedurally barred. In other words, Mr. Gosselin's filing of such cross-appeal only served to emphasize that there was a potential problem with the method and manner in which interest was calculated on the judgment.

As borne out by the record, events which transpired within the case, served to distract and delay efforts to address Mr. Gosselin's actions which were injurious to the Tomyns. As indicated within the LINX readout attached as Appendix No. 3, from the time the initial mandate was issued in the case, the proceedings within the case took on a life of their own, and certainly did not follow what could be characterized as "the norm".

Almost immediately following the Court's determination to execute or the Court's issuance of an order executing on the appeals bond, Universal, through Phil Talmadge, brought a Motion pursuant to CR 60 and RAP 2.5, and launched an assault against that portion of the May 20, 2005, judgment, that had previously been affirmed on appeal. It was quite clear that Universal through Mr. Talmadge, was attempting to generate an order by the Trial Court, which could "open the door" to a challenge of that portion of the May 20, 2005, judgment. Ultimately, Judge Buckner rejected such efforts, and as was the pattern in this case, Universal filed a Notice of Appeal of the Trial Court's orders, rejecting such efforts.

Due to the joint efforts, the Tomyns and Sharbonos convinced the Court of Appeals to limit Universal's efforts at a second round of appeals, to a limited question relating to "calculation of post judgment interest".

All other issues were dismissed by the Court of Appeals as being barred by the previously issued mandate.

In the interim, the Trial Court, at the request of the Intervenors, required that Universal Underwriters, given the peculiarity created by Universal's successive appeals, (and the then-existing economy), required Universal Underwriters to post a cash bond within the Registry of the Court in order to secure a stay pending appeal. That decision of the Trial Court was subject to a motion filed with the Appellate Court under the terms of RAP 8.1(5). Additionally, in June 2009, Intervenor Tomyns were able to acquire from the Trial Court an order disbursing a portion of Universal's funds, which had been posted within the Registry of the Court, for the face amount of Paragraph 1 of the May 20, 2005 Judgment, i.e. \$4,893,298.63. (Appendix No. 10). (Supp. CP).

As indicated by the LINX docketing statement, which is attached as Appendix No. 3, re-trial with respect to the Sharbonos' claims which had been subject to reversal by the first Court of Appeals opinion in this case, was set for September 21, 2009. As is most often the case in civil litigation, as the trial date approached, defendant Universal Underwriters became much more motivated with respect to trying to resolve all Tomyn/Sharbonos matters through a negotiated resolution. To that end, in mid August 2009 the Tomyns, Sharbonos and Universal attended a

mediation session at JDR in Seattle, with retired King County Superior Court Judge George Finkle, as mediator. During the course of that mediation session, the Tomyns and Sharbonos jointly negotiated with Universal. This mediation was a failure.

The failed mediation session with Judge Finkle occurred well in advance of the September 21, 2009 trial date. The Tomyns clearly intended to make dedicated efforts toward a negotiated resolution, while the pressure mounted on Universal to try to resolve the case short of trial.¹ During the course of the failed mediation, nor in the week thereafter, did Mr. Gosselin ever communicate displeasure with the joint negotiation position taken during the course of the Judge Finkle mediation, or indicate that the Sharbonos intended to seek a separate settlement. As a result, we were simply stunned to learn on August 21, 2009, that Mr. Gosselin and Universal had entered into a separate mediated settlement agreement based on negotiations that were kept secret from the Tomyns and their counsel. Mr. Gosselin's revelation regarding the settlement negotiations, from which the Tomyns and their counselor were purposely excluded, prompted an

¹ With respect to the Sharbonos' personal claims, it is noted that clearly the Sharbonos were not in a position of weakness, given the fact that the first jury had awarded them substantial sums of money - over \$4.5 million. In some respects, the Sharbonos' position during the course of re-trial was actually better than it was during the course of the first trial, because the Court of Appeals had reinstated a negligence claim against their insurance agent, Lynn Van De Wege. See, 139 Wn. App. at 423.

exchange of email communications in which counsel for the Tomyns expressed grave concerns with respect to what had transpired.²

D. SECRET NEGOTIATION AND SEPARATE SETTLEMENT

During the course of communications with Mr. Gosselin following his announcement that Universal and the Sharbonos had reached a tentative separate settlement, he refused to disclose or provide any information regarding the details of such settlement, alleging that Universal supposedly desired confidentiality. Such a pronouncement and position taken by Mr. Gosselin created grave concerns with respect to what was then transpiring, and the potential for duplicitous efforts between Universal and the Sharbonos, to undermine the Tomyns' position and entitlements to compensation. As such, and given Mr. Gosselin's refusal to disclose the details of the proposed Sharbonos/Universal settlement, the Tomyns had no alternative but to seek the intervention of Judge Buckner to ensure that the Tomyns' interest were not being compromised^{3 4} (Appendix No. 1). (Supp. CP).

² Under the terms of Pierce County Local Rule 3, which relates to case scheduling, Alternative Dispute Resolution proceedings are mandatory. While the Local Rule specifically mandates judicial settlement conferences, it is a well established tradition within Pierce County, that private mediation can be utilized, (and is by far more effective), in lieu of a judicial settlement conference. Under the terms of Pierce County Local Rule 16, attendance at a settlement conference is mandatory. One can reasonably question the propriety of Alternative Dispute Resolution proceedings (ADR) which does not include all involved parties.

³ Naturally, the Tomyns were extremely mindful that the initial genesis of this case was what the Court of Appeals determined to be Universal's "bad faith as a matter of law", due to Universal's withholding of information. As what appeared to be their practice, once again information was being withheld from the Tomyns, allegedly at Universal's behest.

⁴ Again, it is noted that Judge Buckner was the pre-assigned trial judge in the case, and had handled all proceedings in that matter since 2001. A copy of the Tomyns' Motion to Compel Disclosure of Settlement Negotiations is attached as Appendix No. 12. On September 4, 2009, Judge Buckner issued an Order compelling "disclosure of settlement negotiations terms of

At the hearing on this matter, Judge Buckner, concerned about being subject to a potential disqualification in a case that she had presided over for nearly a decade, left the bench after entering the Order. At that time, in the presence of the court reporter, Mr. Gosselin provided an oral recitation of the facts and circumstances surrounding the previously hidden settlement negotiations between himself and Universal Underwriters. This was the first time that the Tomyns learned that Universal and the Sharbonos had engaged in a second mediation session at JDR with a different mediator, Theodore Spearman. Following the court hearing, Mr. Gosselin emailed a copy of the proposed settlement agreement to the Tomyn's counsel.

In the meantime, counsel for Universal filed yet another Motion for Discretionary Review to the Court of Appeals with respect to Judge Buckner's September 4, 2009, Order to Compel Disclosure. Thus, between Judge Buckner's September 4, 2009, Order to Compel and an October 13, 2009, efforts to acquire a TRO, the following matters were still pending despite the Sharbonos and Universal's purported settlement which resulted in the striking of the trial date:

1. The appeal regarding "calculation of post-judgment interest" and Mr. Gosselin's cross- appeal regarding entitlement to Paragraph 7 interest, was still pending within Division 2 of the Court of Appeals;

proposed settlement". That Order is attached as Exhibit No. 14. The September 4, 2009 Order specifically provided:

ORDERED, ADJUDGED, and DECREED that plaintiff Sharbonos and defendant Universal Underwriters disclose the proposed settlement terms is hereby granted. Plaintiff Sharbonos and defendants Universal and Van De Wege shall provide **full disclosure forthwith**.

2. Universal's Motion for Discretionary Review regarding Judge Buckner's Order compelling disclosure, (which ultimately was granted for review purposes), had been filed; and
3. Phil Talmadge, on behalf of Universal, was still challenging within the Appellate Court, pursuant to RAP 8.1, Judge Buckner's decisions relating to supersedeas and cash bonding.

The first the Tomyns learned of the consummation of a final settlement was when we reviewed a pleading filed by Universal within the Court of Appeals entitled "Reply on Universal's Motion Pursuant to RAP 8.1(h)". We were extremely alarmed when we reviewed the content of that pleading, which was filed as part of a challenge to Judge Buckner's cash supersedeas decision.

Mr. Talmadge within the pleading provided, in part:

Finally, the Sharbonos failed to reveal that Universal and the Sharbonos have a settlement of any claims the Sharbonos may have against Universal apart from the issue now pending before this court, the interest on the May 20, 2005 Judgment. Universal paid \$2.35 million to the Sharbonos from funds separate from those in the registry of the Pierce County Superior Court. This settlement resolves any obligation that Universal has to the Sharbonos, apart from the amount of interest on the May 20, 2005 Judgment. **It is Universal's belief that the range of interest to which the Sharbonos are entitled to under that Judgment is \$900,000.00 to \$1.6 million. That is the amount to which any supersedeas as obligation under RAP 8.1(c) attaches.**

Ultimately, Mr. Talmadge's and Universal's efforts to have the appellate court modify Judge Buckner's supersedeas decisions, (related to the successive appeal), were rejected by the Appellate Court.

Upon review of Mr. Talmadge's appellate pleading, the Tomyns were extremely troubled by its content because Mr. Talmadge appeared to try to create a link between the payment of \$2.35 million to the Sharbonos, as part of their separate settlement, with the amount of funds held within the Registry of the Court as cash supersedeas. The \$900,000.00 to \$1.6 million number referenced within Mr. Talmadge's pleading made very little sense, unless Universal was claiming some kind of set off and/or reduction based on the amounts paid to the Sharbonos as part of their settlement agreement.⁵ As discussed in the footnote below, Mr. Talmadge's assertions regarding the potential amount of interest due and owing made no sense without a credit being applied toward the amount within the Registry of the Court. While he did not directly say so, it appears that Mr. Talmadge, in a rather confusing fashion, was trying to create such an impression within his appellate pleading.⁶

⁵ On March 4, 2011 Judge Buckner following the conclusion of the interest calculation appeal, entered an order disbursing an additional \$2,879,936.30 to the Tomyns for satisfaction of Universal's obligations under the terms of the May 20, 2005 Judgment, and the trial court's October 3, 2008 Order, which was affirmed within the second published opinion in this case. See, *Sharbono v. Universal Underwriters*, 158 Wash. App. 963, 973–74, 247 P.3d 430 (December 17, 2010). Such an amount remained due and owing despite the fact that the published Court of Appeals opinion regarding interest substantially reduced (by approximately \$1.8 million) of potential interest payments under the terms of Paragraph 1 and 7 of the May 20, 2005 Judgment. It is the Tomyns' firm opinion, that had Mr. Gosselin not filed his cross-appeal, which was rejected out at hand by the appellate court, such a reduction simply would not have occurred.

⁶ The position taken within Mr. Talmadge's pleading is internally inconsistent, because in one sense he is saying that the Sharbonos settlement was from funds unrelated to those funds within the Registry of the Court, while at the same time he is indicating that Universal was entitled to some kind of a credit for settling with the Sharbonos. As is self-evident, the amount within the registry of the court had nothing to do with any of the Sharbonos' personal claims because the judgment in their favor had been reversed within the first appeal. The only matters which were subject to the cash supersedeas would have been the underlying Paragraph 1 Judgment, and its related interest, plus the interest generated from Paragraph 7 in favor of the Tomyns. It is noted that by the time these events were occurring, the litigation was approaching a ten-year vintage. There had already been one mandate entered affirming the Judgment, yet Universal failed to

Shortly after reviewing Mr. Talmadge's appellate pleading, Mr. Gosselin forwarded a copy of the final Sharbono/Universal settlement agreement. Upon review of the settlement agreement, the Tomyns' concerns regarding the propriety of what was occurring and the undermining of the Tomyns' interests, were increased. Although the Sharbonos/Tomyn settlement agreement purports to preserve, and work around the existence of the Tomyn/Sharbonos settlement agreement, from the Tomyns' perspective it was clearly violative of the Tomyn/Sharbono settlement agreement, and the implied covenant of good faith and fair dealing. Under the terms of the settlement agreement, Mr. Gosselin essentially "switched sides", in that he now was obligated to pursue matters directly for the benefit of Universal Underwriters. Paragraph 6 of the Sharbonos/Universal settlement agreement, which is attached as Appendix No. 13, provides at Paragraph 6:

The parties [Sharbonos and Universal] 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 2, Case No. 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 payment described in Paragraph 7 below, the Sharbonos promise that to the extent that the cross appeal results in the payment or**

voluntarily make any payment on such amounts which were clearly due and owing. Thus, the high supersedeas amount ordered by Judge Buckner was certainly reflective of the fact that the underlying case involved litigation for which there was no clear end in sight.

Award to the 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.
(Emphasis added)

Further, Paragraph 7 of the Sharbonos/Universal settlement agreement again provides a direct link between the payment of \$2.35 million to the Sharbonos to the amounts set forth within Paragraph 7 of the May 20, 2005 Judgment, which the Trial Court, (an ultimately the Court of Appeals), had previously ordered paid to the Tomyns:

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

What should be glaringly apparent, on review of these facts, is that the Sharbonos, despite the fact that the jury had previously evaluated their claims to be worth in excess of \$4.5 million, agreed to settle with Universal for an amount which is **nearly identical** to the amount awarded to the Tomyns as Paragraph 7 interest by the Trial Court within its October 3, 2008, order. (It is the exact same number without additional interest, rounded down). Under the terms of their settlement agreement, the Sharbonos were agreeing to make efforts to undermine the Tomyns' entitlement to the Paragraph 7 interest, and depending on the ultimate outcome of the interest appeal, were procuring that amount for themselves only to return it to Universal in exchange for the settlement funds.

**E. MOTION FOR TEMPORARY RESTRAINING
ORDER TO MAINTAIN STATUS QUO**

Stunned by the profound bad faith perpetrated by the Sharbonos through their counsel, Mr. Gosselin, the Tomyns viewed it as absolutely necessary that efforts be made to preserve the status quo in order to protect the Tomyns' interest. On October 13, 2009, the Tomyns sought an ex parte TRO, which Mr. Gosselin references within his grievance materials.

On October 13, 2009, at the direction of the presiding department, the Tomyns presented to Judge Culpepper with our TRO paperwork. Upon arrival at Judge Culpepper's courtroom, he was provided full and complete copies of the Tomyns' written materials for his review. Following his review of such materials, Judge Culpepper took the bench and closely questioned the Tomyns' counsel, with regard to the temporary restraining order that we were seeking.

Attached as Exhibit No. 18 is the TRO and Order to Show Cause signed by Judge Culpepper. As indicated on its face, the Order expeditiously placed the matter before Judge Buckner on October 16, 2009, only three days later. Judge Culpepper also ordered the filing of a \$2,500.00 injunction bond.

On October 16, 2009, Judge Buckner heard extensive argument regarding Plaintiff's Motion for a Restraining Order, and request that the Sharbonos/Universal settlement funds be deposited in the Registry of the Court. Ultimately, Judge Buckner determined that the presence of the above-referenced cash supersedeas was sufficient, thus resulting in her determination that plaintiff

could not establish the existence of "irreparable harm" to continue the TRO, (See, Exhibit No. 19 - Order Quashing TRO).

Significantly, Judge Buckner also found that although she was not inclined to provide injunctive relief, efforts seeking such relief were reasonable under the circumstances. She specifically rejected Mr. Gosselin's effort to execute on the injunction bond which we had filed, and denied his request for an award of costs and attorney's fees, (See, Exhibit No. 20, Judge Buckner's Order Denying Forfeiture of Security, Damages and Attorney's Fees). Thus, Judge Buckner has already considered Mr. Gosselin's concerns, and found, despite her reluctance to provide injunctive relief, Tomyns' efforts in seeking it was entirely reasonable.

Again, it is noted, that Judge Buckner has presided over this case since the year 2001.

Following the denial and injunctive relief, the Tomyns still had substantial concerns with respect to Mr. Gosselin's actions. As a result, the Tomyns enlisted the aid of renowned legal ethicists, Professor John Strait, and former Seattle University Dean, David Boerner. Their opinions were reduced to declaration form.

On December 22, 2009, that motion was heard by Judge Buckner. It is recalled that Judge Buckner provided an extended amount of time for argument, and took the issue very seriously. ⁷ Ultimately, Judge Buckner denied

7

Apparently, due to a service error, the Declaration of John Strait was not before Judge Buckner at that hearing.

Intervenor's Motion to Disqualify Mr. Gosselin, observing that it was her opinion that the Tomyns were intended third-party beneficiaries of Mr. Gosselin's legal services, but a claim for damages for breach of contract was the appropriate remedy, and not disqualification of Mr. Gosselin as the Sharbono's counsel.

Given concerns regarding Judge Buckner's failure to consider Professor Strait's declaration we filed a Motion for Reconsideration of this ruling on December 31, 2009.⁸

Believing strongly that Mr. Gosselin did have a lawyer's obligation to the Tomyns, under the circumstances of this case, the Tomyns filed a Notice of Appeal with respect to that issue.

While that matter was pending, we finally received a decision from the Court of Appeals, Division II, on the calculation of interest issue, which also addressed the Tomyns' entitlement to all the interest accrued from the May 20, 2005 judgment. Within the calculation of interest decision, at 158 Wn. App., at pages 973-74, the Court of Appeals rejected Mr. Gosselin's contentions that the Sharbonos somehow had entitlement to the interest generated from the monies which were due and owing to the Tomyns:

8

Oddly, even though Mr. Gosselin was successful in acquiring an order denying the Intervenor's motion to disqualify him from the case, he nevertheless filed a Notice of Appeal with the Court of Appeals regarding Judge Buckner's ruling. According to Mr. Gosselin, even though he was successful in resisting the Tomyns' effort to disqualify him from the case, he nevertheless felt "aggrieved" by Judge Buckner's observations that the Tomyns were a third-party beneficiary of his services and that a damage claim was appropriate as opposed to disqualification. As indicated within the most recent unpublished Court of Appeals opinion issued in this case, which is attached at Appendix No. 2, Mr. Gosselin's misguided effort to appeal an order on a matter which he prevailed, was dismissed by a Court of Appeals Commissioner, which held that the Sharbonos were not aggrieved parties "since the possibility of future litigation based on the Trial Court's comments is speculative".

On cross-appeal, the Sharbonos argue that they, not the Tomyns, are entitled to the post 2005 judgment interest accruing on the judgment against Universal. We disagree. In their settlement of the Tomyn's lawsuit against them, reduced to judgment in 2001, the Sharbonos assigned to the Tomyns "the benefits payable and the liability insurance policy, which because of an act of bad faith, Universal estopped to deny or deem to have sold to [the Sharbonos].

This assignment included the post judgment interest payable on a judgment arising from those benefits. We find unpersuasive the Sharbonos' argument that they're entitled to interest. The purpose of interest is to provide compensation for the "lost value of money" to the party to whom it was properly attributable. Here, the judgment and, thus, the interest were "properly attributable" to the Tomyns, not the Sharbonos. Accordingly, we affirmed the Trial Court's designation of the Tomyns as recipients of all judgment interest. (Citations omitted).

(Exhibit No. 2).

As previously touched upon, due to the Court of Appeals' recalculation of interest, which was invited in part by Mr. Gosselin's cross-appeal, the amount of interest ultimately paid to the Tomyns was **substantially** reduced from the Trial Court's initial calculations, which were predicated upon the plain language of the May 20, 2005 judgment. Essentially the interest generated under paragraph 1 of the judgment from May 20, 2005, was removed by the Court's published opinion. The Tomyns position on this issue is hardly disrespectful of the Appellate Court's opinion on interest as suggested by Mr. Gosselin at page 16, footnote 4 of Appellant's Opening Brief. The Court's published opinion on interest correctly sets out the methodology for calculating interest. The Tomyns' point, as discussed below, is that there also was a reasonable basis for the Appellate Court

to decline to even address such an issue post-mandate, due to waiver principles, that was undermined by the Sharbonos' bad-faith conduct.

Of further interest, is that on March 22, 2011, the Court of Appeals issued an unpublished decision regarding Judge Buckner's order compelling disclosure of the Sharbono/Universal settlement negotiations and agreement.

Judge Armstrong, in his unpublished opinion, first noted that the issues were actually "moot", and made the following observations:

Here, the Sharbonos were involved in a unique contractual relationship with the Tomyns, arising out of the Tomyn/Sharbono settlement agreement. Because the Sharbonos were suing Universal to satisfy the confessed judgment they owed the Tomyns, the Sharbonos were not merely representing their own interest in the proceeding; it appears that they also had some duty to protect the Tomyns' interest as well. Because the issue is whether it was proper to compel disclosure under these unique circumstances, it is unlikely to reoccur, we decline to review this moot issue.

(Appendix No. 1).

It is noted that after the issuance of the published opinion relating to the calculation of interest, Universal did not pursue any additional avenues of appellate relief on that issue.

Thus, at the end of 2011, Intervenor Tomyns began filing motions for disbursal of funds and negotiating with counsel for Universal, Jacquelyn Beatty, regarding the calculation and payment of the funds due and owing to the Tomyns. Ultimately, as indicated above, an order was entered on March 4, 2011, disbursing

to the Tomyns the interest accrued after May 20, 2005, which had not been previously paid.

At this time, Mr. Gosselin demanded a “full satisfaction of judgment” of the confessed judgment, which had previously been filed regarding the Tomyn/Sharbono settlement agreement. On March 4, 2011, the Trial Court declined to direct counsel for Tomyns to enter into a “full” satisfaction of judgment because it was far from clear as to whether or not the Sharbonos, (due to breach of the agreement with the Tomyns), owed additional monies to the Tomyns. In other words, Judge Buckner was not inclined to enter such a ruling and could not find that the Sharbonos had fully complied with all of their obligations under the terms of the Tomyn/Sharbono settlement agreement.

The Sharbonos appealed that order.

III. ARGUMENT

A. Standard of Review and Relevant Burdens of Proof.

A diligent review of available legal research resources has not disclosed what, if any, standard of review would be applicable to the matter which is currently before the Court. Appellant's brief is silent with respect to such an issue.

It is noted that what is at issue here is a question relating to the trial court's management of a case which has come before it. It is suggested that the most analogous matters are subject to review by the appellate court under an abuse of discretion standard. See, for example, *Howard v. Royal Specialty Underwriting*,

Inc., 121 Wn. App. 372, 379, 89 P.3d 265 (2004), (issues relating to the scope of discovery and motions for continuance are reviewed under an abuse of discretion standard); see also, *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1990), (a court's orders regarding motions to amend pleadings is reviewed under an abuse of discretion standard; *Blair v. Ta-Seattle East No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011) (trial court sanctions for discovery violations are reviewed for an "abuse of discretion").

It is suggested that an abuse of discretion standard also should be applied to the question of whether or not the trial court was within its prerogatives in refusing to enter a full satisfaction of judgment. Such an issue involves matters which, particularly in this case, are uniquely within the purview and knowledge of the trial court and should not be subject to the second guessing by the appellate court. As discussed in the case of *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010), (a case which involved the review of a trial court's evidentiary rulings), an abuse of discretion standard is extremely deferential to a trial court's determination:

Discretion is abused when it is exercised on untenable grounds or for untenable reasons. Thus, even where an appellate court disagreed with the trial court, it may not substitute its judgment for that of the trial court unless the basis for the trial court's ruling is untenable. An errant interpretation of the law is an untenable reason for a ruling. (Citations omitted).

Further, even if we assume arguendo that a standard other than a "abuse of discretion standard" has application in this case, the procedural vehicle utilized by the Appellant, in attempt to have what are essentially issues of fact resolved by

the trial court is somewhat problematic. Typically a party seeking resolution of factual issues, as a matter of law, is obligated to file a motion pursuant to CR 56 for summary judgment. Of course, CR 56 motions must comport with very particularized standards. See, *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (listing various rules). Here, the Appellant utilized the vehicle of essentially a motion to compel the entry of a satisfaction of judgment. Ultimately the trial court determined that factual issues precluded entry of such an order. Instead of seeking an evidentiary hearing where factual issues could be resolved, the Appellants filed this appeal.

Typically motions for summary judgment are reviewed *de novo*, with all the facts and inferences construed in a manner most favorable to the non-moving party, which here would be the respondent Tomyns. See, *Hadley v. Maxwell*, 144 Wn.2d 306, 308, 27 P.3d 600 (2001); *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 381, 460 P.3d 789 (2000).

A settlement agreement is interpreted the same as a contract. See *McGuire v. Bates*, 169 Wn.2d 185, 188-89, 234 P.3d 205 (2010). Generally, the parties seeking enforcement of a contract has the burden of proving performance of any and all express conditions precedent. See, *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 557, 703 P.2d 1340 (1987). As the supreme court stated in *Ross v. Harding*, 64 Wn.2d, 231, 237, 391 P.2d 526 (1964) "proof of performance of an express condition precedent is a burden which must be met by a party who seeks enforcement of a contract '... a plaintiff, in order to maintain an action on the contract must have complied with the conditions present precedent contained

therein. That is to say, a breach by a plaintiff a material condition precedent relieves the defendant of liability under the contract.'" See also *State v. Trask*, 91 Wn. App. 253, 273-74, 957 P.2d 781 (1998).

Additionally it is noted by way of burden of proofs, generally the question of payment, involves questions relating to affirmative defenses. CCR 8(c). While what is not directly at issue is a "affirmative defense" of payment, the existence of such proposition as a "affirmative defense" is suggestive that the burden of proof clearly was upon the Sharbonos in this case to establish in fact payment in full.

As discussed below, there clearly were outstanding factual issues that could not simply be resolved on a "motion to compel" with respect to whether or not the Sharbonos had fully complied with all of their obligations under the terms of the Tomyne/Sharbono settlement agreement, particularly as it relates to the implied covenant of good faith and fair dealing.

Finally by way of preliminary considerations, the Tomyne are in full agreement with Universal Underwriters, that its entitlement to full satisfaction of judgment in this case, is an entirely separate issue as to whether or not the Sharbonos are entitled to a full satisfaction of judgment under the terms of the Tomyne/Sharbono settlement agreement. Universal Underwriters, was not a party to the Tomyne/Sharbono settlement agreement. Further, Universal Underwriters fulfilled all its obligations under the terms of the May 20, 2005 Judgment, and the opinion of this Court which is now set forth at 158 Wn. App. 963, 247 P.3d 430 (2010). While the Tomyne are not particularly pleased with respect to certain actions on the part of Universal Underwriters, before, and during the subject

litigation, and are in fact very troubled by certain aspects of Universal's actions, such concerns, are entirely separate and apart from the very limited question presented in this appeal, i.e., whether or not under the terms of the Tomy/Sharbono settlement agreement, the Sharbonos are entitled to entry of a full satisfaction of judgment. As discussed in more detail below, the Trial Court was correct in finding that due to outstanding factual issues regarding compliance with that agreement, the Sharbonos clearly were not entitled to entry of a full satisfaction, at the time in question.

B. The Sharbonos Violated the Implied Covenant of Good Faith and Fair Dealing.

As this Court is no doubt aware within every contract there is an implied covenant of good faith and fair dealing. See, generally, *Edmonson v. Pop Choi*, 155 W. App. 376, 386, 228 P.3d 780 (2010). The implied covenant of good faith and fair dealing contained in every contract, requires mutual cooperation so that each party may enjoy the full benefit of performance. At its essence, the implied covenant of good faith and fair dealing ensures that a party to a contract do not interfere with the other party's ability to get the full benefit of the contract. See, *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 357, 662 P.2d 385 (1983). Further, when a party only partially performs a contract they are only entitled to the benefit and/or payment for such partial performance. See, *DuColon Mechanical, Inc. v. Shinstein/Forness, Inc.*, 77 W. App., 707, 893 P.2d 1127 (1995).

In this case, it is clearly the Tomyns' position that the Sharbonos were not and are not entitled to full satisfaction of judgment in this case due to their breach

of the implied covenant of good faith and fair dealing, which has resulted in partial performance of a Sharbono/Tomyn settlement agreement, but not full performance. Specifically, under the terms of the agreement, the Sharbonos were promising to pursue a lawsuit on the Tomyns' behalf so that they could receive the assigned rights/benefits.

Under Paragraph 2 of the subject contract which included at Paragraph "B", "the benefits payable under any liability insurance which because of an act of bad faith, Universal is estopped or denied or deemed to have sold to respondents". Naturally such provisions would include any award of "presumptive damage" which is measured by the terms of the confessed judgment that was entered into as part of the Tomyn/Sharbono settlement agreement, plus any interest generated thereby.

Up until the issuance of the first mandate in this case, following the first round of appeals herein, the Sharbonos through Mr. Gosselin complied with their obligations under the terms of the Tomyn/Sharbono settlement agreement. However once the mandate was issued, clearly such performance became only partial in the sense that the Sharbonos made "a grab for the money" when Mr. Gosselin on their behalf started asserting a position on behalf of the Sharbonos that they were entitled to the interest generated from Paragraph 7 of the May 20, 2005 Judgment, which in and of itself was interest generated from Paragraph 1 which specifically reference the assigned benefits to the Tomyns under the terms of the Tomyn/Sharbono settlement agreement.

As a result, the Tomyns had no other alternative but to intervene into this lawsuit in order to protect their own interests from the obvious overreaching of the Sharbonos, which clearly were intended to deny the Tomyns the full benefit of their bargain. As conclusively already determined by this Court, the notion that one could separate the interest from a principal amount and try to make it something other than what it was, is simply a preposterous proposition.

Ultimately the fanciful position taken by the Sharbonos was resoundingly rejected by the trial court in its October 3, 2008, Order which did two things, it calculated interest based on the plain language of both Paragraph 1 and 7 of the May 20, 2005 Judgment and also made a determination that those amounts belong to the Tomyns. Despite the trial court's rejection of such a spurious position the Sharbonos compounded their bad faith, by filing a cross-appeal with respect to the entitlement aspect of that Order, after Universal had also appealed the interest calculations.

Such circumstances were further compounded by the fact that such shenanigans were occurring at an extremely sensitive point in the litigation. As reflected by the records and files herein, such events were all occurring post-mandate. It was post-mandate in a case where the underlying defendant, Universal Underwriters had failed to assign error to any matters relating to Paragraph 1 and Paragraph 7 of the May 20, 2005 Judgment. Further, if one actually examines the record which was before the appellate court even prior to rendering such a determination it is noted that the May 20, 2005 Judgment was entered by the trial court without objection by Universal Underwriters with

respect to the content and/or language of both Paragraphs 1 and 7, which **on their face** both provide for the generation of interest.

Thus, at the time that Mr. Gosselin was filing a cross-appeal, there were substantial arguments available both to the Sharbonos and the Tomyns that any effort on Universal's behalf to challenge the two interest-generating provisions to appear on the face of the May 20, 2005 Judgment was procedurally barred under a number of theories. First of all the existence of two interest-generating provisions within the May 20, 2005 Judgment, as it related to the Tomyns' confessed judgment emanating out of the Tomyne/Sharbono settlement agreement was arguably beyond appellate reach because the issue had not been initially raised at the time of the entry of the May 20, 2005 Judgment, was entered, and generally issues raised for the first time on appeal are untimely. See generally, *Bennett v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990).⁹

As noted in a number of cases including *Davis v. Davis*, 71 Wn.2d 607, 609, 134 P.2d 464; *State v. Bauers*, 25 Wn.2d 925, 930, 172 P.2d 279 (1946); *State v. Bradfield*, 29 W. App. 679, 630 P.2d 494 (1981), the appellate courts within the State of Washington are committed to the following proposition:

⁹ As explained in *Bennett v. Hardy*, ultimately under the terms of RAP 2.5(a) appellate courts are afforded substantial discretion as to what issues they may or may not consider, even though otherwise doctrinally or procedurally barred. Additionally, because Universal had failed to raise the issue during the course of the first appeal and it failed to assign error to any aspect of the Paragraph 1 and 7 judgment, and its underlying predicates, consideration of the trial court's calculation of interest from the facial language of Paragraph 1 and Paragraph 7 would be barred under the terms of the "law of the case" doctrine. Generally under the terms of the law of the case doctrine once an appellate holding enunciates a principal law that holding must be followed in all subsequent stages within the same proceeding. See, *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The purpose of the law of the case doctrine is both finality and efficiency in the judicial process. See, *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008).

This court from the early days has been committed to the rule that questions determined on appeal or questions which might have been determined had they be presented, will not be again considered on a subsequent appeal in the same case.

However, despite such a clear rule of law, Universal did exactly that, **it** raised an issue i.e. the existence of two interest-generating provisions, within **the** May 20, 2005 Judgment , which should have been raised during the course of **the** first appeal had there been a proper record made before the trial court. It is **noted** that even constitutional issues which could have been raised in a first **appeal** cannot be raised for the first time in a second. *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993); *State v. Kilgore*, 141 W. App. 817, 172 P.3d 373 (2007) (dismissal of appeals and appropriate remedy for abuse of efforts to file a **second** appeal).

Further, presumptively Universal's efforts to challenge the trial court's application of interest calculations would have been barred under the **mandate** rule, because generally orders which simply are enforcing the terms of **the** mandate are not per se appealable. See, *Asher v. Allyn*, 132 W. App. 371, 378, 131 P.3d 339 (2009). See also RAP 12.2.¹⁰

¹⁰ Following Universal's appeal regarding the October 3, 2008 Order it made substantial efforts to have the affirmed portion of the May 20, 2005 Judgment overturned by the Trial Court by way of a procedurally irregular CR 60 motion. Failing in such efforts Universal filed yet another notice of appeal which was consolidated into the appeal relating to the October 3, 2008 Order. It is noted that generally once a mandate has issued a Superior Court no longer has jurisdiction to consider a CR 60 motion to vacate its own judgment which had previously been affirmed on appeal. *Thomas v. Bremer*, 88 W. App. 728, 949 P.2d 800 (1997). Further even if the trial court had the authority to entertain a CR 60 motion any appeal would be limited to the propriety of the denial of such a motion. See, *Bjurstrom v. Campbell*, 27 W. App. 449, 618 P.2d 533 (1980).

Although the Court of Appeals ultimately in the interest-related appeal, limited that appeal to "calculation of post-judgment interest", based presumptively on application of the above-referenced procedural bars, it is suggested that even that issue, was entertained by the appellate court solely as a by-product of its residual discretion under RAP 2.5(a). Given the existence of the numerous procedural bars, referenced above, it is respectfully submitted that such a position is "supportable" and reasonable.

As recognized by the trial court, the fact that Mr. Gosselin, had filed a cross-appeal with respect to allocation and/or entitlement only served to underscore that there was a potential "problem" worthy of appellate review, even though arguably such review was otherwise doctrinally and procedurally barred.

While perhaps one could argue that any damages from such breach, beyond the need for the Tomyns to intervene, with its associated costs and attorney's fees, are "unsupportable" it is hard to see how proof of damages for such actions, would be any different than that applicable in the attorney malpractice context where an attorney has engaged in appellate error. As the Court is no doubt aware, in the appellate malpractice context, cause in fact is predicated on the notion that had certain conduct not occurred there would have been a positive result or a better result on appeal. See, *Daugert v. Pappas*, 104 Wn.2d 254, 258-60, 704 P.2d 600 (1985). Ultimately cause in fact under such circumstances generally involves an issue of law which is decided by the trial court in the first instance. *Id.*, at 259. Here, Judge Buckner, implicitly recognized the damage caused by the Sharbonos' appellate actions, when she observed:

I will be denying the request for full satisfaction, but granting your request for partial satisfaction of judgment, because, again, I see that with regard to that cause of action, the first one, that there were issues that were — decisions that I made that were reversed by the court of appeals. So I think there would have been more money here for the Tomyns under these circumstances. (RP 3/4/11 at 16).

Further, as indicated above there are certainly outstanding issues as to whether or not the Sharbonos complied with the actual terms of the settlement agreement in that under its terms they were precluded from making claims against the Tomyns. Clearly, the actions of the Sharbonos in seeking monies that clearly belonged to the Tomyns, would be a form of an adverse "claim", thus violative of the express terms of the settlement agreement.

In any event, as the trial court correctly concluded there clearly are and were outstanding factual issues with respect to whether or not the Sharbonos had fully performed under the terms of the Tomyn/Sharbono settlement agreement, which otherwise would entitle them to full satisfaction of judgment. Such issues ultimately should be resolved by way of an evidentiary hearing in front of Judge Buckner and/or can be resolved through a separate lawsuit.¹¹

C. Until Outstanding Issues Regarding Breach/Performance by the Sharbonos Have Been Resolved, the Tomyns Should Not Be Required to Provide the Sharbonos a Full Satisfaction of Judgment.

The Tomyns respectfully disagree with the Sharbonos with respect to whether or not providing a full satisfaction of judgment to the Sharbonos would

¹¹ There are also outstanding issues with respect to the method and manner in which the Sharbonos went about settling their alleged "retained claims" which also served to undermine the Tomyns from receiving the full benefit of their bargain. It is noted that under the terms of the Sharbono/Universal settlement agreement the Sharbonos were literally tasked with undermining the Tomyns' position with respect to entitlement to Paragraph 7 interest with a goal that was clearly beneficial to Universal.

undermine and/or preclude the Tomyns from further addressing the Sharbonos' breach of contract and/or bad-faith performance. The case of *Do v. Farmer*, 127 W. App. 180, 189, 110 P.3d 840 (2005) is highly distinguishable. In that case, the appellate court simply addressed unique issues relating to the operation of the mandatory arbitration rules and when an entitlement to MAR 7.3 attorney fees accrues. Here, the practical effect of what the Sharbonos seek, is a determination of the trial court that the Tomyns have received all that they are entitled to. Ultimately what they are seeking, is satisfaction of "a confessed judgment", which presumptively then could be used as a basis for an argument that any further claims on behalf of the Tomyns regarding performance of the subject contract by the Sharbonos would have preclusive effect either under the doctrine of res judicata and/or collateral estoppel. See, *Stevens County v. Futurewise*, 146 W. App. 493, 502, 192 P.3d Page 1 (2008) (the doctrine of res judicata bars parties from re-litigating claims that were raised or could have been raised in earlier action); See also, *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987) (discussing elements of collateral estoppel).

Here what the Sharbonos are seeking is a satisfaction of judgment thus effectually rendering the confessed judgment final. If in fact the Sharbonos do not intend to use the confessed judgment in such a manner, and intends to waive in the future any such assertions, in reply they should clearly state so.

CONCLUSION

The Trial Court did not abuse its discretion by refusing to enter in a full satisfaction of judgment because there remains outstanding issues as to whether or

not the Sharbonos breached/fully performed their obligations under the terms of the Tomyň/Sharbono settlement agreement. Ultimately whether such misconduct occurred, should, at a minimum, resolved in an evidentiary hearing before the Trial Court, and/or through separate litigation.

The Sharbonos have the burden of proving performance, and/or entitlement to a full satisfaction, and even if it is an issue subject to "*de novo*" review, factual issues precluded the relief they were seeking. Thus for the reasons stated above the decisions of the trial court should be affirmed and/or this matter remanded for an evidentiary hearing.

DATED this 27th day of October, 2011.

A handwritten signature in black ink, appearing to read "Paul Lindenmuth", written in a cursive style.

Paul Lindenmuth, WSBA# 15817
Of Attorneys for Respondents

RECEIVED
OCT 27 2011
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

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

JAMES and DEBORAH SHARBONO, individually and the marital
community comprised 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

CERTIFICATE OF SERVICE

Ben F. Barcus, WSBA # 15576
Paul A. Lindenmuth, WSBA# 15817
The Law Offices of Ben F. Barcus & Associates, PLLC
4303 Ruston Way
Tacoma, WA 98402
253-752-4444

On October 27, 2011, a true and correct copy of:

**SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
(COURT OF APPEALS AND SUPERIOR COURT) AND BRIEF OF
RESPONDENTS**

was served on the following:

By regular U.S. mail:

Jacquelyn A. Beatty
Karr Tuttle Campbell
1201 Third Avenue, Ste. 2900
Seattle, WA 98101-3284

By hand delivery:

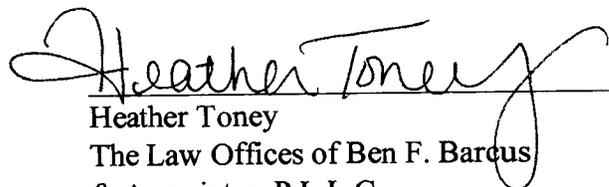
Timothy R. Gosselin
1901 Jefferson Ave., Ste. 304
Tacoma, WA 98402-1611

Copy filed via hand delivery.:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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: October 27, 2011



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

Appendix 1

Westlaw.

Page 1

Not Reported in P.3d, 160 Wash.App. 1036, 2011 WL 986043 (Wash.App. Div. 2)
 (Cite as: 2011 WL 986043 (Wash.App. Div. 2))

H
 NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington, Division 2.
 James and Deborah **SHARBONO**, individually and
 the marital community comprised thereof, Re-
 spondents,

v.

UNIVERSAL UNDERWRITERS INSURANCE
 COMPANY, a foreign insurer, Appellants,
 and

Len Van De Wege And "Jane Doe" Van De Wege,
 individually and the marital community comprised
 thereof, Defendants,
 and

Clinton L. Tomy, individually and as Personal
 Representative of the Estate of Cynthia L. Tomy,
 deceased; and as Parent/Guardian of Nathan
 Tomy, Aaron Tomy, and Christian Tomy, minor
 children, Intervenors.

No. 39781-1-II.
 March 22, 2011.

West KeySummaryAppeal and Error 30 
 781(1)

30 Appeal and Error
 30XIII Dismissal, Withdrawal, or Abandonment
 30k779 Grounds for Dismissal
 30k781 Want of Actual Controversy
 30k781(1) k. In General. Most Cited
 Cases

Due to the unique circumstances of a case in
 which family of motorist killed in collision with in-
 sureds sought to compel disclosure of the proposed
 settlement terms between insureds and insurer re-
 garding the amount of liability coverage for the ac-
 cident, the issue was unlikely to recur, and thus re-
 view of the moot issue was not warranted. Because
 insureds were suing insurer to satisfy the confessed
 judgment they owed the family of motorist, in-

sureds were not merely representing their own in-
 terests in the proceeding; it appeared that they also
 had some duty to protect motorist's family's in-
 terests as well. The issue presented was whether it
 was improper to compel disclosure under these
 unique circumstances.

Appeal from Pierce County Superior Court; Hon.
 Rosanne Nowak Buckner, J.
 Philip Albert Talmadge, Emmelyn Hart, Talmadge/
 Fitzpatrick, Tukwila, WA, Jacquelyn A. Beatty, At-
 torney at Law, Seattle, WA, for Appellants.

Benjamin Franklin Barcus, Paul Alexander Linden-
 muth, Ben F. Barcus & Associates PLLC, Tacoma,
 WA, for Respondents Intervenor(s).

UNPUBLISHED OPINION

ARMSTRONG, J.

*1 James and Deborah **Sharbono** sued Univer-
 sal Underwriters Insurance Company to establish
 the amount of their coverage for an auto accident
 that a family member caused. The parties reached a
 proposed settlement following mediation. Interven-
 or Clinton Tomy, whose wife died in the accident,
 moved to compel disclosure of the proposed settle-
 ment terms. The trial court granted the motion and
 Universal sought discretionary review, arguing that
 the disclosure order violated the mediation commu-
 nication privilege under the Uniform Mediation Act
 (UMA), chapter 7.07 RCW. The Tomyns counter
 that this issue is moot because the settlement is now
 final and they have received a copy of the agree-
 ment. We agree and decline to review the issue be-
 cause of the unique facts leading to the trial court's
 ruling compelling disclosure.

FACTS

On December 11, 1998, Cassandra **Sharbono**
 hit a car driven by Cynthia Tomy, causing Cyn-
 thia's death. Her husband, Clinton Tomy, sued
 Cassandra and her parents, James and Deborah
Sharbono. Clinton sued individually, as the per-

Not Reported in P.3d, 160 Wash.App. 1036, 2011 WL 986043 (Wash.App. Div. 2)
(Cite as: 2011 WL 986043 (Wash.App. Div. 2))

sonal representative of his wife's estate, and as the guardian of their children. The Tomyns and the Sharbonos settled, with the Sharbonos agreeing to confess judgment for \$4,525,000 and to sue Universal to recover insurance proceeds to satisfy the judgment amount. The Sharbonos prevailed against Universal at trial and Universal appealed. We reversed several trial court rulings on the extent of coverage and an award for bad faith damages. See *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wash.App. 383, 388-93, 424, 161 P.3d 406 (2007).

On remand, the Tomyns moved to intervene as a party in the action. Universal moved to limit the Tomyns' intervention to the ongoing dispute over the calculation of interest on a portion of the judgment that we affirmed. See *Sharbono*, 139 Wash.App. at 424, 161 P.3d 406. Universal argued that the Tomyns had no standing to participate in the remaining dispute over bad faith damages because the Sharbonos had expressly retained bad faith claims for themselves in the TomynSharbono settlement. The trial court allowed the Tomyns to intervene to protect their interest in the affirmed judgment.

On August 11, 2009, the Sharbonos, the Tomyns, and Universal participated in an unsuccessful mediation session. On August 18, the Sharbonos and Universal separately mediated and agreed to a proposed settlement. The Sharbonos' counsel then notified the Tomyns' counsel that they were working on finalizing the settlement agreement. The Tomyns were surprised the Sharbonos would settle without including them in the negotiations and demanded full disclosure of the proposed agreement. Universal and the Sharbonos refused.

The Tomyns moved to compel disclosure of the negotiations and proposed settlement terms, expressing concern that the settlement might impact their interests. Universal opposed the motion, arguing that the settlement negotiations were protected from disclosure under the UMA. The trial court granted the Tomyns' motion, ruling:

*2 I understand that we are talking about settlement of the Sharbonos' claims. However, the Sharbonos' claims do arise from the wrongful death of Cynthia Tomy. Under these circumstances, that substantially outweighs the interest in protecting the confidentiality under the mediation statute, and I will grant the request to compel disclosure of the settlement negotiations.

Report of Proceedings (RP) at 27. After further argument and requests to clarify the scope of the order, the trial court ruled: "I'll just require disclosure at this point of proposed settlement terms without drafts." RP at 37. The Sharbonos' counsel then orally disclosed the proposed settlement terms on the record.

ANALYSIS

The parties agree that this case is now moot because the Sharbonos and Universal have finalized their settlement and provided a copy of the final agreement to the Tomyns. We may review a moot case if it presents issues of "continuing and substantial public interest." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wash.2d 781, 796, 225 P.3d 213 (2009) (quoting *In re Marriage of Horner*, 151 Wash.2d 884, 891, 93 P.3d 124 (2004)). In deciding whether a case presents issues of continuing and substantial public interest, we consider three factors: "(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Satomi*, 167 Wash.2d at 796, 225 P.3d 213 (quoting *Horner*, 151 Wash.2d at 892, 93 P.3d 124).

Due to the unique circumstances of this case, it is unlikely that this particular issue will recur or that an authoritative determination will be helpful in providing future guidance to public officers. The issue is not simply whether, in a multi-party case, the court can compel disclosure of a mediated settlement between fewer than all parties. Here, the Sharbonos were involved in a unique contractual relationship with the Tomyns arising out of the

Not Reported in P.3d, 160 Wash.App. 1036, 2011 WL 986043 (Wash.App. Div. 2)
(Cite as: 2011 WL 986043 (Wash.App. Div. 2))

Tomyn– Sharbono settlement agreement. Because the Sharbonos were suing Universal to satisfy the confessed judgment they owed the Tomyns, the Sharbonos were not merely representing their own interests in this proceeding; it appears that they also had some duty to protect the Tomyns' interests as well. Because the issue of whether it was improper to compel disclosure under these unique circumstances is unlikely to recur, we decline to review this moot issue.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: QUINN–BRINTNALL, J., and PENOYAR, C.J.

Wash.App. Div. 2, 2011.
Sharbono v. Universal Underwriters Ins. Co.
Not Reported in P.3d, 160 Wash.App. 1036, 2011
WL 986043 (Wash.App. Div. 2)

END OF DOCUMENT

Appendix 2

Westlaw.

Page 1

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

H

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 2.

James and Deborah **SHARBONO**, individually and
the marital community comprised thereof, Re-
spondents,

v.

UNIVERSAL UNDERWRITERS INSURANCE
COMPANY, a foreign insurer; Len Van De Wege
and "Jane Doe" Van De Wege, individually and the
marital community comprised thereof, Respond-
ents,

Clinton L. Tomy, individually and as Personal
Representative of the Estate of Cynthia L. Tomy,
deceased; and as Parent/Guardian of Nathan
Tomy, Aaron Tomy, and Christian Tomy, minor
children, Appellants/Intervenors.

No. 40245-9-II.
July 19, 2011.

Appeal from Pierce County Superior Court; Hon.
Rosanne Nowak Buckner, J.
Benjamin Franklin Barcus, Paul Alexander Linden-
muth, Ben F. Barcus & Associates PLLC, Tacoma,
WA, for Appellants.

Timothy R. Gosselin, Gosselin Law Office PLLC,
Tacoma, WA, Philip Albert Talmadge, Talmadge/
Fitzpatrick, Tukwila, WA, Jacquelyn A. Beatty, At-
torney at Law, Seattle, WA, for Respondents.

UNPUBLISHED OPINION

VAN DEREN, J.

*1 Clinton Tomy, on behalf of himself, his
deceased wife's estate, and his minor children,
seeks review of a trial court ruling denying the
Tomys' motion to disqualify attorney Timothy

Gosselin, who represents James and Deborah **Shar-
bono** and their daughter Cassandra in this long-
running lawsuit arising from a vehicle accident,
which caused Cynthia Tomy's death. The **Shar-
bonos** are liable for Cynthia Tomy's death. At is-
sue is whether a settlement agreement between the
Sharbonos and the Tomys or a course of conduct
pursued under the settlement agreement (1) made
Gosselin the Tomys' attorney, (2) made the
Tomys third party beneficiaries of Gosselin's ser-
vices, or, (3) if there was otherwise a common in-
terest privilege, the violation of which warrants
Gosselin's disqualification from representing any
party in this case.

We affirm the trial court's denial of the
Tomys' disqualification motion, holding that there
was no attorney-client relationship between Gos-
selin and the Tomys created under the **Sharbono/
Tomy** settlement agreement, that the Tomys are
not third party beneficiaries of Gosselin's represen-
tation of the **Sharbonos**, and that the Tomys failed
to prove that Gosselin breached any duty to protect
confidential information under the "common in-
terest"^{FN1} theory.

FN1. *Broyles v. Thurston County*, 147
Wn.App. 409, 442, 195 P.3d 985 (2008).

FACTS

This case has a long and complicated history.
For more than a decade, the case has been involved
in various forms of negotiations, settlement, medi-
ation, and litigation. It has yielded numerous ap-
peals and three decisions by this court already.^{FN2}
Although the present appeal concerns only the pro-
prietly of the trial court's denial of the Tomys' mo-
tion to disqualify the **Sharbonos'** attorney, Gos-
selin, the Tomys' assertions of error reach back to
events early in this case's history, including a 2001
settlement agreement and subsequent performance
of obligations under that agreement. A brief over-
view of relevant facts follows.

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

FN2. *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383, 161 P.3d 406 (2007); *Sharbono v. Universal Underwriters Ins. Co.*, 158 Wn.App. 963, 247 P.3d 430 (2010); *Sharbono v. Universal Underwriters Ins. Co.*, noted at 160 Wn.App. 1036 (2011). Our commissioner has consolidated two additional appeals, *Sharbono v. Universal Underwriters Ins. Co.*, No. 41931-9-II (Wash. Ct.App. appeal filed Mar. 31, 2011); *Tomyn v. Sharbono*, No. 41981-5-II (Wash. Ct.App. appeal filed Apr. 11, 2011), which are pending.

This case had its genesis in a 1998 car accident, in which a vehicle owned by James and Deborah **Sharbono** and driven by their 16 year old daughter, Cassandra, struck Cynthia Tomyn's car causing Tomyn's death. *Sharbono v. Universal Underwriters Ins. Co.*, 158 Wn.App. 963, 965-66, 247 P.3d 430 (2010). Shortly thereafter, the Tomyns hired attorney Ben Barcus to represent them in pursuing claims against the **Sharbonos**, and the **Sharbonos** hired Gosselin to represent their interests.

The **Sharbonos** had primary liability coverage with State Farm Insurance Company and umbrella coverage under their commercial and personal liability policies with Universal Underwriters Insurance Company. *Sharbono*, 158 Wn.App. at 966. The **Sharbonos** claimed that they had three umbrella policies; Universal advised them they had only one umbrella policy with a \$1,000,000 limit. *Sharbono*, 158 Wn.App. at 966. During settlement negotiations with the Tomyns, the **Sharbonos** asked Universal several times to produce its underwriting file so that they and the Tomyns could know the extent of the **Sharbonos'** liability coverage but Universal refused. *Sharbono*, 158 Wn.App. at 966. Settlement negotiations between the **Sharbonos** and the Tomyns continued for more than a year and were finally successful in March 2001. Ben Barcus represented the Tomyns and Gosselin represented the **Sharbonos** during these negotiations.

*2 Under the terms of the settlement, the **Sharbonos** agreed to have judgment entered against them for \$4,525,000. They also agreed to file a lawsuit against Universal and to give certain awards against Universal to the Tomyns if they prevailed. The **Sharbonos** retained their rights to other recoveries, and the Tomyns agreed to execute a full satisfaction of the confessed judgment upon final resolution of the **Sharbonos'** suit against Universal, regardless of the result of that suit.^{FN3}

FN3. In affirming the settlement's reasonableness, we have already recognized that the settlement was negotiated through an adversarial process "at arms length" and in "good faith." 139 Wn.App. at 406.

In compliance with the settlement agreement, the **Sharbonos** sued Universal asserting multiple claims against Universal and its agent, who purportedly sold the **Sharbonos** the multiple umbrella policies. The particulars of this suit are detailed in *Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383, 161 P.3d 406 (2007). For present purposes we note that the **Sharbonos** were successful in many of their claims, both on summary judgment and in an ensuing jury trial, after which the trial court entered judgment against Universal for approximately \$9,400,000, which included a jury verdict of \$4,500,000 regarding the **Sharbonos'** personal damages. Universal appealed, and we affirmed in part and reversed in part, vacating the \$4,500,000 jury award and remanding for further proceedings. *Sharbono*, 139 Wn.App. at 424.

Following denial of further review by our Supreme Court in July 2008, see *Sharbono v. Universal Underwriters Ins. Co.*, 163 Wn.2d 1055, 187 P.3d 752 (2008), the case proceeded on remand to the trial court, where the **Sharbonos** moved to execute on Universal's appeal bond, see *Sharbono*, 158 Wn.App. at 968, and purportedly obtained a trial setting for the **Sharbonos'** remanded claims. At this point, August 2008, the Tomyns moved to intervene. *Sharbono*, 158 Wn.App. at 968 n. 6. On September 5, 2008, the trial court granted the

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

Tomyns' motion, permitting them limited intervention to protect their interest in the 2005 judgment.

On October 3, 2008, the trial court also granted the **Sharbonos'** motion to execute on Universal's appeal bond, calculated prejudgment and postjudgment interest amounts, and designated the Tomyns as the proper recipients of all such interest amounts. *Sharbono*, 158 Wn.App. at 968. Universal appealed the October 3 order and the **Sharbonos** cross-appealed the designation of the Tomyns as recipients of all interest amounts.^{FN4} *Sharbono*, 158 Wn.App. at 969. We ultimately vacated the amount of the trial court's interest award, remanded for recalculation of interest, and affirmed the trial court's designation of the Tomyns as the proper recipient of all interest payments. *Sharbono*, 158 Wn.App. at 974.

FN4. Universal appealed other rulings of the trial court, but in a separate order we narrowed the scope of Universal's appeal to a challenge of the trial court's interest calculation only. See *Sharbono*, 158 Wn.App. at 969–71.

In the meantime, in August 2009, Gosselin and Barcus, on behalf of the **Sharbonos** and the Tomyns, respectively, mediated with Universal without success. Later that same month, Gosselin, on behalf of the **Sharbonos**, mediated with Universal regarding that part of the lawsuit that the **Sharbonos** had retained for themselves, and this mediation was successful. On August 21, 2009, Gosselin e-mailed Barcus, informing him of the *Sharbono/Universal* settlement and assuring him that it addressed only the **Sharbonos'** separate retained interests. Barcus immediately responded, demanding details of the settlement and threatening suit.

*3 The Tomyns then filed a motion to compel disclosure of the *Sharbono/Universal* settlement negotiations and the terms of the proposed settlement agreement. The trial court granted the motion on September 4, 2009, and Gosselin gave an oral presentation on the record disclosing the terms of

the proposed settlement. *Sharbono v. Universal Underwriters Ins. Co.*, noted at 160 Wn.App. 1036, 2011 WL 986043, at *1. On October 9, Gosselin further provided the Tomyns with a copy of the final settlement agreement between the **Sharbonos** and Universal.^{FN5}

FN5. Universal sought discretionary review of the disclosure order, arguing that the order violated the mediation communication privilege under the Uniform Mediation Act, chapter 7.07 RCW. *Sharbono*, 2011 WL 986043, at *1. Because a copy of the final agreement had been given to the Tomyns by the time we considered the matter, the parties agreed that the matter was moot. We agreed, and declined to address the matter. *Sharbono*, 2011 WL 986043, at *2.

On October 13, the Tomyns filed an ex parte motion for a temporary restraining order (TRO) and order to show cause seeking to impound the \$2,350,000 that the **Sharbonos** had received in their settlement with Universal. At the resulting October 16 show cause hearing, the trial court quashed the TRO and denied a permanent injunction, noting that the court registry contained sufficient funds (\$7,900,000) to protect the Tomyns' interest.

On November 18, the Tomyns moved to disqualify Gosselin. They argued that Gosselin should be disqualified on three grounds: (1) he was the Tomyns' attorney and had a conflict of interest serving the **Sharbonos'** interest, (2) he was hired to represent the Tomyns' interests so they were third party beneficiaries to whom Gosselin owed a duty of loyalty, and (3) the **Sharbonos** and the Tomyns shared a common interest that gave rise to a privilege that Gosselin could no longer honor because the **Sharbonos'** and the Tomyns' interests now conflicted. Gosselin argued (1) he could not have an attorney-client relationship with the Tomyns because that relationship would be illegal and an obvious conflict with his obligations to the **Sharbonos**; (2) the circumstances for a common interest had not

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

occurred and, even if they had, the interest did not create a right to disqualify counsel but, rather, a privilege to protect communications; and (3) a third party beneficiary relationship could not arise because it would have divided Gosselin's loyalties between his clients, the **Sharbonos** and the **Tomyns**, and a third party beneficiary relationship did not arise because he was hired only to represent the **Sharbonos**. The **Sharbonos** expressly testified that they hired Gosselin to represent them, not the **Tomyns**.

On December 22, the trial court denied the **Tomyns'** motion to disqualify Gosselin and on February 5, 2010, the court denied the **Tomyns'** subsequent motion to reconsider. The **Tomyns** appeal. Gosselin cross-appealed the trial court's oral ruling that the **Tomyns** were third party beneficiaries and that they may have a right to sue Gosselin for damages. See footnote 8.

ANALYSIS

The **Tomyns** claim that the trial court erred in finding that Gosselin need not be disqualified from representing any party in this long-standing case based on either a direct attorney-client relationship that arose during his representation of the **Sharbonos** against Universal, through a third party beneficiary theory, or based on a "common interest" theory. We disagree.

A. Standard of Review

*4 "Whether circumstances demonstrate a conflict under ethical rules is a question of law we review de novo." *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn.App. 265, 279, 135 P.3d 955 (2006). Properly resolving this alleged conflict requires the trial court to exercise discretion and we review the trial court's resolution for abuse of discretion. *RWR Mgmt.*, 133 Wn.App. at 279. We also review denial of a reconsideration motion for abuse of discretion. *RWR Mgmt.*, 133 Wn.App. at 280.

B. Direct Attorney-Client Relationship

The **Tomyns** first contend that the **Sharbono/Tomyn** settlement agreement created a direct attorney-client relationship between the **Tomyns** and Gosselin. We disagree.

The essence of the attorney[-]client relationship is whether the attorney's advice or assistance is sought and received on legal matters. The relationship need not be formalized in a written contract but, rather, may be implied from the parties' conduct. Whether a fee is paid is not dispositive. The existence of the relationship "turns largely on the client's subjective belief that it exists."

Bohn v. Cody, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (citations omitted) (quoting *In re McGlothen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983)). But the client's subjective belief does not control the issue unless such belief is reasonably formed based on the attending circumstances. *Bohn*, 119 Wn.2d at 363.

The **Tomyns** contend that, by assigning certain claims to the **Tomyns** and obligating the **Sharbonos** to pursue those claims, the **Sharbono/Tomyn** settlement agreement by its terms made the **Sharbonos'** retained counsel, Gosselin, the **Tomyns'** attorney for purposes of pursuing those claims; and that, at the very least, the agreement created joint representation. Throughout their brief, the **Tomyns** rely on the notion that the settlement agreement assigns claims to the **Tomyns**. Gosselin answers that the settlement agreement did no more than make the **Sharbonos** contractually obligated to the **Tomyns** to perform certain acts, and that he, working for the **Sharbonos** only, performed the required acts to fulfill the **Sharbonos'** obligations under the settlement agreement.

This dispute turns on the language of the **Sharbono/Tomyn** settlement agreement. First, the agreement included an integration clause stating that the written settlement agreement "contains the entire agreement of the parties." Clerk's Papers (CP) at 21. Notably, the agreement expressly states that its purpose is "to protect the assets, earnings and personal liability of [the **Sharbonos**]" from a verdict in excess of the insurance coverage available to

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

them, “as well as to protect [the **Sharbonos**] from the expense and hardship of bankruptcy proceedings.” CP at 17. The agreement acknowledged that the Tomyns had sued the **Sharbonos** for damages based on Cynthia Tomyn's death, that the **Sharbonos** had primary insurance coverage of \$250,000 (as acknowledged by State Farm) and \$1,000,000 of umbrella liability coverage (as acknowledged by Universal), and that the **Sharbonos** contended that Universal was obligated to provide at least \$3,000,000 in insurance coverage.

*5 The settlement further stated that the parties through their respective attorneys had conducted independent investigations and concluded that

[the **Sharbonos**] face a real and substantial risk that judgment will be entered against [them] in excess of the \$250,000 insurance provided by State Farm and the \$1[,000,000] insurance Universal acknowledges. Universal's denial of additional insurance has left the [**Sharbonos**]’ property, earnings, and personal assets exposed to substantial risk of attachment to satisfy such judgment.

Therefore, in an effort to settle all of [the Tomyn] s' claims against [the **Sharbonos**] in a way that offers some protection of [the **Sharbonos**]’ assets; eliminates or reduces the risk that [the **Sharbonos**] 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 [the **Sharbonos**]’ net assets; and preserves the ability to challenge any wrongful conduct by Universal or others with regard to the insurance available to [the **Sharbonos**], the parties have agreed to settlement on the following terms and conditions.

CP at 18. The settlement agreement then detailed the **Sharbonos**’ confession of judgment, their assignment of specific rights to the Tomyns, and their agreement to sue Universal.^{FN6}

FN6. In exchange for these contingent money awards, the Tomyns agreed not to execute or enforce the judgment that the **Sharbonos** had agreed to; they agreed not to proceed against the **Sharbonos**’ personal assets, earnings or property; and they agreed to confine any collection of the judgment to the funds obtained reflecting the “amounts awarded” as assigned in paragraph 2 of the settlement agreement. CP at 18. The Tomyns also agreed that “[r]egardless of the result, upon final resolution of the suit [against Universal], [the Tomyn]s will execute a full satisfaction of judgment in favor of [the] **Sharbono**[s].” CP at 20.

Notably, the assignment of rights to the Tomyns is limited to “amounts awarded against or obtained from Universal” for specific enumerated benefits payable and causes of action. CP at 18. The agreement assigns no claims or causes of action to the Tomyns, rather it contractually obligates the **Sharbonos** to hand over particular enumerated proceeds to the Tomyns if the **Sharbonos** successfully sue Universal. This distinction is significant here because, under the express terms of the settlement agreement, the **Sharbonos** retain all claims against Universal, but they are contractually obligated to pursue those claims and hand over amounts awarded from such litigation as to certain specified claims only.

Accordingly, since no “claims” were assigned to the Tomyns under the settlement agreement, when Gosselin pursued the claims (bad faith, etc.) against Universal, he was not acting on the Tomyns’ behalf he was acting on his clients’ behalf, the **Sharbonos**, pursuing the **Sharbonos**’ claims against Universal and fulfilling the **Sharbonos**’ obligations under the settlement agreement. Thus, no attorney-client relationship arose between Gosselin and the Tomyns, and there was no joint representation. Accordingly, the trial court correctly determined that “the settlement agreement in this case

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

d[id] not convert [Gosselin's] adversarial representation to joint representation of the Tomyns." ^{FN7} Report of Proceedings (RP) (Dec 22, 2009) at 31.

FN7. Seattle University School of Law Associate Professor John Strait's expert opinion, offered on behalf of the Tomyns, expressed in his declaration to the trial court, also appears to be based on the incorrect factual assumption that the Tomyns were assigned "claims" under the settlement agreement. Seattle University School of Law Professor Emeritus David Boerner's expert opinion declaration, again offered on behalf of the Tomyns, on this issue notes only that whether an attorney-client relationship exists between Gosselin and the Tomyns is disputed; that *if* such a relationship is found, then the **Sharbonos** and the Tomyns are Gosselin's joint clients, requiring Gosselin to withdraw from representing either client if a conflict develops between such joint clients.

Further, because the Tomyns are not, and never have been, Gosselin's clients, RPC 1.7 (addressing conflicts of interest among current clients) and RPC 1.9 (addressing an attorney's duties to former clients) have no application here. Neither does RPC 1.6 (addressing confidentiality of information relating to the representation of a client) nor RPC 1.16 (providing for mandatory withdrawal from the representation of a client if that representation will result in violation of the rules of professional conduct or other law) apply. Strait's opinion mentions these rules, but without much analysis, opining that Gosselin has violated them. But as we discussed herein, his analysis largely turns on inaccurate factual assumptions.

C. Third Party Beneficiary Claim

The Tomyns argue next that, even if there is no

direct attorney-client relationship between the Tomyns and Gosselin, because of the "assignment of claims" to the Tomyns, they are intended third party beneficiaries of Gosselin's representation. ^{FN8} Br. of Appellants/Intervenors at 28. We disagree.

FN8. As a threshold matter, the trial court opined that although a third party beneficiary theory would apply here, the appropriate remedy would be a claim for damages "if that can be proven," rather than Gosselin's disqualification. RP (Dec. 22, 2009) at 42-43. The trial court signed the order denying the Tomyns' motion to disqualify Gosselin, but it did not enter findings. Gosselin separately appealed the trial court's ruling on the Tomyns' third party beneficiary claim. Our commissioner dismissed his appeal, holding that the trial court's oral comments have no binding effect unless incorporated into the judgment. The commissioner also held that the **Sharbonos** are not aggrieved parties since the possibility of future litigation based on the trial court's comment is speculative. The commissioner's ruling dismissing Gosselin's appeal puts this issue in an odd procedural posture. Clearly, both the **Sharbonos** and the Tomyns feel the trial court erred in dealing with the third party beneficiary issue raised and argued below. The **Sharbonos** feel that the trial court clearly indicated that Gosselin could be found liable for damages because the Tomyns are third party beneficiaries of his representation of the **Sharbonos**. The Tomyns contend without elaboration that the trial court abused its discretion by finding a third party relationship, but declining to disqualify Gosselin. We address this issue as briefed by the parties due to the long history of litigation between the parties to provide guidance to the trial court, which continues to manage on-going litigation.

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

*6 To determine whether a lawyer owes a duty to a nonclient, Washington courts apply a six element test. *In re Guardianship of Karan*, 110 Wn.App. 76, 81, 38 P.3d 396 (2002) (citing *Trask v. Butler*, 123 Wn.2d 835, 842, 872 P.2d 1080 (1994)). The *Trask*^{FN9} factors are:

FN9. The *Trask* court combined the third party beneficiary test with a modified multi-factor balancing test because both relied on the intent to benefit the plaintiff as a threshold inquiry. *See* 123 Wn.2d at 842.

1. The extent to which the transaction was intended to benefit the plaintiff;
2. The foreseeability of harm to the plaintiff;
3. The degree of certainty that the plaintiff 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.

123 Wn.2d at 843. The threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained. "While the answer to the threshold question does not totally resolve the issue, no further inquiry need be made unless such an intent exists." *Trask*, 123 Wn.2d at 843.

Here, in arguing that these criteria are met, the Tomyns again rely on inaccurate depictions of the settlement agreement. Regarding the first *Trask* factor, the Tomyns state, "[I]f 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." Br. of Appellants/Intervenors at 30. But the plain language of the settlement agreement does not support that contention. As we dis-

cussed and quoted in the previous section, the express and repeated purpose (intent) of the agreement is to protect the Sharbonos' assets. While the agreement requires the Sharbonos to pursue their claims against Universal, it specifically requires the Tomyns, upon final resolution of such suit, to "execute a full satisfaction of judgment in favor of [the Sharbonos]," "[r]egardless of the result" of such suit. CP at 20 (emphasis added). Accordingly, by its terms, the settlement agreement's intent and design are to protect the Sharbonos' assets and only contingently, and thus incidentally, to benefit the Tomyns.

The Tomyns further argue, "[I]f 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." Br. of Appellants/Intervenors at 30. But as we discussed above, the settlement agreement did not assign any "claims" to the Tomyns.

As for the second *Trask* factor, the foreseeability of harm, the Tomyns argue that "under the Tomyn/ Sharbono agreement, [Gosselin] was obligated to pursue the interests of both." Br. of Appellants/Intervenors at 30. That, again, mischaracterizes the agreement. The Sharbonos, with Gosselin acting as their attorney—and for their benefit alone—could satisfy the settlement agreement merely by pursuing the Sharbonos' claims against Universal (and later, if successful, pay the Tomyns certain specified amounts). Nothing in the settlement agreement obligates Gosselin to the Tomyns. Moreover, any expectation or foreseeability of harm to the Tomyns arising out of Gosselin's conduct in acting as the Sharbonos' attorney is low, because his performance on behalf of the Sharbonos must be in good faith in accordance with the obligations imposed under the Sharbono/Tomyn settlement agreement or the Sharbonos would be liable for breach of the agreement and could face personal liability. There is in every contract an implied duty of good faith and fair dealing, which obligates the parties to cooperate with each other so

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

that each may obtain the full benefit of performance. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). But the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract, nor does it inject substantive terms into the parties' contract; rather, the duty requires only that the parties perform in good faith the obligations imposed by their agreement and, thus, the duty arises only in connection with terms agreed to by the parties. *Badgett*, 116 Wn.2d at 569.

*7 Regarding the third *Trask* factor, the degree of certainty that the Tomyns suffered injury, and the fourth factor, the closeness of the connection between Gosselin's conduct and the injury, the Tomyns' brief points to the dispute (appealed separately) over who is entitled to the interest on the judgment. There has been no harm to the Tomyns as they have been awarded the judgment interest in the appeal decided after they submitted briefing in this appeal. *Sharbono*, 158 Wn.App. at 974 (affirming the designation of the Tomyns as the recipients of all judgment interest). The presence of injury is a prerequisite for *Trask* factors three and four.

The fifth *Trask* factor, the policy of preventing future harm,^{FN10} is not furthered by imposing a duty on Gosselin to the Tomyns and, as we discuss in the sixth factor, such imposition would do more harm than good. Here, the settlement agreement indicated that oversight of the Tomyns' interest was to be performed by their attorney. The provision requiring the *Sharbonos* to initiate suit against Universal by a specific date also provided that "[the Tomyn]s, through their chosen counsel, may participate and assist ... as they choose" in the *Sharbonos*' suit against Universal on the *Sharbonos*' claims, for which the *Sharbonos* had assigned the award amounts to the Tomyns. CP at 19. Here, the Tomyns' attorney closely monitored the *Sharbonos*' and Gosselin's progress and intervened when he felt it was warranted. Accordingly, the Tomyns' interests were already protected and, as we discuss

below, the imposition of a duty on Gosselin toward the Tomyns would promote rather than prevent a future harm.

FN10. The Tomyns again look to the settlement agreement, arguing that, while it did not expressly state that it was a joint representation agreement, it nevertheless created such relationship. They argue that an attorney's duty, once the interests of his joint clients become conflicting, is to advise his clients of the conflict and afford his clients the opportunity to waive the conflict or retain other counsel. But as we already discussed, the settlement agreement did not create a joint representation.

In addressing the final factor, burden on the profession, the *Trask* court noted that public policy must be considered as follows:

The policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney's ethical obligations to the client. This occurs where a duty to a nonclient creates a risk of divided loyalties because of a conflicting interest or of a breach of confidence.

Trask, 123 Wn.2d at 844 (citation omitted). This final factor weighs heavily here. As noted, contrary to the Tomyns' assertions, the settlement agreement did not obligate Gosselin to the Tomyns and to impose such a duty on him would create a risk of divided loyalties. As discussed, each of the *Trask* factors argues against finding that Gosselin had a duty to the Tomyns.

The *Trask* court applied the above six factors in determining that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries. *Trask*, 123 Wn.2d at 845. This was because

(1) the estate and its beneficiaries are *incidental*, not intended, beneficiaries of the attorney-per-

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

sonal representative relationship; (2) the estate heirs may bring a direct cause of action against the personal representative for breach of fiduciary duty; and (3) the unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs unduly burdens the legal profession.

*8 *Trask*, 123 Wn.2d at 845. Similarly here, (1) the Tomyns are incidental beneficiaries of the Gosselin–Sharbono attorney-client relationship in the context of the Sharbono/Tomyn settlement agreement, (2) given the obligations under the settlement agreement as discussed, the Tomyns can seek relief directly against the Sharbonos for any alleged breach of that agreement, and (3) imposing a duty on Gosselin to the Tomyns under the settlement agreement creates an unwarranted risk of unresolvable conflict of interest in deciding whose interests Gosselin is to represent. Accordingly, applying the *Trask* factors, we hold that Gosselin owed no duty to the Tomyns as nonclients under the Sharbono/Tomyn settlement agreement.

Alternatively, the Tomyns assert that the trial court abused its discretion when it determined that a third party relationship existed, but declined to disqualify Gosselin because the appropriate remedy would be a claim for damages rather than disqualification. Case law supports the trial court's view that a damages remedy is available if such a duty is found. As the *Karan* court noted, "To determine whether a lawyer owes a duty to a nonclient which then creates standing to sue for malpractice, Washington applies [the] six-element [*Trask*] test." 110 Wn.App. at 81. "Once a relationship giving rise to a duty is established, the elements of a malpractice claim are the same as for any other negligence action." *Karan*, 110 Wn.App. at 87. The trial court did not abuse its discretion in pointing out that damages are a proper remedy if a breach of duty to a nonclient is proven. But here, the Tomyns failed to prove that Gosselin had a duty to them, thus, the Tomyns' claim that the trial court abused its discre-

tion fails.

D. Common Interest

The Tomyns next assert that the trial court should have disqualified Gosselin due to the operation of the common interest privilege. "The 'common interest' doctrine provides that when multiple parties share confidential communications pertaining to their common claim or defense, the communications remain privileged as to those outside their group." *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010) (citing *Broyles*, 147 Wn.App. at 442); see also *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 716, 985 P.2d 262 (1999). Federal courts apply the same rule. "The 'common interest' or 'joint defense' privilege is an exception to the general rule that the voluntary disclosure of a privileged attorney-client or work-product communication to a third party waives the privilege." *Avocent Redmond Corp. v. Rose Elec., Inc.*, 516 F.Supp.2d 1199, 1202 (W.D.Wash.2007) (citing *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir.1965)). "The privilege protects the confidentiality of communications passing from one party to the attorney of another party when made to further a joint effort." *Avocent*, 516 F.Supp.2d at 1202 (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989)). "The privilege can give rise to a 'disqualifying conflict where information gained in confidence by an attorney becomes an issue.'" *Avocent*, 516 F.Supp.2d at 1202–03 (quoting *United States v. Henke*, 222 F.3d 633, 637 (9th Cir.2000)).

*9 "The common interest or joint defense privilege applies where (1) the communication was made by separate parties in the course of a matter of common interest or joint defense; (2) the communication was designed to further that effort; and (3) the privilege has not been waived." *Avocent*, 516 F.Supp.2d at 1203. Relevant here, "[t]he burden of proving that a joint defense or common interest privilege applies falls on the party seeking disqualification." *Avocent*, 516 F.Supp.2d at 1201. While a written agreement regarding the privilege

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

is not required, “the parties must invoke the privilege: they must intend and agree to undertake a joint defense/[common interest] effort.” *Avocent*, 516 F.Supp.2d at 1203.

Moreover, even if the parties did intend to create a joint defense or common interest privilege, the party asserting the existence of such privilege must prove that client confidential information was shared. *Avocent*, 516 F.Supp.2d at 1203. To this end, declarations by a party's attorney that the attorneys “shared ‘mental impressions, tentative conclusions, opinions, and legal theories’ regarding the case” are insufficient; they must identify “specific client confidences that were shared.” *Avocent*, 516 F.Supp.2d at 1204 (quotation citation omitted).

In *Avocent*, attorneys for the parties in question “communicated regarding a number of issues pertinent to the litigation, including ... motions for summary judgment.” 516 F.Supp.2d at 1204. But the evidence provided did not establish the sharing of any confidential information. *Avocent*, 516 F.Supp.2d at 1204. “The Court will not assume that just because the parties ... exchanged drafts of ... motions that they exchanged *confidential* information.” *Avocent*, 516 F.Supp.2d at 1204. Accordingly, the party asserting the existence of the privilege failed to meet its burden of showing that confidential communications were made in support of a joint defense. *Avocent*, 516 F.Supp.2d at 1204. Based on that failing, the court denied the party's motion to disqualify the law firm in question. *Avocent*, 516 F.Supp.2d at 1205; *see also Henke*, 222 F.3d at 638 (that joint defense meetings have occurred does not in itself require disqualification of an attorney that participated in such meetings).

In *Waller v. Financial Corporation of America*, 828 F.2d 579 (9th Cir.1987), the court applied the joint defense privilege, under which communications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with codefendants for purposes of a common defense. 828 F.2d at 583 n. 7. In *Waller*, a defendant accounting firm in a shareholder suit sought to ob-

ject to a partial settlement between a codefendant bank and plaintiff shareholders. 828 F.2d at 583–84. The accounting firm asserted that the bank's agreement to cooperate in the shareholders' suit against other codefendants would likely result in the bank disclosing confidential communications that the bank received from the accounting firm and that were protected by a joint defense agreement. *Waller*, 828 F.2d at 583–84. The court noted that the partial settlement did not require such disclosures and, in any event, because the accounting firm refused to describe the substance of its allegedly confidential disclosures, the court had no way of knowing whether the bank possessed any privileged communications to share even if the bank was disposed toward disclosure.^{FN11} *Waller*, 828 F.2d at 584.

FN11. The *Waller* court observed that the accounting firm could attempt to seek an injunction or disqualification of counsel because these remedies were “expressly prescribe[d]” in the codefendants' joint defense agreement. 828 F.2d at 584. Here, there is no such agreement.

*10 The same is true here. The Tomyns assert that their attorney shared strategies, concerns, and confidences with Gosselin, but such general averments fail to meet their burden of establishing that *confidential* communications were shared sufficient to trigger a common interest privilege.^{FN12} *See Avocent*, 516 F.Supp.2d at 1204–05. Accordingly, the trial court did not err in denying the Tomyns' motion to disqualify Gosselin based on the “common interest” theory.

FN12. Similarly, the common interest analyses of Boerner and Strait *assume* that confidential information was shared.

We hold that Gosselin did not have an attorney-client relationship with the Tomyns, that no duty to them arose under the third party beneficiary theory, and that Gosselin's disqualification was not required because the Tomyns have not shown that

Not Reported in P.3d, 162 Wash.App. 1050, 2011 WL 2848801 (Wash.App. Div. 2)
(Cite as: 2011 WL 2848801 (Wash.App. Div. 2))

Gosselin revealed confidential information learned from the Tomyns' attorneys. Thus, we affirm the trial court's denial of the Tomyns' motion to disqualify Gosselin.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: PENOYAR, C.J., and JOHANSON, J.

Wash.App. Div. 2, 2011.
Sharbono v. Universal Underwriters Ins. Co.
Not Reported in P.3d, 162 Wash.App. 1050, 2011
WL 2848801 (Wash.App. Div. 2)

END OF DOCUMENT

Appendix 3

Pierce County Superior Court Civil Case 01-2-07954-4

**PURCHASE COPIES**

Case Title: JAMES SHARBONO ET AL VS UNIVERSAL UNDERWRITERS INSURANCE COMPANY ET AL
Case Type: Commercial
Access: Public
Track Assignment: Amended Standard
Jury Size: 12
Estimated Trial Length: 12.0 days
Dept Judge: **06 ROSANNE BUCKNER**
Resolution: 04/15/2005 Jury Verdict after Trial
Completion: 05/20/2005 Judgment/Order/Decree Filed

Litigants

| Name | Type | Status |
|---|-------------------------------|------------|
| SHARBONO, JAMES | Plaintiff | |
| Attorney for SHARBONO, JAMES | Type | Bar Number |
| <u>TIMOTHY R. GOSSELIN</u> | Atty for Plaintiff/Petitioner | 13730 |
| SHARBONO, DEBORAH | Plaintiff | |
| Attorney for SHARBONO, DEBORAH | Type | Bar Number |
| <u>TIMOTHY R. GOSSELIN</u> | Atty for Plaintiff/Petitioner | 13730 |
| SHARBONO, CASSANDRA | Plaintiff | |
| Attorney for SHARBONO, CASSANDRA | Type | Bar Number |
| <u>TIMOTHY R. GOSSELIN</u> | Atty for Plaintiff/Petitioner | 13730 |
| UNIVERSAL UNDERWRITERS INSURANCECOM | Defendant | |
| Attorneys for UNIVERSAL UNDERWRITERS INSURANCECOM | Type | Bar Number |
| <u>JACQUELYN A. BEATTY</u> | Atty for Defendant | 17567 |
| <u>PHILIP ALBERT TALMADGE</u> | Atty for Defendant | 6973 |
| <u>Emmelyn Hart</u> | Atty for Defendant | 28820 |
| VAN DE WEGE, LEN | Defendant | |
| Attorneys for VAN DE WEGE, LEN | Type | Bar Number |
| <u>JACQUELYN A. BEATTY</u> | Atty for Defendant | 17567 |
| <u>PHILIP ALBERT TALMADGE</u> | Atty for Defendant | 6973 |
| <u>Emmelyn Hart</u> | Atty for Defendant | 28820 |
| VAN DE WEGE, JANE DOE | Defendant | |
| Attorneys for VAN DE WEGE, JANE DOE | Type | Bar Number |
| <u>JACQUELYN A. BEATTY</u> | Atty for Defendant | 17567 |
| <u>PHILIP ALBERT TALMADGE</u> | Atty for Defendant | 6973 |
| <u>Emmelyn Hart</u> | Atty for Defendant | 28820 |
| TOMYN, CLINTON | Intervenor | |
| Attorney for TOMYN, CLINTON | Type | Bar Number |
| <u>Benjamin Franklin Barcus</u> | Atty for Intervenor | 15576 |
| TOMYN, CYNTHIA L | Intervenor | |
| Attorney for TOMYN, CYNTHIA L | Type | Bar Number |
| <u>Benjamin Franklin Barcus</u> | Atty for Intervenor | 15576 |
| TOMYN, NATHAN | Intervenor | |
| Attorney for TOMYN, NATHAN | Type | Bar Number |
| <u>Benjamin Franklin Barcus</u> | Atty for Intervenor | 15576 |
| TOMYN, ERIN | Intervenor | |
| Attorney for TOMYN, ERIN | Type | Bar Number |
| <u>Benjamin Franklin Barcus</u> | Atty for Intervenor | 15576 |

TOMYN, CHRISTIAN

Attorney for TOMYN, CHRISTIAN

Benjamin Franklin Barcus**CASEYS TRANS-PLANT INC
PARKLAND TRANSMISSION**

Intervenor

Type

Bar Number

Atty for Intervenor

15576

Involved Party

Involved Party

Filings | e-file document | download filings | E-Serve documents |

| Filing Date | Filing | Access | Pages | Microfilm |
|-------------|---|--------|-------|-----------|
| 05/10/2001 | FILING FEE RECEIVED | Public | | |
| 05/10/2001 | <u>SUMMONS</u> | Public | 2 | |
| 05/10/2001 | <u>COMPLAINT</u> | Public | 10 | |
| 05/10/2001 | ORDER SETTING CASE SCHEDULE | Public | | |
| 05/10/2001 | REQUEST FOR ASSIGN TO CIVIL TRACK | Public | | |
| 05/10/2001 | <u>SUMMONS</u> | Public | 2 | |
| 05/10/2001 | <u>SUMMONS</u> | Public | 2 | |
| 05/17/2001 | CERTIFICATE OF SERVICE | Public | | 2157-426 |
| 05/22/2001 | AFFIDAVIT/DECLARATION OF SERVICE | Public | | 2159-382 |
| 05/22/2001 | NOTICE OF APPEARANCE | Public | | |
| 05/23/2001 | AFFIDAVIT/DECLARATION OF SERVICE | Public | | 2159-1823 |
| 07/06/2001 | CONFIRMATION OF SERVICE | Public | | |
| 09/10/2001 | JURY DEMAND RECEIVED - TWELVE *PLA* | Public | | 2202-2058 |
| 09/12/2001 | <u>ANSWER & AFFIRMATIVE DEFENSE</u> | Public | 9 | |
| 09/12/2001 | JURY DEMAND RECEIVED - TWELVE *DEF* | Public | | 2203-1943 |
| 10/15/2001 | CORRESPONDENCE | Public | | |
| 02/08/2002 | <u>ORDER ASSIGNING NEW JUDGE</u> | Public | 2 | |
| 02/13/2002 | <u>ORDER AMENDING CASE SCHEDULE</u> | Public | 1 | |
| 02/13/2002 | <u>ASSIGNED TO DEPT 6</u> | Public | 1 | |
| 06/24/2002 | <u>CORRESPONDENCE</u> | Public | 1 | |
| 07/11/2002 | <u>CONFIRMATION OF JOINDER OF PARTIES, CLAIMS AND DEFENSES</u> | Public | 3 | |
| 07/12/2002 | <u>LETTER RE SETTLEMENT CONFERENCE</u> | Public | 1 | |
| 10/17/2002 | <u>MOTION TO COMPEL</u> | Public | 19 | |
| 10/17/2002 | <u>NOTE OF ISSUE</u> | Public | 1 | |
| 10/18/2002 | <u>DECLARATION OF JAMES SHARBONO</u> | Public | 280 | |
| 10/18/2002 | <u>NOTE OF ISSUE</u> | Public | 1 | |
| 10/18/2002 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 8 | |
| 10/18/2002 | <u>MOTION FOR SUMMARY JUDGMENT</u> | Public | 30 | |
| 10/28/2002 | <u>ORDER COMPELLING ANSWERS TO INTERROGATORIES</u> | Public | 3 | |
| 10/28/2002 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 | |
| 11/18/2002 | <u>MOTION TO CONTINUE</u> | Public | 7 | |
| 11/18/2002 | <u>CERTIFICATE OF SERVICE</u> | Public | 2 | |
| 11/18/2002 | <u>DECLARATION OF EARL M SUTHERLAND</u> | Public | 4 | |
| 11/18/2002 | <u>RESPONSE</u> | Public | 38 | |
| 11/18/2002 | <u>NOTE OF ISSUE</u> | Public | 1 | |

| | | | |
|------------|--|--------|-----|
| 11/22/2002 | <u>DECLARATION OF MELANIE STELLA</u> | Public | 46 |
| 11/22/2002 | <u>MEMORANDUM IN REPLY/RESPONSE</u> | Public | 6 |
| 11/27/2002 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 |
| 11/27/2002 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 |
| 12/05/2002 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 12/06/2002 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 12/13/2002 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 |
| 12/13/2002 | <u>ORDER AMENDING CASE SCHEDULE</u> | Public | 1 |
| 12/13/2002 | <u>ORDER FOR CONTINUANCE OF TRIAL DATE</u> | Public | 2 |
| 12/27/2002 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 |
| 12/27/2002 | <u>ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT</u> | Public | 2 |
| 01/16/2003 | <u>MOTION</u> | Public | 5 |
| 01/17/2003 | <u>CERTIFICATE OF SERVICE</u> | Public | 2 |
| 01/21/2003 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 |
| 01/24/2003 | <u>ORDER GRANTING PARTIAL SUMMARY JUDGMENT</u> | Public | 2 |
| 02/26/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 02/26/2003 | <u>MOTION</u> | Public | 173 |
| 03/05/2003 | <u>OBJECTIONS/OPPOSITION</u> | Public | 21 |
| 03/05/2003 | <u>DECLARATION OF JOHN D WINFREY III</u> | Public | 61 |
| 03/05/2003 | <u>CERTIFICATE OF SERVICE</u> | Public | 2 |
| 03/06/2003 | <u>REPLY IN SUPPORT</u> | Public | 21 |
| 03/14/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 04/28/2003 | <u>STATEMENT</u> | Public | 27 |
| 04/29/2003 | <u>NOTICE OF SUBMISSION OF ADDITIONAL EVIDENCE</u> | Public | 21 |
| 05/02/2003 | <u>ORDER DECLARING SETTLEMENT REASONABLE & BINDING</u> | Public | 2 |
| 05/02/2003 | <u>CLERK'S MINUTE ENTRY</u> | Public | 2 |
| 05/16/2003 | <u>DECLARATION OF JOHN WINFREY</u> | Public | 153 |
| 05/16/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 05/16/2003 | <u>CERTIFICATE OF SERVICE</u> | Public | 2 |
| 05/16/2003 | <u>MOTION FOR SUMMARY JUDGMENT</u> | Public | 17 |
| 06/02/2003 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 13 |
| 06/02/2003 | <u>DECLARATION OF MAUREEN FALECKI</u> | Public | 57 |
| 06/02/2003 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 5 |
| 06/02/2003 | <u>OBJECTIONS/OPPOSITION</u> | Public | 27 |
| 06/26/2003 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 |
| 06/26/2003 | <u>ORDER AMENDING CASE SCHEDULE</u> | Public | 1 |
| 06/26/2003 | <u>ORDER RESCHEDULING TRIAL</u> | Public | 3 |
| 10/17/2003 | <u>OBJECTIONS TO SUBPOENA DUCES TECUM</u> | Public | 6 |
| 10/24/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 10/24/2003 | <u>MOTION FOR ADMISSION OF MICHAEL BARNES</u> | Public | 5 |
| 10/24/2003 | <u>CONSENT OF LOCAL DESIGNATED COUNSEL FOR ADMISSION</u> | Public | 2 |
| 10/24/2003 | <u>MOTION FOR ADMISSION OF SONIA MARTIN</u> | Public | 5 |
| 10/24/2003 | <u>CONSENT OF LOCAL DESIGNATED COUNSEL</u> | Public | 2 |

| | | | |
|------------|--|--------|-----|
| 10/30/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 10/30/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 10/30/2003 | <u>MOTION TO COMPEL</u> | Public | 10 |
| 10/30/2003 | <u>DECLARATION OF JOHN WINFREY</u> | Public | 8 |
| 10/30/2003 | <u>MOTION TO COMPEL</u> | Public | 7 |
| 10/30/2003 | <u>DECLARATION OF JOHN WINFREY III</u> | Public | 11 |
| 10/30/2003 | <u>DECLARATION OF DANL BRIDGES</u> | Public | 4 |
| 11/04/2003 | <u>DECLARATION OF DANL BRIDGES</u> | Public | 4 |
| 11/05/2003 | <u>RESPONSE TO MOTION</u> | Public | 44 |
| 11/06/2003 | <u>AFFIDAVIT OF BEN F BARCUS</u> | Public | 27 |
| 11/06/2003 | <u>MOTION FOR PROTECTIVE ORDER</u> | Public | 17 |
| 11/07/2003 | <u>ORDER GRANTING MOTION</u> | Public | 2 |
| 11/07/2003 | <u>ORDER DENYING MOTION</u> | Public | 3 |
| 11/07/2003 | <u>ORDER OF ADMISSION PRO HAC VICE OF SONIA MARTIN</u> | Public | 2 |
| 11/07/2003 | <u>ORDER OF ADMISSION PRO HAC VICE OF MICHAEL BARNES</u> | Public | 2 |
| 11/12/2003 | <u>OBJECTIONS/OPPOSITION</u> | Public | 15 |
| 11/12/2003 | <u>OBJECTIONS/OPPOSITION</u> | Public | 15 |
| 11/13/2003 | <u>OBJECTIONS/OPPOSITION</u> | Public | 15 |
| 11/14/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/14/2003 | <u>OBJECTIONS/OPPOSITION</u> | Public | 12 |
| 11/14/2003 | <u>OBJECTIONS/OPPOSITION</u> | Public | 3 |
| 11/14/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/17/2003 | <u>ORDER SHORTENING TIME</u> | Public | 2 |
| 11/17/2003 | <u>MOTION FOR PROTECTIVE ORDER</u> | Public | 74 |
| 11/18/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/18/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/18/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/18/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/18/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/18/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/18/2003 | <u>ORDER QUASHING / PROTECTIVE ORDER</u> | Public | 3 |
| 11/19/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/19/2003 | <u>DECLARATION OF JOHN D WINFREY III</u> | Public | 3 |
| 11/19/2003 | <u>RESPONSE</u> | Public | 123 |
| 11/20/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 11/20/2003 | <u>DECLARATION OF TIMOTHY R GOSSELIN</u> | Public | 19 |
| 11/20/2003 | <u>MOTION TO COMPEL</u> | Public | 11 |
| 11/20/2003 | <u>MOTION TO SHORTEN TIME</u> | Public | 3 |
| 11/20/2003 | <u>ORDER SHORTENING TIME</u> | Public | 2 |
| 11/21/2003 | <u>ORDER TO SHOW CAUSE</u> | Public | 2 |
| 11/21/2003 | <u>MOTION FOR ORDER TO SHOW CAUSE</u> | Public | 6 |
| 11/24/2003 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 11/24/2003 | | Public | 2 |

| <u>CLERK'S MINUTE ENTRY</u> | | | |
|------------------------------------|--|--------|-----|
| 11/24/2003 | <u>DECLARATION OF EARL M SUTHERLAND</u> | Public | 8 |
| 11/25/2003 | <u>RESPONSE IN OPPOSITION</u> | Public | 8 |
| 11/26/2003 | <u>DECLARATION OF JOHN D WINFREY III</u> | Public | 4 |
| 11/26/2003 | <u>ORDER TO COMPEL</u> | Public | 2 |
| 11/26/2003 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 12/03/2003 | <u>LETTER RE SETTLEMENT CONFERENCE</u> | Public | 1 |
| 12/04/2003 | <u>CERTIFICATE OF SERVICE</u> | Public | 2 |
| 12/04/2003 | <u>RESPONSE</u> | Public | 4 |
| 12/05/2003 | <u>ORDER HALTING DISCOVERY & PROVIDING FOR CERTIAN RELIEF</u> | Public | 3 |
| 12/09/2003 | <u>PLAINTIFF'S LIST OF WITNESSES & EXHIBITS</u> | Public | 10 |
| 12/16/2003 | <u>JOINT STATEMENT OF EVIDENCE</u> | Public | 16 |
| 12/17/2003 | <u>NOTICE RE: EVIDENTIARY RULE</u> | Public | 9 |
| 12/18/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 12/18/2003 | <u>MOTION TO COMPEL</u> | Public | 8 |
| 12/18/2003 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 10 |
| 12/19/2003 | <u>SUBPOENA TO ATTEND TRIAL</u> | Public | 2 |
| 12/19/2003 | <u>ORDER FOR SUBPOENA OF OUT OF COUNTY WITNESS</u> | Public | 4 |
| 12/19/2003 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 |
| 12/23/2003 | <u>WITNESS LIST</u> | Public | 422 |
| 12/23/2003 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 12/24/2003 | <u>MOTION TO CONTINUE</u> | Public | 5 |
| 12/24/2003 | <u>MOTION TO SHORTEN TIME</u> | Public | 2 |
| 12/24/2003 | <u>JOINT STATEMENT OF EVIDENCE</u> | Public | 9 |
| 12/24/2003 | <u>NOTE FOR MOTION DOCKET - LATE FILING</u> | Public | 1 |
| 12/24/2003 | <u>NOTE FOR MOTION DOCKET - LATE FILING</u> | Public | 1 |
| 12/26/2003 | <u>RESPONSE</u> | Public | 6 |
| 12/29/2003 | <u>MEMORANDUM IN REPLY/RESPONSE</u> | Public | 9 |
| 12/30/2003 | <u>REPLY</u> | Public | 37 |
| 12/30/2003 | <u>DECLARATION OF TIMOTHY R GROSSELIN</u> | Public | 48 |
| 12/31/2003 | <u>ORDER GRANTING MOTION</u> | Public | 2 |
| 12/31/2003 | <u>RESPONSE</u> | Public | 4 |
| 01/07/2004 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 01/07/2004 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 01/07/2004 | <u>MOTION TO SHORTEN TIME</u> | Public | 4 |
| 01/07/2004 | <u>REPLY</u> | Public | 22 |
| 01/07/2004 | <u>DECLARATION OF LYN VAN DE WEGE</u> | Public | 18 |
| 01/07/2004 | <u>DECLARATION OF DAN BRIDGES</u> | Public | 127 |
| 01/07/2004 | <u>MOTION TO COMPEL</u> | Public | 5 |
| 01/07/2004 | <u>DECLARATION OF JOHN D WINFREY III</u> | Public | 13 |
| 01/07/2004 | <u>CERTIFICATE OF SERVICE</u> | Public | 2 |
| 01/08/2004 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 1 |
| 01/08/2004 | <u>CLERK'S MINUTE ENTRY</u> | Public | 1 |

| | | | |
|------------|--|--------|-----|
| 01/08/2004 | <u>DECLARATION OF EARL M SUTHERLAND</u> | Public | 5 |
| 01/09/2004 | <u>MOTION TO SHORTEN TIME</u> | Public | 3 |
| 01/09/2004 | <u>MOTION FOR DEFAULT</u> | Public | 24 |
| 01/09/2004 | <u>DECLARATION OF TIMOTHY R GOSSELIN</u> | Public | 100 |
| 01/09/2004 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 01/12/2004 | <u>RESPONSE TO MOTION</u> | Public | 6 |
| 01/13/2004 | <u>MOTION IN LIMINE</u> | Public | 10 |
| 01/13/2004 | <u>TRIAL BRIEF</u> | Public | 14 |
| 01/13/2004 | <u>MOTION IN LIMINE</u> | Public | 3 |
| 01/13/2004 | <u>OBJECTIONS/OPPOSITION</u> | Public | 19 |
| 01/13/2004 | <u>DECLARATION OF SONIA MARTIN</u> | Public | 35 |
| 01/13/2004 | <u>DECLARATION OF EARL M SUTHERLAND</u> | Public | 31 |
| 01/13/2004 | <u>DECLARATION OF MICHAEL MILLER</u> | Public | 3 |
| 01/13/2004 | <u>DECLARATION OF KATHERINE EDDY</u> | Public | 3 |
| 01/13/2004 | <u>DECLARATION OF ASHLEY OSBORNE</u> | Public | 3 |
| 01/13/2004 | <u>SUBPOENA</u> | Public | 2 |
| 01/13/2004 | <u>DECLARATION OF DAN BRIDGES</u> | Public | 64 |
| 01/13/2004 | <u>ORDER RE: OF CONTINUANCE</u> | Public | 2 |
| 01/13/2004 | <u>STIPULATION AND ORDER FOR RETURN OF EXHIBITS AND/OR UNOPENED DEPOSITI</u> | Public | 1 |
| 01/26/2004 | <u>ORDER AMENDING CASE SCHEDULE</u> | Public | 1 |
| 02/13/2004 | <u>CERTIFICATION OF SERVICES</u> | Public | 2 |
| 02/17/2004 | <u>NOTICE OF INTENT TO WITHDRAW</u> | Public | 2 |
| 03/04/2004 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 03/04/2004 | <u>MOTION TO CHANGE TRIAL DATE</u> | Public | 5 |
| 03/12/2004 | <u>ORDER AMENDING CASE SCHEDULE</u> | Public | 1 |
| 04/20/2004 | <u>MOTION FOR JUDGMENT</u> | Public | 10 |
| 04/20/2004 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 05/06/2004 | <u>AFFIDAVIT OF BEN F BARCUS</u> | Public | 6 |
| 05/06/2004 | <u>RESPONSE TO MOTION</u> | Public | 5 |
| 05/07/2004 | <u>JUDGMENT ON SANCTIONS</u> | Public | 3 |
| 06/09/2004 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 06/09/2004 | <u>OBJECTIONS/OPPOSITION</u> | Public | 31 |
| 09/20/2004 | <u>PLAINTIFF'S LIST OF WITNESSES</u> | Public | 13 |
| 09/20/2004 | <u>DEFENDANT'S LIST OF WITNESSES</u> | Public | 4 |
| 10/19/2004 | <u>DISCLOSURE OF WITNESSES</u> | Public | 2 |
| 01/06/2005 | <u>MOTION TO COMPEL</u> | Public | 34 |
| 01/12/2005 | <u>RESPONSE</u> | Public | 37 |
| 01/13/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 01/13/2005 | <u>MOTION TO COMPEL</u> | Public | 35 |
| 01/20/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 01/26/2005 | <u>DECLARATION OF TIMOTHY R GOSSELIN</u> | Public | 6 |
| 01/28/2005 | <u>DECLARATION OF DAN BRIDGES</u> | Public | 349 |

| | | | |
|------------|--|--------|------|
| 01/28/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 01/28/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 01/28/2005 | <u>MOTION FOR PARTIAL SUMMARY JUDGMENT</u> | Public | 37 |
| 01/28/2005 | <u>DECLARATION OF LEN DE WEGE</u> | Public | 15 |
| 01/28/2005 | <u>MOTION FOR SUMMARY JUDGMENT</u> | Public | 20 |
| 01/31/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 02/03/2005 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 02/03/2005 | <u>DECLARATION OF PAULA T OLSON</u> | Public | 37 |
| 02/03/2005 | <u>MOTION TO STRIKE</u> | Public | 7 |
| 02/09/2005 | <u>DECLARATION OF DAN BRIDGES</u> | Public | 80 |
| 02/09/2005 | <u>MOTION FOR SANCTIONS</u> | Public | 6 |
| 02/09/2005 | <u>OBJECTIONS / OPPOSITION</u> | Public | 11 |
| 02/10/2005 | <u>RESPONSE</u> | Public | 3 |
| 02/10/2005 | <u>DECLARATION OF TIMOTHY R GOSSELIN</u> | Public | 14 |
| 02/10/2005 | <u>REPLY</u> | Public | 6 |
| 02/11/2005 | <u>ORDER DENYING MOTION</u> | Public | 1 |
| 02/11/2005 | <u>ORDER ON DISCOVERY MOTIONS</u> | Public | 2 |
| 02/14/2005 | <u>RESPONSE</u> | Public | 14 |
| 02/14/2005 | <u>DECLARATION IN OPPOSITION</u> | Public | 12 |
| 02/14/2005 | <u>RESPONSE</u> | Public | 16 |
| 02/14/2005 | <u>DECLARATION OF DAN BRIDGES</u> | Public | 34 |
| 02/18/2005 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 1830 |
| 02/18/2005 | <u>REPLY IN SUPPORT</u> | Public | 11 |
| 02/22/2005 | <u>RESPONSE</u> | Public | 6 |
| 02/22/2005 | <u>DEFENDANT'S LIST OF WITNESSES</u> | Public | 2 |
| 02/22/2005 | <u>DEFENDANT'S LIST OF WITNESSES</u> | Public | 8 |
| 02/22/2005 | <u>MOTION TO STRIKE</u> | Public | 29 |
| 02/22/2005 | <u>REPLY</u> | Public | 9 |
| 02/22/2005 | <u>OBJECTIONS / OPPOSITION</u> | Public | 2 |
| 02/22/2005 | <u>WITNESS LIST</u> | Public | 24 |
| 02/22/2005 | <u>NOTICE RE: EVIDENTIARY RULE</u> | Public | 17 |
| 02/22/2005 | <u>DECLARATION IN SUPPORT</u> | Public | 14 |
| 02/24/2005 | <u>RESPONSE</u> | Public | 4 |
| 02/24/2005 | <u>RESPONSE</u> | Public | 6 |
| 02/24/2005 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 66 |
| 02/28/2005 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 6 |
| 03/03/2005 | <u>JOINT STATEMENT OF EVIDENCE</u> | Public | 23 |
| 03/10/2005 | <u>NOTE FOR JUDGES MOTION CALENDAR</u> | Public | 2 |
| 03/10/2005 | <u>NOTE FOR JUDGES MOTION CALENDAR</u> | Public | 2 |
| 03/10/2005 | <u>NOTE FOR JUDGES MOTION CALENDAR</u> | Public | 1 |
| 03/10/2005 | <u>MOTION IN LIMINE</u> | Public | 91 |
| 03/10/2005 | <u>MOTION IN LIMINE</u> | Public | 6 |
| 03/11/2005 | <u>NOTICE OF ATTORNEY CHANGE OF ADDRESS</u> | Public | 1 |

| | | | |
|------------|---|--------|-----|
| 03/22/2005 | <u>☞</u> NOTICE FOR ATTENDANCE AT TRIAL | Public | 2 |
| 03/23/2005 | <u>e</u> MOTION IN LIMINE DEFENDANTS | Public | 8 |
| 03/23/2005 | <u>e</u> MOTION IN LIMINE DEFENDANTS | Public | 3 |
| 03/23/2005 | <u>e</u> MOTION IN LIMINE | Public | 22 |
| 03/23/2005 | <u>e</u> MOTION IN LIMINE | Public | 3 |
| 03/23/2005 | <u>e</u> MOTION TO EXCLUDE | Public | 128 |
| 03/23/2005 | <u>e</u> NOTE OF ISSUE | Public | 1 |
| 03/24/2005 | <u>e</u> MOTION FOR RECONSIDERATION | Public | 9 |
| 03/28/2005 | <u>☞</u> AFFIDAVIT/DECLARATION OF SERVICE | Public | 1 |
| 03/28/2005 | <u>☞</u> STIPULATION AND ORDER FOR RETURN OF EXHIBITS AND/OR UNOPENED DEPOSITI | Public | 1 |
| 03/28/2005 | <u>☞</u> TRIAL BRIEF | Public | 10 |
| 03/29/2005 | <u>☞</u> PEREMPTORY CHALLENGE SHEET | Public | 1 |
| 03/29/2005 | <u>☞</u> JURY PANEL SELECTION LIST | Public | 3 |
| 03/29/2005 | <u>☞</u> DEFENDANT'S PROPOSED INSTRUCTIONS | Public | 7 |
| 03/30/2005 | <u>☞</u> NETURAL STATEMENT OF THE CASE | Public | 2 |
| 03/30/2005 | <u>☞</u> NEUTRAL STATEMENT OF THE CASE | Public | 3 |
| 03/30/2005 | <u>☞</u> ORDER FOR MOTION | Public | 5 |
| 04/04/2005 | <u>☞</u> MOTION FOR RECONSIDERATION | Public | 13 |
| 04/04/2005 | <u>☞</u> MEMORANDUM RE SCOPE OF TESTIMONY | Public | 7 |
| 04/04/2005 | <u>☞</u> DEPOSITION OF JAMES SHARBONO | Public | 121 |
| 04/04/2005 | <u>☞</u> DEPOSITION OF JAMES SHARBONO | Public | 198 |
| 04/04/2005 | <u>☞</u> DEPOSITION OF DEBORAH SHARBONO | Public | 194 |
| 04/05/2005 | <u>☞</u> JURY NOTE 7 | Public | 7 |
| 04/05/2005 | <u>☞</u> NOTICE OF FILING DEPOSITION | Public | 1 |
| 04/05/2005 | <u>☞</u> DEPOSITION OF MAUREEN FALECKI W/EXHIBITS | Public | 709 |
| 04/06/2005 | <u>☞</u> JURY NOTE 8 | Public | 8 |
| 04/06/2005 | <u>☞</u> NOTICE OF FILING DEPOSITION | Public | 1 |
| 04/06/2005 | <u>☞</u> DEPOSITION OF CLARENCE RAY | Public | 89 |
| 04/06/2005 | <u>☞</u> NOTICE OF FILING DEPOSITION | Public | 1 |
| 04/06/2005 | <u>☞</u> DEPOSITION OF ROBERT M HUKU | Public | 72 |
| 04/07/2005 | <u>☞</u> JURY NOTE 6 | Public | 6 |
| 04/08/2005 | <u>☞</u> PLAINTIFF'S PROPOSED INSTRUCTIONS *SUPP* | Public | 14 |
| 04/08/2005 | <u>☞</u> DEFENDANT'S PROPOSED INSTRUCTIONS | Public | 18 |
| 04/11/2005 | <u>☞</u> JURY NOTE 4 | Public | 4 |
| 04/11/2005 | <u>☞</u> NOTICE OF DEPOSITION EXCERPTS | Public | 1 |
| 04/11/2005 | <u>☞</u> DEFENDANT'S PROPOSED INSTRUCTIONS | Public | 8 |
| 04/11/2005 | <u>☞</u> MEMORANDUM RE RESUMPTION OF HARM | Public | 7 |
| 04/11/2005 | <u>☞</u> MEMORANDUM RE JURY INSTRUCTION | Public | 9 |
| 04/11/2005 | <u>☞</u> NOTICE OF FILING DEPOSITION | Public | 1 |
| 04/11/2005 | <u>☞</u> DEPOSITION OF DAVID KNOWLES PHD | Public | 84 |
| 04/11/2005 | <u>☞</u> DEPOSITION OF CASSANDRA BARNEY FKA SHARBONO | Public | 57 |
| 04/11/2005 | <u>☞</u> NOTICE OF FILING DEPOSITION | Public | 2 |

| | | | |
|------------|--|--------|-----|
| 04/12/2005 | <u>JURY NOTE 3</u> | Public | 3 |
| 04/12/2005 | <u>NOTICE OF FILING DEPOSITION</u> | Public | 1 |
| 04/12/2005 | <u>DEPOSITION OF LEN J VAN DE WEGE</u> | Public | 212 |
| 04/12/2005 | <u>NOTICE OF FILING DEPOSITION</u> | Public | 1 |
| 04/12/2005 | <u>DEPOSITION OF JOHN PECKENPAUGH</u> | Public | 295 |
| 04/13/2005 | <u>JURY NOTE 3</u> | Public | 3 |
| 04/13/2005 | <u>COURT'S INSTRUCTIONS TO JURY</u> | Public | 18 |
| 04/14/2005 | <u>WITNESS RECORD</u> | Public | 2 |
| 04/14/2005 | <u>EXHIBITS RECEIVED IN VAULT</u> | Public | 10 |
| 04/15/2005 | <u>JOINT STATEMENT OF EVIDENCE</u> | Public | 23 |
| 04/15/2005 | <u>VERDICT FOR PLAINTIFF</u> | Public | 2 |
| 04/15/2005 | <u>CLERK'S MINUTE ENTRY</u> | Public | 20 |
| 05/05/2005 | <u>MOTION FOR ATTORNEYS FEES</u> | Public | 12 |
| 05/05/2005 | <u>MOTION FOR TREBLE DAMAGES</u> | Public | 4 |
| 05/05/2005 | <u>DECLARATION IN SUPPORT</u> | Public | 72 |
| 05/05/2005 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 05/06/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 05/12/2005 | <u>NOTICE OF ASSOCIATION OF COUNSEL</u> | Public | 3 |
| 05/18/2005 | <u>RESPONSE</u> | Public | 8 |
| 05/19/2005 | <u>AFFIDAVIT/DECLARATION OF FEES & COSTS</u> | Public | 3 |
| 05/19/2005 | <u>REPLY IN SUPPORT</u> | Public | 6 |
| 05/20/2005 | <u>JUDGMENT</u> | Public | 4 |
| 05/20/2005 | <u>ORDER RE: PRESUMPTIVE DAMAGES</u> | Public | 2 |
| 05/20/2005 | <u>ORDER RE: FEES, COSTS AND TREBLE DAMAGES</u> | Public | 13 |
| 05/31/2005 | <u>MOTION FOR NEW TRIAL</u> | Public | 20 |
| 06/01/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 06/08/2005 | <u>NOTICE OF APPEAL TO COURT OF APPEALS</u> | Public | 7 |
| 06/09/2005 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public | 1 |
| 06/15/2005 | <u>OBJECTIONS/OPPOSITION</u> | Public | 7 |
| 06/15/2005 | <u>DECLARATION OF TIMOTHY GOSSLIN</u> | Public | 9 |
| 06/15/2005 | <u>NOTICE OF CROSS APPEAL</u> | Public | 23 |
| 06/15/2005 | <u>AFFIDAVIT OF MAILING</u> | Public | 2 |
| 06/16/2005 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public | 1 |
| 06/17/2005 | <u>ORDER DENYING MOTION</u> | Public | 2 |
| 06/17/2005 | <u>REBUTTAL</u> | Public | 3 |
| 06/28/2005 | <u>PERFECTION NOTICE FROM COURT OF APPEALS</u> | Public | 2 |
| 06/29/2005 | <u>MOTION TO COMPEL</u> | Public | 5 |
| 06/29/2005 | <u>DECLARATION OF TIMOTHY R GOSELIN</u> | Public | 24 |
| 06/29/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 07/01/2005 | <u>RECESS LETTER</u> | Public | 1 |
| 07/01/2005 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 07/08/2005 | <u>RECESS LETTER</u> | Public | 1 |
| 07/08/2005 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 5 |

| | | | |
|------------|--|--------|----|
| 07/14/2005 | <u>CLERK'S PAPERS PREPARED</u> | Public | 10 |
| 07/18/2005 | <u>NOTE OF ISSUE</u> | Public | 1 |
| 07/18/2005 | <u>DECLARATION OF DAN BRIDGES</u> | Public | 2 |
| 07/18/2005 | <u>RESPONSE</u> | Public | 14 |
| 07/19/2005 | <u>BOND</u> | Public | 5 |
| 07/26/2005 | <u>REPLY</u> | Public | 10 |
| 07/29/2005 | <u>ORDER TO COMPEL</u> | Public | 2 |
| 08/09/2005 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 09/22/2005 | <u>NOTICE OF ATTORNEY CHANGE OF ADDRESS</u> | Public | 2 |
| 10/21/2005 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 3 |
| 10/27/2005 | <u>CLERK'S PAPERS PREPARED</u> | Public | 3 |
| 10/31/2005 | <u>CLERK'S PAPERS PREPARED - CORRECTED</u> | Public | 2 |
| 11/02/2005 | VERBATIM REPORT TRANS TO DIV II *04-04-05*VOL 4 | Public | |
| 11/02/2005 | VERBATIM REPORT TRANS TO DIV II *04-04-05*VOL 5 | Public | |
| 11/08/2005 | VERBATIM REPORT TRANS TO DIV II *03-31-05*VOL 3 | Public | |
| 11/08/2005 | VERBATIM REPORT TRANS TO DIV II *03-29-05*VOL 1 | Public | |
| 11/08/2005 | VERBATIM REPORT TRANS TO DIV II *03-30-05VOL 2 | Public | |
| 11/08/2005 | VERBATIM REPORT TRANS TO DIV II *04-06-05*VOL 7 | Public | |
| 11/08/2005 | VERBATIM REPORT TRANS TO DIV II *04-07-05*VOL 8 | Public | |
| 11/08/2005 | VERBATIM REPORT TRANS TO DIV II *04-08-05*VOL 9 | Public | |
| 11/08/2005 | VERBATIM REPORT TRANS TO DIV II *04-11-05*VOL 10 | Public | |
| 11/08/2005 | VERBATIM REPORT TRANS TO DIV II *04-13-05*VOL 13 | Public | |
| 11/10/2005 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 11/10/2005 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 11/18/2005 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 11/21/2005 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 11/21/2005 | VERBATIM REPORT TRANS TO DIV II*04-15-04*VOL#13 | Public | |
| 11/22/2005 | <u>NOTICE OF FILING A VERBATIM REPORT</u> | Public | 1 |
| 11/22/2005 | VERBATIM REPORT TRANS TO DIV II*04-12-05*VOL#13 | Public | |
| 12/06/2005 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 12/06/2005 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 12/13/2005 | VERBATIM REPORT TRANS TO DIV II *04-05-05 | Public | |
| 12/23/2005 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 07/11/2008 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 08/20/2008 | <u>NOTICE OF ABSENCE/UNAVAILABILITY</u> | Public | 1 |
| 08/26/2008 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 08/26/2008 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 08/26/2008 | <u>MOTION TO EXECUTE</u> | Public | 66 |
| 08/26/2008 | <u>AFFIDAVIT OF SERVICE BY MAIL</u> | Public | 2 |
| 08/28/2008 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 08/28/2008 | <u>MOTION FOR INTERVENTION</u> | Public | 5 |
| 08/28/2008 | <u>AFFIDAVIT/DECLARATION IN SUPPORT</u> | Public | 13 |
| 08/29/2008 | | Public | 42 |

| MANDATE | | |
|----------------|---|-----------|
| 09/03/2008 | <u>AFFIDAVIT OF SERVICE BY MAILING AND FACSIMILE</u> | Public 2 |
| 09/03/2008 | <u>RESPONSE TO MOTION</u> | Public 1 |
| 09/03/2008 | <u>RESPONSE TO MOTION</u> | Public 21 |
| 09/03/2008 | <u>ARCHIVED RECORD</u> | Public 16 |
| 09/04/2008 | <u>REPLY IN SUPPORT</u> | Public 9 |
| 09/04/2008 | <u>REPLY</u> | Public 16 |
| 09/04/2008 | <u>NOTICE OF APPEARANCE</u> | Public 4 |
| 09/04/2008 | <u>OBJECTIONS/OPPOSITION TO MOTION</u> | Public 27 |
| 09/05/2008 | <u>ORDER OF INTERVENTION</u> | Public 3 |
| 09/09/2008 | <u>EXHIBITS RETURNED FROM COURT OF APPEALS</u> | Public 1 |
| 09/23/2008 | <u>NOTE OF ISSUE</u> | Public 2 |
| 09/23/2008 | <u>AFFIDAVIT OF SERVICE BY MAIL</u> | Public 2 |
| 09/23/2008 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public 5 |
| 09/25/2008 | <u>NOTE OF ISSUE</u> | Public 2 |
| 09/25/2008 | <u>JOINDER IN MOTION</u> | Public 24 |
| 09/25/2008 | <u>AFFIDAVIT/DECLARATION OF COUNSEL</u> | Public 14 |
| 09/25/2008 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public 3 |
| 09/25/2008 | <u>DECLARATION OF MAILING</u> | Public 4 |
| 09/30/2008 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public 2 |
| 09/30/2008 | <u>AFFIDAVIT/DECLARATION OF SERVICE *AMENDED*</u> | Public 2 |
| 09/30/2008 | <u>DECLARATION OF JACQUELYN A BEATTY</u> | Public 16 |
| 09/30/2008 | <u>MOTION TO CONTINUE</u> | Public 4 |
| 09/30/2008 | <u>MOTION TO SHORTEN TIME</u> | Public 4 |
| 09/30/2008 | <u>NOTE FOR MOTION DOCKET - LATE FILING</u> | Public 3 |
| 09/30/2008 | <u>NOTE FOR MOTION DOCKET - LATE FILING</u> | Public 3 |
| 10/01/2008 | <u>AFFIDAVIT OF SERVICE BY FACSIMILE</u> | Public 2 |
| 10/01/2008 | <u>RESPONSE</u> | Public 11 |
| 10/01/2008 | <u>DECLARATION OF JACQUELYN BEATTY</u> | Public 28 |
| 10/01/2008 | <u>RESPONSE</u> | Public 50 |
| 10/02/2008 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public 2 |
| 10/02/2008 | <u>REPLY IN SUPPORT</u> | Public 5 |
| 10/02/2008 | <u>RESPONSE TO MOTION</u> | Public 4 |
| 10/02/2008 | <u>REPLY IN SUPPORT</u> | Public 5 |
| 10/03/2008 | <u>ORDER GRANTING MOTION</u> | Public 3 |
| 10/07/2008 | <u>NOTICE OF APPEAL TO COURT OF APPEALS</u> | Public 3 |
| 10/09/2008 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public 1 |
| 10/14/2008 | <u>SUPPLEMENTAL APPEAL BOND</u> | Public 10 |
| 10/16/2008 | <u>NOTE OF ISSUE</u> | Public 3 |
| 10/16/2008 | <u>MOTION TO VACATE AND/OR AMEND JUDGMENT</u> | Public 84 |
| 10/17/2008 | <u>NOTICE OF CROSS APPEAL</u> | Public 5 |
| 10/17/2008 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public 2 |
| 10/20/2008 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public 1 |

| | | | |
|------------|---|--------|----|
| 10/20/2008 | <u>NOTICE OF APPEAL TO COURT OF APPEALS *AMENDED*</u> | Public | 10 |
| 10/21/2008 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 3 |
| 10/21/2008 | <u>DECLARATION OF MAILING</u> | Public | 2 |
| 10/21/2008 | <u>OBJECTION TO SUPPLEMENTAL APPEAL BOND</u> | Public | 86 |
| 10/22/2008 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public | 1 |
| 10/22/2008 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 2 |
| 10/22/2008 | <u>RESPONSE TO MOTION</u> | Public | 5 |
| 10/22/2008 | <u>MEMORANDUM OF AUTHORITIES</u> | Public | 24 |
| 10/23/2008 | <u>REPLY IN SUPPORT</u> | Public | 16 |
| 10/30/2008 | <u>NOTE OF ISSUE</u> | Public | 4 |
| 11/06/2008 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 3 |
| 11/07/2008 | <u>ORDER STRIKING MOTION TO VACATE</u> | Public | 2 |
| 11/07/2008 | <u>DESIGNATION OF CLERK'S PAPERS -SUPPLEMENTAL</u> | Public | 3 |
| 11/12/2008 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 2 |
| 11/19/2008 | <u>CLERK'S PAPERS PREPARED</u> | Public | 5 |
| 11/19/2008 | <u>CLERK'S PAPERS PREPARED</u> | Public | 4 |
| 11/20/2008 | <u>ADMINISTRATIVE RECORD</u> | Public | 34 |
| 11/20/2008 | <u>ADMINISTRATIVE RECORD</u> | Public | 46 |
| 11/20/2008 | <u>CLERK'S PAPERS PREPARED</u> | Public | 3 |
| 11/21/2008 | <u>NOTICE OF APPEAL TO COURT OF APPEALS</u> | Public | 5 |
| 11/25/2008 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public | 1 |
| 12/08/2008 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 12/08/2008 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 12/15/2008 | <u>DESIGNATION OF CLERK'S PAPERS -SUPPLEMENTAL</u> | Public | 3 |
| 12/26/2008 | <u>CLERK'S PAPERS PREPARED</u> | Public | 4 |
| 12/29/2008 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 01/02/2009 | <u>LETTER FROM COURT OF APPEALS</u> | Public | 2 |
| 01/05/2009 | VERBATIM REPORT TRANS TO DIV II *10-24-08* | Public | |
| 01/05/2009 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 01/06/2009 | VERBATIM REPORT TRANS TO DIV II *10-03-08* | Public | |
| 01/06/2009 | VERBATIM REPORT TRANS TO DIV II *09-05-08* | Public | |
| 01/06/2009 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 01/14/2009 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 01/15/2009 | VERBATIM REPORT TRANS TO DIV II *10-24-08* | Public | |
| 01/15/2009 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 05/14/2009 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 3 |
| 05/14/2009 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 05/14/2009 | <u>MOTION TO REQUIRE CASH SUPERSEDEAS FUNDS</u> | Public | 22 |
| 05/14/2009 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 3 |
| 05/15/2009 | <u>ORDER AMENDING CASE SCHEDULE</u> | Public | 2 |
| 05/20/2009 | <u>OBJECTIONS/OPPOSITION</u> | Public | 14 |
| 05/20/2009 | <u>DECLARATION OF JACQUELYN A BEATTY</u> | Public | 83 |
| 05/20/2009 | | Public | 3 |

| <u>CERTIFICATE OF SERVICE</u> | | |
|--------------------------------------|--|-----------|
| 05/21/2009 | <u>REPLY TO OPPOSITION</u> | Public 25 |
| 05/21/2009 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public 3 |
| 05/21/2009 | <u>REPLY</u> | Public 25 |
| 05/22/2009 | <u>ORDER RE: SUPERSEDEAS FUNDS</u> | Public 2 |
| 06/02/2009 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public 1 |
| 06/03/2009 | <u>NOTE OF ISSUE</u> | Public 2 |
| 06/03/2009 | <u>MOTION FOR RELIEF FROM STAY</u> | Public 2 |
| 06/03/2009 | <u>MEMORANDUM OF AUTHORITIES</u> | Public 78 |
| 06/03/2009 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public 3 |
| 06/04/2009 | <u>NOTE OF ISSUE</u> | Public 2 |
| 06/05/2009 | <u>DECLARATION IN SUPPORT</u> | Public 27 |
| 06/05/2009 | <u>MOTION TO STRIKE</u> | Public 41 |
| 06/09/2009 | <u>RESPONSE TO MOTION</u> | Public 3 |
| 06/09/2009 | <u>NOTICE OF APPEARANCE</u> | Public 1 |
| 06/09/2009 | <u>DECLARATION OF STEVEN S KEPPLINGER</u> | Public 5 |
| 06/09/2009 | <u>DECLARATION OF BRIAN L MEIKLE</u> | Public 3 |
| 06/10/2009 | <u>REPLY</u> | Public 2 |
| 06/10/2009 | <u>RESPONSE TO MOTION</u> | Public 16 |
| 06/10/2009 | <u>DECLARATION OF DAN BRIDGES</u> | Public 18 |
| 06/10/2009 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public 1 |
| 06/10/2009 | <u>OBJECTIONS/OPPOSITION</u> | Public 40 |
| 06/10/2009 | <u>DECLARATION OF BRIAN L MEIKLE</u> | Public 2 |
| 06/10/2009 | <u>DECLARATION OF ROBERT HUKE</u> | Public 4 |
| 06/10/2009 | <u>NOTICE OF APPEARANCE</u> | Public 1 |
| 06/11/2009 | <u>REPLY IN SUPPORT</u> | Public 6 |
| 06/11/2009 | <u>REPLY</u> | Public 28 |
| 06/12/2009 | <u>ORDER TO DISBURSE FUNDS</u> | Public 4 |
| 06/12/2009 | <u>ORDER DENYING MOTION</u> | Public 2 |
| 06/16/2009 | <u>NOTICE OF ABSENCE/UNAVAILABILITY</u> | Public 1 |
| 06/19/2009 | <u>NOTICE OF ABSENCE/UNAVAILABILITY</u> | Public 3 |
| 06/19/2009 | <u>ORDER DENYING CR 11 SANCTIONS</u> | Public 3 |
| 06/29/2009 | <u>NOTICE OF ABSENCE/UNAVAILABILITY</u> | Public 2 |
| 07/08/2009 | <u>NOTE FOR JUDGES MOTION CALENDAR</u> | Public 2 |
| 07/08/2009 | <u>MOTION TO LIMIT INTERVENTION</u> | Public 28 |
| 07/10/2009 | <u>NOTE OF ISSUE</u> | Public 2 |
| 07/10/2009 | <u>DECLARATION OF JACQUELYN BEATTY</u> | Public 72 |
| 07/10/2009 | <u>MOTION TO MODIFY</u> | Public 8 |
| 07/17/2009 | <u>RECESS LETTER</u> | Public 1 |
| 07/23/2009 | <u>NOTICE OF INTENT TO WITHDRAW</u> | Public 2 |
| 07/24/2009 | <u>NOTICE OF INTENT TO WITHDRAW</u> | Public 2 |
| 07/24/2009 | <u>DECLARATION OF JACQUELYN BEATTY</u> | Public 92 |
| 07/24/2009 | <u>MOTION FOR SUMMARY JUDGMENT</u> | Public 21 |

| | | | |
|------------|---|--------|-----|
| 07/24/2009 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 07/27/2009 | <u>NOTE OF ISSUE</u> | Public | 3 |
| 07/29/2009 | <u>OBJECTIONS/OPPOSITION TO DEF'S MOT TO LIMIT INTERV</u> | Public | 29 |
| 07/29/2009 | <u>MEMORANDUM IN OPPOSITION</u> | Public | 11 |
| 07/29/2009 | <u>RESPONSE IN OPPOSITION</u> | Public | 3 |
| 07/29/2009 | <u>RESPONSE TO MOTION</u> | Public | 2 |
| 07/29/2009 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 2 |
| 07/30/2009 | <u>REPLY IN SUPPORT</u> | Public | 5 |
| 07/30/2009 | <u>REPLY IN SUPPORT</u> | Public | 16 |
| 07/31/2009 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 07/31/2009 | <u>ORDER DENYING MOTION TO LIMIT INTERVENTION</u> | Public | 2 |
| 07/31/2009 | <u>ORDER DENYING MOTION TO MODIFY SUPERSEDEAS</u> | Public | 3 |
| 07/31/2009 | <u>DECLARATION OF JACQUELYN BEATTY</u> | Public | 19 |
| 07/31/2009 | <u>MOTION FOR PARTIAL SUMMARY JUDGMENT</u> | Public | 14 |
| 08/06/2009 | <u>MOTION FOR SPOILIATION</u> | Public | 15 |
| 08/06/2009 | <u>DECLARATION OF TIM GODDELIN IN SUPPORT</u> | Public | 37 |
| 08/06/2009 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 08/07/2009 | <u>NOTE FOR JUDGES MOTION CALENDAR</u> | Public | 2 |
| 08/07/2009 | <u>MOTION FOR SUMMARY JUDGMENT</u> | Public | 22 |
| 08/07/2009 | <u>DECLARATION OF DANL RIDGES</u> | Public | 44 |
| 08/12/2009 | <u>MOTION TO STRIKE MOTION ON SPOILIATION</u> | Public | 7 |
| 08/12/2009 | <u>RESPONSE TO MOTION FOR SPOILIATION INSTRUCTION</u> | Public | 48 |
| 08/12/2009 | <u>RESPONSE TO MOTION FOR SPOILIATION INSTRUCTION</u> | Public | 48 |
| 08/17/2009 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 141 |
| 08/17/2009 | <u>RESPONSE IN OPPOSITION</u> | Public | 14 |
| 08/17/2009 | <u>RESPONSE TO MOTION</u> | Public | 6 |
| 08/17/2009 | <u>DECLARATION OF JAMES SHARBONO</u> | Public | 4 |
| 08/17/2009 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 88 |
| 08/18/2009 | <u>REPLY IN SUPPORT</u> | Public | 15 |
| 08/18/2009 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 49 |
| 08/27/2009 | <u>MOTION TO COMPEL</u> | Public | 15 |
| 09/02/2009 | <u>OBJECTIONS/OPPOSITION</u> | Public | 9 |
| 09/02/2009 | <u>DECLARATION OF JACQUELYN A BEATTY</u> | Public | 11 |
| 09/04/2009 | <u>ORDER TO COMPEL DISCLOSURE</u> | Public | 2 |
| 09/17/2009 | <u>NOTICE OF DISCRETIONARY REVIEW/CT OF APPEALS</u> | Public | 5 |
| 09/18/2009 | <u>NOTICE OF SETTLEM,ENT</u> | Public | 2 |
| 09/18/2009 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public | 1 |
| 09/23/2009 | <u>PERFECTION NOTICE FROM COURT OF APPEALS</u> | Public | 2 |
| 10/13/2009 | <u>CLERK'S MINUTE ENTRY</u> | Public | 2 |
| 10/13/2009 | <u>AFFIDAVIT OF PREJUDICE</u> | Public | 2 |
| 10/13/2009 | <u>REASSIGNED TO DEPT 17 *MOTION ONLY*</u> | Public | 1 |
| 10/13/2009 | <u>MT/DECLARATION FOR EXPARTE RESTRAINING ORDER AND ORDER TO SHOW CAUSE</u> | Public | 2 |

| | | | |
|------------|---|------------|-----|
| 10/13/2009 | <u>☞</u> AFFIDAVIT OF BEN F BARCUS IN SUPPORT | Public | 115 |
| 10/13/2009 | <u>☞</u> TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE | Public | 3 |
| 10/16/2009 | <u>☞</u> CLERK'S MINUTE ENTRY | Public | 3 |
| 10/16/2009 | <u>☞</u> AFFIDAVIT/DECLARATION OF SERVICE | Public | 22 |
| 10/16/2009 | <u>☞</u> EXHIBIT RECORD | Public | 1 |
| 10/16/2009 | <u>☞</u> RESPONSE TO AFFIDAVIT OF BEN F BARCUS | Public | 37 |
| 10/22/2009 | <u>☞</u> NOTE OF ISSUE | Public | 2 |
| 10/22/2009 | <u>☞</u> NOTE OF ISSUE | Public | 2 |
| 10/22/2009 | <u>☞</u> NOTE OF ISSUE | Public | 2 |
| 10/22/2009 | <u>☞</u> MOTION FOR FORFEITURE OF SECURITY/DAMAGES/FEES | Public | 3 |
| 10/22/2009 | <u>☞</u> DECLARATION OF TIMOTHY R GOSSELIN | Public | 2 |
| 11/04/2009 | <u>e</u> OBJECTIONS/OPPOSITION | Public | 30 |
| 11/04/2009 | <u>e</u> DECLARATION OF CLINTON TOMYN | Public | 54 |
| 11/04/2009 | <u>e</u> DECLARATION OF PAUL A LINDENMUTH | Public | 8 |
| 11/04/2009 | <u>e</u> OBJECTIONS/OPPOSITION TO ORDER OF DISMISSAL | Public | 3 |
| 11/05/2009 | <u>☞</u> DECLARATION OF JAMES & DEBORAH SHARBONO | Public | 2 |
| 11/05/2009 | <u>☞</u> DECLARATION OF TIMOTHY GOSSELIN | Public | 3 |
| 11/05/2009 | <u>☞</u> AFFIDAVIT/DECLARATION OF SERVICE | Public | 2 |
| 11/05/2009 | <u>☞</u> REPLY IN SUPPORT | Public | 4 |
| 11/05/2009 | <u>e</u> DECLARATION OF ANGEL SUAREZ JR RE SERVICE | Public | 3 |
| 11/06/2009 | <u>e</u> PERFECTION NOTICE FROM COURT OF APPEALS | Public | 2 |
| 11/06/2009 | <u>☞</u> DESIGNATION OF CLERK'S PAPERS | Public | 2 |
| 11/06/2009 | <u>☞</u> ORDER DENYING MOTION | Public | 2 |
| 11/06/2009 | <u>☞</u> ORDER QUASHING TEMP RESTRAINING ORDER | Public | 3 |
| 11/06/2009 | <u>☞</u> DECLARATION OF CHRISTINA RE EMAIL | Public | 14 |
| 11/09/2009 | <u>e</u> 3RD SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS | Public | 3 |
| 11/10/2009 | <u>e</u> NOTICE OF INTENT TO WITHDRAW | Public | 2 |
| 11/18/2009 | <u>e</u> NOTE OF ISSUE | Public | 2 |
| 11/18/2009 | <u>e</u> MOTION TO DISQUALIFY COUNSEL | Public | 2 |
| 11/18/2009 | <u>e</u> MEMORANDUM OF POINTS/AUTHORITIES | Public | 37 |
| 11/18/2009 | <u>e</u> DECLARATION OF PROFESSOR DAVID BOERNER | Public | 22 |
| 11/18/2009 | <u>e</u> DECLARATION OF PAUL A LINDENMUTH | Public | 307 |
| 11/18/2009 | <u>☞</u> NOTE OF ISSUE | Public | 2 |
| 11/18/2009 | <u>☞</u> DECLARATION OF PAUL LINDENMUTH | Public | 307 |
| 11/18/2009 | <u>☞</u> MOTION TO DISQUALIFY COUNSEL | Public | 2 |
| 11/18/2009 | <u>☞</u> MEMORANDUM OF AUTHORITIES | Public | 37 |
| 11/18/2009 | <u>☞</u> DECLARATION OF DAVID BOERNER | Public | 22 |
| 11/19/2009 | <u>☞</u> CLERK'S PAPERS PREPARED | Public | 3 |
| 11/19/2009 | <u>☞</u> CLERK'S PAPERS PREPARED | Public | 2 |
| 11/19/2009 | <u>e</u> CLERK'S PAPERS SENT | Public | 1 |
| 11/24/2009 | <u>e</u> DESIGNATION OF CLERK'S PAPERS | Public | 3 |
| 12/02/2009 | <u>e</u> CLERK'S PAPERS SENT | Public | 1 |
| 12/04/2009 | <u>☞</u> VERBATIM REPORT TRANS TO DIV II *09-04-09* | Restricted | 43 |

| | | | |
|------------|---|------------|----|
| 12/04/2009 | <u>CLERK'S PAPERS PREPARED CORRECTED AS TO PAGE NUMBERS</u> | Public | 3 |
| 12/09/2009 | <u>CLERK'S PAPERS PREPARED</u> | Public | 2 |
| 12/17/2009 | <u>DECLARATION OF ASSOC PROF JOHN A STRAIT</u> | Public | 11 |
| 12/18/2009 | <u>RESPONSE IN OPPOSITION</u> | Public | 15 |
| 12/18/2009 | <u>DECLARATION OF TIMOTHY R GOSSELIN</u> | Public | 62 |
| 12/21/2009 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 12/22/2009 | <u>CLERK'S MINUTE ENTRY</u> | Public | 2 |
| 12/22/2009 | <u>ORDER DENYING MOTION</u> | Public | 3 |
| 12/30/2009 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 3 |
| 12/31/2009 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 12/31/2009 | <u>MOTION FOR RECONSIDERATION</u> | Public | 2 |
| 12/31/2009 | <u>MEMORANDUM OF AUTHORITIES</u> | Public | 19 |
| 12/31/2009 | <u>AFFIDAVIT OF BEN BARCUS</u> | Public | 13 |
| 01/08/2010 | <u>RECESS LETTER</u> | Public | 1 |
| 01/08/2010 | <u>TRANSCRIPT OF PROCEEDINGS - COURTS ORAL RULING</u> | Public | 4 |
| 01/11/2010 | <u>CLERK'S PAPERS PREPARED</u> | Public | 2 |
| 01/20/2010 | <u>RESPONSE IN OPPOSITION</u> | Public | 10 |
| 01/21/2010 | <u>NOTE FOR JUDGES MOTION CALENDAR</u> | Public | 2 |
| 01/21/2010 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 01/21/2010 | <u>NOTICE OF APPEAL TO COURT OF APPEALS, DIVISION II</u> | Public | 11 |
| 01/22/2010 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public | 1 |
| 02/04/2010 | <u>REPLY TO SHARBONO'S OPPOSITION</u> | Public | 5 |
| 02/05/2010 | <u>AMENDED NOTICE OF APPEAL TO COURT OF APPEALS</u> | Public | 15 |
| 02/05/2010 | <u>ORDER DENYING MOTION</u> | Public | 3 |
| 02/11/2010 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public | 1 |
| 02/12/2010 | <u>NOTICE OF APPEAL WITH FEE</u> | Public | 9 |
| 02/22/2010 | <u>TRANSMITTAL LETTER COPY FILED</u> | Public | 1 |
| 02/22/2010 | <u>RECEIPT FOR APPEAL FILED 2/12/10</u> | Public | 10 |
| 03/29/2010 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 3 |
| 03/29/2010 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 3 |
| 04/06/2010 | <u>LETTER FROM COURT OF APPEALS</u> | Public | 1 |
| 04/08/2010 | <u>CLERK'S PAPERS PREPARED</u> | Public | 5 |
| 04/14/2010 | VERBATIM REPORT TRANS TO DIV II *06-12-09* | Restricted | |
| 04/15/2010 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 04/27/2010 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 05/17/2010 | VERBATIM REPORT TRANS TO DIV II *12/22/09* | Restricted | |
| 05/17/2010 | VERBATIM REPORT TRANS TO DIV II *2/5/10* | Restricted | |
| 05/17/2010 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 05/17/2010 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 2 |
| 05/26/2010 | <u>CLERK'S PAPERS PREPARED COA# 39781-1</u> | Public | 3 |
| 06/09/2010 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 06/09/2010 | <u>DECLARATION OF JACQUELYN A BEATTY</u> | Public | 15 |
| 06/09/2010 | | Public | 5 |

| | | | |
|------------|--|------------|----|
| | <u>MOTION TO EXONERATE APPEAL BOND</u> | | |
| 06/09/2010 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 06/10/2010 | <u>CLERK'S PAPERS SENT - CORRECTED</u> | Public | 1 |
| 06/16/2010 | <u>AFFIDAVIT/DECLARATION OF SERVICE</u> | Public | 2 |
| 06/16/2010 | <u>RESPONSE TO MOTION</u> | Public | 7 |
| 06/18/2010 | <u>CLERK'S MINUTE ENTRY</u> | Public | 2 |
| 06/18/2010 | <u>ORDER GRANTING MOTION TO EXONERATE APPEAL BOND</u> | Public | 3 |
| 07/30/2010 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 2 |
| 08/13/2010 | <u>CLERK'S PAPERS PREPARED #40245-9</u> | Public | 2 |
| 08/23/2010 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 10/06/2010 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 3 |
| 10/15/2010 | <u>CLERK'S PAPERS PREPARED #40245-9</u> | Public | 3 |
| 11/05/2010 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 12/27/2010 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 12/27/2010 | <u>MOTION TO DISBURSE FUNDS</u> | Public | 39 |
| 02/24/2011 | <u>NOTE OF ISSUE</u> | Public | 2 |
| 02/24/2011 | <u>NOTE FOR JUDGES MOTION CALENDAR</u> | Public | 1 |
| 02/24/2011 | <u>MOTION TO DISBURSE FUNDS</u> | Public | 11 |
| 02/24/2011 | <u>DECLARATION OF JACQUELYN BEATTY WITH EXHIBITS</u> | Public | 37 |
| 02/24/2011 | <u>MOTION TO SATISFY JUDGMENT</u> | Public | 6 |
| 02/24/2011 | <u>DECLARATION OF TIMOTHY R GOSSELIN</u> | Public | 29 |
| 02/24/2011 | <u>NOTE OF ISSUE</u> | Public | 3 |
| 02/25/2011 | <u>PRAECIPE</u> | Public | 11 |
| 03/02/2011 | <u>RESPONSE TO MOTION</u> | Public | 47 |
| 03/02/2011 | <u>DECLARATION OF PAUL A. LINDENMUTH</u> | Public | 2 |
| 03/02/2011 | <u>RESPONSE TO MOTION</u> | Public | 3 |
| 03/03/2011 | <u>REPLY IN SUPPORT</u> | Public | 4 |
| 03/03/2011 | <u>DECLARATION OF TIMOTHY GOSSELIN</u> | Public | 4 |
| 03/03/2011 | <u>MANDATE</u> | Public | 16 |
| 03/04/2011 | <u>ORDER DIRECTING TOMYNS TO PARTIALLY SATISFY JUDGMENT</u> | Public | 2 |
| 03/04/2011 | <u>ORDER TO DISBURSE FUNDS</u> | Public | 3 |
| 03/04/2011 | <u>ORDER TO DISBURSE FUNDS</u> | Public | 3 |
| 03/04/2011 | <u>SATISFACTION OF JUDGMENT</u> | Public | 3 |
| 03/31/2011 | <u>NOTICE OF APPEAL WITH FEE</u> | Public | 22 |
| 04/08/2011 | <u>PERFECTION NOTICE FROM COURT OF APPEALS</u> | Public | 2 |
| 04/08/2011 | <u>LETTER FROM COURT OF APPEALS</u> | Public | 1 |
| 05/06/2011 | <u>MANDATE</u> | Public | 7 |
| 05/13/2011 | <u>DESIGNATION OF CLERK'S PAPERS</u> | Public | 3 |
| 06/01/2011 | <u>CLERK'S PAPERS PREPARED</u> | Public | 4 |
| 06/10/2011 | <u>CLERK'S PAPERS SENT</u> | Public | 1 |
| 06/15/2011 | VERBATIM REPORT TRANS TO DIV II *6/14/11* | Restricted | |
| 06/15/2011 | <u>TRANSMITTAL LETTER VRP COPY FILED</u> | Public | 1 |
| 08/22/2011 | <u>MANDATE</u> | Public | 2 |

**Proceedings**

| Date | Calendar | Outcome |
|--------------------|---|----------------------------|
| Week Of 10/04/2001 | DEPT 05 - JUDGE HOGAN (Rm. 2-C) Unconfirmed Status Conference | Cancelled/Amend Case Sched |
| Week Of 04/11/2002 | DEPT 05 - JUDGE HOGAN (Rm. 2-C) Unconfirmed Settlement Conference | Cancelled/Amend Case Sched |
| Week Of 04/25/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Pretrial Conference | Cancelled/Amend Case Sched |
| 05/09/2002 | DEPT 06 - JUDGE BUCKNER (Rm. JC2) Confirmed 9:30 Trial | Cancelled/Amend Case Sched |
| Week Of 07/08/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Status Conference | Cancelled/Stricken |
| 10/25/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Compel | Continued |
| 10/28/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Ex-Parte w/ Order Held |
| 11/01/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Compel | Cancelled/Stricken |
| 11/27/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Continued |
| 11/27/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Part Summary Judgment | Continued |
| 12/06/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Cancelled/Stricken |
| 12/06/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Part Summary Judgment | Continued |
| Week Of 12/09/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Status Conference | Cancelled/Stricken |
| 12/13/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Adjust Trial Date | Motion Held |
| 12/20/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Part Summary Judgment | Continued |
| 12/27/2002 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Part Summary Judgment | Motion Held |

| | | |
|--------------------|--|----------------------------|
| 01/17/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Continued |
| 01/21/2003 | DEPT 01 - JUDGE ORLANDO (Rm. 411) Unconfirmed 4:00 Settlement Conference | Cancelled/Amend Case Sched |
| 01/24/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 531) Confirmed 9:00 Motion | Motion Held |
| Week Of 01/27/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Pretrial Conference | Cancelled/Amend Case Sched |
| 02/10/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:30 Trial | Cancelled/Amend Case Sched |
| 03/07/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Continued |
| 05/02/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 1:30 Motion | Motion Held |
| Week Of 06/10/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Status Conference | Cancelled/Stricken |
| 06/13/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Summary Judgment | Cancelled/Stricken |
| Week Of 06/16/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Settlement Conference | Cancelled/Stricken |
| 06/26/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Ex-Parte w/ Order Held |
| Week Of 06/30/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Pretrial Conference | Cancelled/Amend Case Sched |
| 07/14/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:30 Trial | Cancelled/Stricken |
| 11/07/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 11/07/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Compel | Motion Held |
| 11/07/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Compel | Motion Held |
| 11/18/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 4:00 Motion | Motion Held |
| 11/24/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) | Motion Held |

| | | |
|--------------------|---|----------------------------|
| | Confirmed 9:00 Motion | |
| 11/26/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Compel | Motion Held |
| 12/05/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Presentation | Motion Held |
| 12/19/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Ex-Parte w/ Order Held |
| 12/26/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Continued |
| Week Of 12/30/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Pretrial Conference | Cancelled/Stricken |
| 12/31/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Compel | Motion Held |
| 12/31/2003 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Adjust Trial Date | Motion Held |
| 01/05/2004 | JUDGE WORSWICK (Rm. 117) Confirmed 4:00 Settlement Conference | Continued |
| 01/08/2004 | JUDGE WORSWICK (Rm. 117) Confirmed 8:00 Settlement Conference | Settlement Conf Held |
| 01/13/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Cancelled/Stricken |
| 01/13/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Cancelled/Stricken |
| 01/13/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Default | Cancelled/Stricken |
| 01/13/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:30 Trial | Continued |
| 03/12/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Adjust Trial Date | Cancelled/Stricken |
| 05/07/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Ex-Parte w/ Order Held |
| 06/18/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Cancelled/Stricken |
| Week Of 07/12/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Status Conference | Cancelled/Amend Case Sched |

| | | |
|--------------------|--|----------------------------|
| Week Of 08/16/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Status Conference | Cancelled/Amend Case Sched |
| Week Of 08/23/2004 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Status Conference | Cancelled - Not Confirmed |
| Week Of 01/17/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Settlement Conference | Cancelled/Amend Case Sched |
| 01/21/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Compel | Cancelled - Not Confirmed |
| 01/28/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Compel | Cancelled/Stricken |
| Week Of 01/31/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Pretrial Conference | Cancelled/Amend Case Sched |
| 02/11/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 02/11/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Compel | Motion Held |
| 02/14/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:30 Trial | Cancelled/Amend Case Sched |
| Week Of 02/21/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Settlement Conference | Cancelled/Amend Case Sched |
| 02/25/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Summary Judgment | Continued |
| 02/25/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Summary Judgment | Continued |
| Week Of 02/28/2005 | DEPT 11 - JUDGE MCCARTHY (Rm. 323) Unconfirmed Settlement Conference | Cancelled/Stricken |
| 03/04/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 03/04/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 1:30 Motion - Summary Judgment | Motion Held |
| 03/04/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 1:30 Motion - Summary Judgment | Motion Held |
| Week Of 03/07/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Pretrial Conference | Cancelled/Amend Case Sched |
| Week Of 03/14/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed Pretrial Conference | Cancelled/Stricken |

| | | |
|-----------------------------|---|----------------------------|
| 03/18/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Cancelled/Stricken |
| Scheduled By: Dan'L Bridges | | |
| 03/18/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Cancelled/Stricken |
| Scheduled By: Dan'L Bridges | | |
| 03/18/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Cancelled/Stricken |
| Scheduled By: Dan'L Bridges | | |
| 03/21/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:30 Trial | Cancelled/Amend Case Sched |
| 03/28/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Motion Held |
| 03/28/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:30 Trial | Jury Trial Held |
| 05/13/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Cancelled/Stricken |
| 05/20/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Presentation | Motion Held |
| 06/10/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Continued |
| 06/17/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 07/08/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Compel | Continued |
| 07/15/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Compel | Continued |
| 07/29/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 07/29/2005 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Compel | Motion Held |
| 07/25/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 550) Confirmed 9:00 Assignment to Set Trial Date | Cancelled/Stricken |
| 09/05/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 09/05/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) | Motion Held |

| | | |
|-------------------------------|---|------------------------|
| | Confirmed 9:00 Motion | |
| 09/05/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Assignment to Set Trial Date | Held |
| 10/03/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Motion Held |
| 10/03/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 10/03/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Presentation | Motion Held |
| 10/24/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 10/24/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Vacate | Cancelled/Stricken |
| 11/07/2008 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Ex-Parte w/ Order Held |
| 05/22/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 270) Confirmed 9:00 Motion | Motion Held |
| 06/12/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 06/12/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 06/12/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 06/19/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 1:30 Motion | Motion Held |
| 07/24/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Continued |
| 07/31/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 07/31/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| Scheduled By: PHILIP TALMADGE | | |
| 08/14/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Continued |
| 08/21/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Cancelled/Stricken |

| | | |
|-----------------------------|---|--------------------|
| 08/21/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Summary Judgment | Cancelled/Stricken |
| 08/28/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Summary Judgment | Cancelled/Stricken |
| 08/28/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Part Summary Judgment | Cancelled/Stricken |
| 09/04/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 09/04/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Summary Judgment | Cancelled/Stricken |
| Scheduled By: Dan'L Bridges | | |
| 09/21/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Trial | Cancelled/Stricken |
| 10/13/2009 | DEPT 17 - JUDGE CULPEPPER (Rm. 211A) Confirmed 4:00 Motion | Motion Held |
| 10/16/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 11:00 Show Cause | Held |
| 10/30/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Disbursement of Funds | Continued |
| 10/30/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Presentation | Continued |
| 10/30/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Presentation | Continued |
| 11/06/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Disbursement of Funds | Motion Held |
| 11/06/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Presentation | Motion Held |
| 11/06/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Presentation | Motion Held |
| 11/25/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion | Continued |
| 12/04/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Continued |
| 12/22/2009 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |

| | | |
|------------|--|--|
| 01/15/2010 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Reconsideration | Continued |
| 01/22/2010 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Reconsideration | Cancelled/Stricken |
| 02/05/2010 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion - Reconsideration Scheduled By: Benjamin Barcus | Motion Held |
| 06/18/2010 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 01/07/2011 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Unconfirmed 9:00 Motion - Disburse Funds | Cancelled/Stricken |
| 03/04/2011 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Motion | Motion Held |
| 03/04/2011 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Disbursement of Funds Scheduled By: JACQUELYN BEATTY | Motion Held |
| 03/04/2011 | DEPT 06 - JUDGE BUCKNER (Rm. 2-E) Confirmed 9:00 Disbursement of Funds | Motion Held Working Copies Provided |

Pending Case Schedule Items

Event Schedule Date

Judgments

| Cause # | Status | Signed | Effective | Filed |
|---------------------|----------------------------|-------------------------------|------------|------------|
| <u>04-9-05535-1</u> | OPEN as of 05/07/2004 | ROSANNE BUCKNER on 05/07/2004 | 05/07/2004 | 05/07/2004 |
| <u>04-9-05536-0</u> | OPEN as of 05/07/2004 | ROSANNE BUCKNER on 05/07/2004 | 05/07/2004 | 05/07/2004 |
| <u>04-9-05537-8</u> | OPEN as of 05/07/2004 | ROSANNE BUCKNER on 05/07/2004 | 05/07/2004 | 05/07/2004 |
| <u>04-9-05538-6</u> | OPEN as of 05/07/2004 | ROSANNE BUCKNER on 05/07/2004 | 05/07/2004 | 05/07/2004 |
| <u>05-9-05829-4</u> | SATISFIED as of 03/04/2011 | ROSANNE BUCKNER on 05/20/2005 | 05/20/2005 | 05/20/2005 |

This calendar lists Confirmed and Unconfirmed Proceedings. Attorneys may **obtain access rights** to confirm/strike selected proceedings. Currently, any proceedings for the Commissioners' calendars can be stricken, but only Show Cause proceedings for the Commissioners' calendars can be confirmed.

Unconfirmed Proceedings will not be heard unless confirmed as required by **the Local Rules of the Superior Court for Pierce County**.

- Hearing and location information displayed in this calendar is subject to change without notice. Any changes to this information after the creation date and time may not display in current version.
- Confidential cases and Juvenile Offender proceeding information is not displayed on this calendar. Confidential case types are: Adoption, Paternity, Involuntary Commitment, Dependency, and Truancy.
- The names provided in this calendar cannot be associated with any particular individuals without individual case research.
- Neither the court nor clerk makes any representation as to the accuracy and completeness of the data except for court purposes.

Created: Thursday October 6, 2011 2:51PM

Appendix 4

Westlaw

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 1

▷

Court of Appeals of Washington,
 Division 2.

James and Deborah SHARBONO, individually and
 the marital community composed thereof; Cas-
 sandra Sharbono, Respondents/Cross-Appellants,
 v.

UNIVERSAL UNDERWRITERS INSURANCE
 COMPANY, a foreign insurer, Appellant/
 Cross-Respondent,
 and

Len Van De Wege and "Jane Doe" Van De Wege,
 husband and wife and the marital community com-
 posed thereof, Appellants.

No. 33379-1-II.
 June 26, 2007.

As Amended on Denial of Reconsideration Oct. 9,
 2007.

Background: Insureds brought breach of contract and bad faith action against umbrella insurer and insurance agent, after settling wrongful death action brought by family of motorist killed when insureds' daughter lost control of insureds' truck. The Pierce County Superior Court, Rosanne Nowak Buckner, J., dismissed insureds' claims against agent, found that insureds' settlement of the wrongful death action was reasonable, granted summary judgment for insureds on insureds' claim they had coverage under three umbrella policies and on insureds' claim that insurer acted in bad faith, and entered judgment for insureds on jury verdict establishing insureds' damages. Insurer appealed, and insureds cross-ap-pealed.

Holdings: The Court of Appeals, Armstrong, J., held that:

(1) umbrella policies issued to insureds' businesses did not provide coverage for wrongful death claim;
 (2) evidence was sufficient to establish that insureds' settlement of wrongful death claim was reasonable;

(3) insurer acted in bad faith by not providing insureds with the underwriting files when they were attempting to settle wrongful death claim;
 (4) insurer did not violate the Consumer Protection Act (CPA) by offering insureds substantially less than the amount of coverage actually available when insureds were attempting to settle wrongful death claim;
 (5) substantial factor proximate cause instruction was not warranted; and
 (6) insureds' claims against agent were independent of their claims against insurer and should not have been dismissed when trial court concluded policies provided enough coverage to cover wrongful death settlement.

Affirmed in part, reversed in part, vacated in part, and remanded.

West Headnotes

[1] Insurance 217 ↪1863

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1863 k. Questions of law or fact.
 Most Cited Cases
 Courts interpret insurance policies as a matter of law.

[2] Insurance 217 ↪1713

217 Insurance
 217XIII Contracts and Policies
 217XIII(A) In General
 217k1711 Nature of Contracts or Policies
 217k1713 k. Policies considered as
 contracts. Most Cited Cases

Insurance 217 ↪1816

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

217k1815 Reasonableness
 217k1816 k. In general. Most Cited

Cases

Insurance 217 ↪1820

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1819 Understanding of Ordinary or
 Average Persons
 217k1820 k. In general. Most Cited
 Cases

Insurance 217 ↪1828

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1828 k. Construction to be fair. Most
 Cited Cases

Insurance policies are contracts, and courts seek to determine the contracting parties' intent by resorting to a fair, reasonable, and sensible construction of the contract's language, as the average insurance purchaser would understand.

[3] Insurance 217 ↪1809

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1809 k. Construction or enforcement
 as written. Most Cited Cases

Courts will enforce an insurance contract as written if the contract is clear and unambiguous.

[4] Insurance 217 ↪1813

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1811 Intention
 217k1813 k. Language of policies.
 Most Cited Cases

If an insurance contract's language is neither ambiguous nor difficult to comprehend, courts will

enforce the intent expressed in the policy regardless of what coverage the insured may have thought he had.

[5] Evidence 157 ↪461(1)

157 Evidence
 157XI Parol or Extrinsic Evidence Affecting
 Writings
 157XI(D) Construction or Application of
 Language of Written Instrument
 157k461 Showing Intent of Parties as to
 Subject-Matter
 157k461(1) k. In general. Most Cited
 Cases

If ambiguities exist in an insurance policy's language, courts may resort to extrinsic evidence to ascertain the parties' intent.

[6] Insurance 217 ↪1808

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1808 k. Ambiguity in general. Most
 Cited Cases

An ambiguity exists in an insurance policy where the insurance policy's language is susceptible to more than one reasonable interpretation.

[7] Insurance 217 ↪1832(1)

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1830 Favoring Insureds or Benefi-
 ciaries; Disfavoring Insurers
 217k1832 Ambiguity, Uncertainty or
 Conflict

217k1832(1) k. In general. Most
 Cited Cases

Courts resolve any ambiguities in an insurance policy in the insured's favor.

[8] Insurance 217 ↪1808

217 Insurance

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 3

217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1808 k. Ambiguity in general. Most
 Cited Cases

Insurance 217 ↪1810

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1810 k. Construction as a whole.
 Most Cited Cases
 If possible, courts interpret an insurance policy
 to harmonize the policy's provisions and avoid cre-
 ating ambiguities.

[9] Insurance 217 ↪2656

217 Insurance
 217XXII Coverage--Automobile Insurance
 217XXII(A) In General
 217k2651 Automobiles Covered
 217k2656 k. Nonowned automobiles in
 general. Most Cited Cases
 Umbrella policies issued to insureds' busi-
 nesses did not cover use of truck by insureds'
 daughter, and thus did not apply to insureds' liabil-
 ity for daughter's accident that killed motorist and
 led to wrongful death action by motorist's family,
 as the businesses did not own or hire such truck,
 and the policies only provided coverage for
 vehicles owned or hired by the businesses.

[10] Appeal and Error 30 ↪1010.1(14)

30 Appeal and Error
 30XVI Review
 30XVI(I) Questions of Fact, Verdicts, and
 Findings
 30XVI(I)3 Findings of Court
 30k1010 Sufficiency of Evidence in
 Support
 30k1010.1 In General
 30k1010.1(8) Particular Cases
 and Questions
 30k1010.1(14) k. Insurance.

Most Cited Cases

Court of Appeals will uphold a trial court's fac-
 tual determination of a settlement's reasonableness,
 in an action regarding whether an insurer is liable
 for the settlement, if substantial evidence supports
 that determination. West's RCWA 4.22.060(1).

[11] Insurance 217 ↪3367

217 Insurance
 217XXVII Claims and Settlement Practices
 217XXVII(C) Settlement Duties; Bad Faith
 217k3366 Settlement by Insured; In-
 sured's Release of Tort-Feasor
 217k3367 k. In general. Most Cited
 Cases

Where an insured negotiates a settlement and
 seeks reimbursement, the insurer is liable only for
 the amount of the settlement that is reasonable and
 paid in good faith. West's RCWA 4.22.060(1).

[12] Insurance 217 ↪3367

217 Insurance
 217XXVII Claims and Settlement Practices
 217XXVII(C) Settlement Duties; Bad Faith
 217k3366 Settlement by Insured; In-
 sured's Release of Tort-Feasor
 217k3367 k. In general. Most Cited
 Cases

To determine a settlement's reasonableness in
 the context of a consent judgment and covenant not
 to execute, in an action regarding whether an in-
 surer is liable for the settlement, a court considers:
 (1) the releasing person's damages; (2) the merits of
 the releasing person's liability theory; (3) the merits
 of the released person's defense theory; (4) the re-
 leased person's relative faults; (5) the risks and ex-
 penses of continued litigation; (6) the released per-
 son's ability to pay; (7) any evidence of bad faith,
 collusion, or fraud; (8) the extent of the releasing
 person's investigation and preparation of the case;
 and (9) the interests of the parties not being re-
 leased. West's RCWA 4.22.060(1).

[13] Insurance 217 ↪3367

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 4

217 Insurance
 217XXVII Claims and Settlement Practices
 217XXVII(C) Settlement Duties; Bad Faith
 217k3366 Settlement by Insured; In-
 sured's Release of Tort-Feasor
 217k3367 k. In general. Most Cited
 Cases

Ensuring reasonable settlements, when an insured brings an action alleging an insurer is liable for the settlement, protects insurers from liability for excessive judgments. West's RCWA 4.22.060 (1).

[14] Insurance 217 ↪3367

217 Insurance
 217XXVII Claims and Settlement Practices
 217XXVII(C) Settlement Duties; Bad Faith
 217k3366 Settlement by Insured; In-
 sured's Release of Tort-Feasor
 217k3367 k. In general. Most Cited
 Cases

No one factor controls when determining whether a settlement is reasonable, in an action regarding whether the insurer is liable for the settlement, and the trial court has the discretion to weigh each case individually. West's RCWA 4.22.060(1).

[15] Insurance 217 ↪3367

217 Insurance
 217XXVII Claims and Settlement Practices
 217XXVII(C) Settlement Duties; Bad Faith
 217k3366 Settlement by Insured; In-
 sured's Release of Tort-Feasor
 217k3367 k. In general. Most Cited
 Cases

Insurance 217 ↪3374

217 Insurance
 217XXVII Claims and Settlement Practices
 217XXVII(C) Settlement Duties; Bad Faith
 217k3373 Amount and Items Recoverable
 217k3374 k. In general. Most Cited
 Cases

Evidence was sufficient to establish that insureds' \$4,525,000 settlement of wrongful death action, brought by family of motorist killed when insureds' daughter lost control of insureds' truck, was reasonable, in insureds' breach of contract and bad faith action against insurer which had issued umbrella policies to insureds and their businesses; economist's report estimated that economic loss to motorist's family was \$1,050,228, there was evidence that motorist's family was close and that motorist's children suffered emotional distress, insureds' daughter was charged with second degree negligent driving, insureds faced a substantial exposure in excess of the \$250,000 limits of their primary coverage, settlement was within range of jury verdicts submitted to trial court, there was evidence that a verdict in excess of primary coverage would force insureds into bankruptcy, and insurer was potentially liable to insureds for up to \$7,000,000. West's RCWA 4.22.060(1).

[16] Insurance 217 ↪3370

217 Insurance
 217XXVII Claims and Settlement Practices
 217XXVII(C) Settlement Duties; Bad Faith
 217k3366 Settlement by Insured; In-
 sured's Release of Tort-Feasor
 217k3370 k. Notice to or consent of li-
 ability insurer. Most Cited Cases

Insurer which had issued umbrella policies to insureds and insureds' businesses was not entitled to notice of insureds' settlement of wrongful death action brought by family of motorist killed when insureds' daughter lost control of insureds' truck, for purposes of insureds' subsequent breach of contract and bad faith action brought against insurer, as statute only required that all parties receive notice of the settlement, and insurer was not a party in the wrongful death action. West's RCWA 4.22.060(1).

[17] Insurance 217 ↪3427

217 Insurance
 217XXVIII Miscellaneous Duties and Liabilities
 217k3427 k. Questions of law or fact. Most

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 5

Cited Cases

Whether an insurer acted in bad faith is generally a question of fact, though a trial court can determine a factual question as a matter of law if reasonable minds could reach but one conclusion.

[18] Insurance 217 ↪3419

217 Insurance

217XXVIII Miscellaneous Duties and Liabilities

217k3416 Of Insurers

217k3419 k. Bad faith in general. Most

Cited Cases

An insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith or fraud, although not by a good faith mistake. West's RCWA 48.01.030.

[19] Insurance 217 ↪3419

217 Insurance

217XXVIII Miscellaneous Duties and Liabilities

217k3416 Of Insurers

217k3419 k. Bad faith in general. Most

Cited Cases

An insurer must give equal consideration to its policyholder's interests as well as its own, for purposes of determining whether the insurer has acted in bad faith. West's RCWA 48.01.030.

[20] Insurance 217 ↪3419

217 Insurance

217XXVIII Miscellaneous Duties and Liabilities

217k3416 Of Insurers

217k3419 k. Bad faith in general. Most

Cited Cases

The question in bad faith claims is always whether the insurer acted reasonably under the facts and circumstances of the case. West's RCWA 48.01.030.

[21] Insurance 217 ↪3419

217 Insurance

217XXVIII Miscellaneous Duties and Liabilities

217k3416 Of Insurers

217k3419 k. Bad faith in general. Most

Cited Cases

Insurer which had issued umbrella policies to insureds and insureds' businesses acted in bad faith when it refused to turn over the underwriting files to private counsel retained by insureds in connection with wrongful death claim asserted by family of motorist killed when insureds' daughter lost control of insureds' truck, where insureds believed they had purchased three separate \$1,000,000 personal umbrella policies, insurer contended that insureds only had \$1,000,000 in umbrella coverage applicable to the accident, insureds' attorney requested the files in order to resolve the coverage issue and settle the wrongful death action, insurer refused to turn over the underwriting files on ground that files contained proprietary information, but insurer failed to point to a single document that contained sensitive information or information that could have impacted its business interests. West's RCWA 48.01.030.

[22] Insurance 217 ↪1867

217 Insurance

217XIII Contracts and Policies

217XIII(H) Relations Between Parties; Implied Terms

217k1867 k. Good faith and fair dealing. Most Cited Cases

Insurers owe a general duty of good faith to their insureds due to the fiduciary relationship insurers and insureds share. West's RCWA 48.01.030.

[23] Antitrust and Trade Regulation 29T ↪ 151

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk151 k. Public impact or interest; private or internal transactions. Most Cited Cases

Antitrust and Trade Regulation 29T ↪221

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 6

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations

29Tk221 k. Insurance. Most Cited Cases

An insurer commits a per se violation of the Consumer Protection Act (CPA) when the insurer violates a statute that contains a specific legislative declaration of public interest impact. RCWA 19.86.010 et seq.

[24] Antitrust and Trade Regulation 29T ↔ 221

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations

29Tk221 k. Insurance. Most Cited Cases

Insurer which had issued umbrella policies to insureds and insureds' businesses did not violate the Consumer Protection Act (CPA) by offering insureds substantially less than the amount of coverage actually available, when insureds were attempting to settle wrongful death claim asserted by family of motorist killed when insureds' daughter lost control of insureds' truck, and thereby compel insureds to commence litigation to recover amounts actually due, as insurer did offer insureds the \$1,000,000 in coverage available under insureds' personal umbrella coverage, and umbrella policies issued to insureds' businesses did not provide coverage for the accident. RCWA 19.86.010 et seq.; WAC 284-30-330(7).

[25] Antitrust and Trade Regulation 29T ↔ 151

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk151 k. Public impact or interest; private or internal transactions. Most Cited Cases

Antitrust and Trade Regulation 29T ↔ 221

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations

29Tk221 k. Insurance. Most Cited Cases

Even if an insured cannot prove a per se violation of the Consumer Protection Act (CPA), the insured may still recover for a CPA violation if the insured can show that the insurer: (1) engaged in an unfair or deceptive act or practice; (2) in trade or commerce; and (3) that the act or practice affects the public interest. RCWA 19.86.010 et seq.

[26] Antitrust and Trade Regulation 29T ↔ 221

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(C) Particular Subjects and Regulations

29Tk221 k. Insurance. Most Cited Cases

In Consumer Protection Act (CPA) action against an insurer, in addition to establishing a violation the insured must also prove: (1) a resulting damage to the insured's business or property, and (2) that a causal link exists between the unfair or deceptive act and the injury suffered. RCWA 19.86.010 et seq.

[27] Insurance 217 ↔ 3426

217 Insurance

217XXVIII Miscellaneous Duties and Liabilities

217k3426 k. Actions in general; evidence. Most Cited Cases

Evidence that commissioner of the Court of Appeals had granted discretionary review of trial court ruling, in wrongful death action brought by family of motorist killed when insureds' daughter lost control of insureds' truck, compelling insurer which had issued umbrella policies to insureds and insureds' businesses to turn over its underwriting

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 7

files, was irrelevant, in insureds' breach of contract and bad faith action against insurer, as trial court in insureds' action had already ruled as a matter of law that insurer had acted in bad faith by refusing to turn over underwriting files to insureds, and only issue for jury in insureds' action was whether insurer's bad faith damaged insureds.

[28] Privileged Communications and Confidentiality 311H ↔417

311H Privileged Communications and Confidentiality

311HVII Other Privileges

311Hk417 k. Settlement negotiation privilege; mediation and arbitration. Most Cited Cases (Formerly 410k196.4)

Evidence of what occurred at mediations, on wrongful death claim asserted against insureds by family of motorist killed in collision with truck driven by insureds' daughter, was not inadmissible under mediation privilege, in trial of breach of contract and bad faith action brought by insureds against their umbrella insurer, on ground that mediations were a result of a court order, a written agreement between the parties or a mandate to mediate, absent production by the insurer of a court order, written agreement or mandate. West's RCWA 5.60.070(1), 7.70.100.

[29] Evidence 157 ↔213(1)

157 Evidence

157VII Admissions

157VII(A) Nature, Form, and Incidents in General

157k212 Offers of Compromise or Settlement

157k213 In General

157k213(1) k. In general. Most Cited Cases

Evidence of what occurred at mediation sessions on wrongful death claim asserted against insureds by family of motorist killed when insureds' daughter lost control of insureds' truck, consisting of impact that family's videotape describing their

loss had on insureds and statements by insurer's representative that insureds would have to sue insurer in order to obtain the underwriting files, was admissible, in trial of insureds' breach of contract and bad faith action against insurer which had issued umbrella policies to insureds and insureds' businesses, as such evidence was offered to show the importance of the underwriting files and the harm that insurer's refusal to produce the underwriting files caused insureds, rather than to establish liability. ER 408.

[30] Civil Rights 78 ↔1033(1)

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1030 Acts or Conduct Causing Deprivation

78k1033 Discrimination in General

78k1033(1) k. In general. Most Cited Cases

Civil Rights 78 ↔1118

78 Civil Rights

78II Employment Practices

78k1118 k. Practices prohibited or required in general; elements. Most Cited Cases (Formerly 78k1137)

Civil Rights 78 ↔1252

78 Civil Rights

78II Employment Practices

78k1241 Retaliation for Exercise of Rights

78k1252 k. Causal connection; temporal proximity. Most Cited Cases

Labor and Employment 231H ↔774

231H Labor and Employment

231HVIII Adverse Employment Action

231HVIII(A) In General

231Hk770 Exercise of Rights or Duties; Retaliation

231Hk774 k. Causation in general.

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Most Cited Cases

The substantial factor proximate cause test is appropriate in discrimination, unfair employment practices and retaliatory termination cases, where causation is difficult to prove, largely due to public policy considerations that strongly favor eradication of discrimination and unfair employment practices.

[31] Antitrust and Trade Regulation 29T ⇨ 364

29T Antitrust and Trade Regulation
 29TIII Statutory Unfair Trade Practices and Consumer Protection
 29TIII(E) Enforcement and Remedies
 29TIII(E)5 Actions
 29Tk361 Proceedings; Trial
 29Tk364 k. Instructions. Most Cited Cases

Insurance 217 ⇨ 3426

217 Insurance
 217XXVIII Miscellaneous Duties and Liabilities
 217k3426 k. Actions in general; evidence. Most Cited Cases

Insurance 217 ⇨ 3579

217 Insurance
 217XXXI Civil Practice and Procedure
 217k3579 k. Instructions. Most Cited Cases
 Substantial factor proximate cause instruction was not warranted, in Consumer Protection Act (CPA) and bad faith action brought by insureds against insurer which had issued umbrella policies to insureds and insureds' businesses, as insureds' claims were premised on failure of insurer to produce its underwriting files in connection with wrongful death claim of family of motorist killed when insured's daughter lost control of insureds' truck and the damages that resulted from the stress and delay in settling the wrongful death claim due to uncertainty over how much coverage insureds had under the policies, and there was no claim that

two inseparable causes contributed to the delayed settlement. RCWA 19.86.010 et seq.; West's RCWA 48.01.030.

[32] Insurance 217 ⇨ 1671

217 Insurance
 217XI Agents and Agency
 217XI(D) Agents for Applicants or Insureds
 217k1668 Duties and Liabilities to Insureds or Others
 217k1671 k. Failure to procure coverage. Most Cited Cases

Insurance 217 ⇨ 1672

217 Insurance
 217XI Agents and Agency
 217XI(D) Agents for Applicants or Insureds
 217k1668 Duties and Liabilities to Insureds or Others
 217k1672 k. Fraud or misrepresentation. Most Cited Cases

Negligence, negligent misrepresentation and breach of fiduciary duty claims of insureds against insurance agent who had procured umbrella policies covering insureds and insureds' businesses, arising out of agent's alleged failure to obtain \$3,000,000 of personal umbrella coverage as requested by insureds, were improperly dismissed by trial court once court determined insureds had sufficient coverage to cover wrongful death settlement, in action against agent and insurer in which insureds alleged insurer acted in bad faith by refusing to provide evidence necessary to verify amount of their umbrella coverage when they attempted to settle wrongful death claim brought by family of motorist killed when insureds' daughter lost control of insureds' truck; claims against agent were independent of the claims for coverage under the umbrella policies, and Court of Appeals determined that only one of the policies provided coverage to insureds.

[33] Costs 102 ⇨ 252

102 Costs

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

102X On Appeal or Error

102k252 k. Attorney fees on appeal or error.

Most Cited Cases

In general, where a prevailing party is entitled to attorney fees in the trial court, they are entitled to attorney fees if they prevail on appeal. RAP 18.1(a).

[34] Insurance 217 ↪ 3586

217 Insurance

217XXXI Civil Practice and Procedure

217k3584 Costs and Attorney Fees

217k3586 k. Appeals. Most Cited Cases

Neither insureds nor insurer would be awarded attorney fees on appeal, in insureds' breach of contract and bad faith action against insurer which had issued umbrella policies to insureds and insureds' businesses, as neither party totally prevailed; insureds prevailed on the reasonableness of their settlement with plaintiffs in underlying wrongful death action and on trial court's determination that insurer acted in bad faith when insureds attempted to settle wrongful death action, while insurer appealed on coverage, stacking and consumer protection issues. RAP 18.1(a).

****410** Philip Albert Talmadge Emmelyn Hart-Biberfeld Talmadge Law Group PLLC Tukwila, WA, Dan'l Wayne Bridges McGaugheyBridges Dunlap PLLC Bellevue, WA, for Appellants.

Timothy R. Gosselin, Attorney at Law, Tacoma, WA, for Respondents.

ARMSTRONG, J.

***388** ¶ 1 Cassandra Sharbono lost control of her truck, crossed into the oncoming traffic lane, and hit a car Cynthia Tomyne was driving. Cynthia Tomyne died as a result of the accident and her family claimed damages against Cassandra's parents, James and Deborah Sharbono (the Sharbonos), who owned the vehicle Cassandra was driving. The Sharbonos had primary liability coverage with State Farm Insurance Company and umbrella cov-

erage under their commercial and personal liability policies with Universal Underwriters Insurance Company. The Sharbonos claimed that they had three umbrella policies; Universal advised them they had only one umbrella policy with a \$1,000,000 limit. During settlement negotiations with the Tomyne, the Sharbonos several times asked Universal to produce its ***389** underwriting file so that they and the Tomyne would know the extent of the Sharbonos' liability coverage. Universal refused. The Tomyne and the Sharbonos ultimately settled for \$4,525,000, and the Sharbonos then sued Universal to establish coverage and to recover damages for Universal's alleged bad faith in refusing to produce its underwriting file. The trial judge granted the Sharbonos summary judgment, declaring that they had coverage under three policies for a total of \$7,000,000; the trial court also ruled that Universal was liable for bad faith as a matter of law, and found the Tomyne-Sharbono settlement reasonable. At the conclusion of the damages trial, the jury awarded the Sharbonos \$4,500,000 for Universal's bad faith. Universal appeals the jury's verdict and the trial court's summary judgments establishing coverage and finding Universal liable for bad faith. Universal also appeals the trial court's determination that the settlement was reasonable. We affirm the summary judgment declaring Universal liable for bad faith and the trial court's ruling that the Tomyne-Sharbono settlement was reasonable. We also affirm the trial court's ruling regarding the settlement's reasonableness. But we reverse the trial court's judgment establishing coverage at \$7,000,000; we hold that under the policy's plain language, the Sharbonos had umbrella coverage of \$1,000,000 under only one policy. And we reverse the trial court's determination that Universal violated the Consumer Protection Act. Finally, we reverse the jury verdict for bad faith damages and the trial court's dismissal of the Sharbonos' claim against their agent for negligently procuring the Universal umbrella policy.

FACTS

¶ 2 James and Deborah Sharbono owned three

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 10

transmission shops: "All Transmission & Automotive," "The Trans-Plant," and "Parkland Transmission." The **Sharbonos** had business partners in the latter two businesses: Clarence *390 and Claudia Ray in The Trans-Plant, and Robert and Debra Huke in Parkland Transmission.

411 ¶ 3 In the mid-1990s, the **Sharbonos and their partners bought commercial insurance from Universal, an insurer specializing in coverage for automobile dealers, auto repair shops, and associated enterprises. Universal insured the three transmission shops under separate but similar insurance policies.^{FN1}

FN1. The **Sharbonos** conceded below that they had no coverage under the Parkland Transmission policy because they were not named insureds in that policy. Thus, that policy is irrelevant for purposes of this appeal.

¶ 4 In 1997, the **Sharbonos** asked their Universal sales agent, Len Van de Wege, about transferring the family's personal umbrella coverage from State Farm to Universal. Universal offered personal umbrella coverage to the **Sharbonos** as an adjunct to the **Sharbono** companies' commercial policies. The **Sharbonos** claim that they asked Van de Wege for \$3,000,000 of personal umbrella coverage. According to the **Sharbonos**, Van de Wege agreed to add a \$1,000,000 personal umbrella to each business policy, providing a total of \$3,000,000 in personal umbrella coverage. According to Van de Wege, the **Sharbonos** did not seek \$3,000,000 in personal umbrella coverage.

¶ 5 When the **Sharbonos** renewed their Universal policies in 1998, they added their personal motor vehicles to their personal umbrella coverage.

¶ 6 On December 11, 1998, Cassandra **Sharbono**, the **Sharbonos'** daughter, lost control of the family truck and swerved into oncoming traffic, striking an approaching car head-on and killing Cynthia Tomyn. The police cited Cassandra for

second degree negligent driving, and the **Sharbonos** later admitted that Cassandra was "at least partially at fault" for the accident. Clerk's Papers (CP) at 557. Cynthia Tomyn, who was 34 years old, was survived by her husband Clinton and their three minor children.

¶ 7 The Tomyns retained attorney Ben Barcus to pursue a wrongful death claim against the **Sharbonos**. The Tomyns *391 initially attempted to settle with the **Sharbonos**, negotiating with the **Sharbonos'** primary auto liability carrier, State Farm, and the **Sharbonos'** personal attorneys, Timothy Gosselin and Maureen Falecki.

¶ 8 Over the next few months, Falecki wrote to Universal asking for documents pertaining to the **Sharbonos'** insurance coverage. Specifically, Falecki asked Universal to produce its underwriting files on the **Sharbonos'** policies, explaining that the **Sharbonos** believed they had \$3,000,000 of personal umbrella coverage. Universal produced copies of the **Sharbonos'** application for the personal umbrella coverage and offered to provide the **Sharbonos** with any other documents they had signed or submitted. But Universal refused to produce its underwriting files, explaining that the files contained proprietary information and that it was unaware of any authority that supported Falecki's request.

¶ 9 The **Sharbonos** and Tomyns participated in two mediation sessions. At the first session, Universal offered to pay the **Sharbonos'** \$1,000,000 umbrella limit toward any settlement above State Farm's \$250,000 in primary coverage. The first mediation failed and Falecki again asked Universal to produce its underwriting files, stating that Universal's failure to disclose the files was one reason the mediation failed. Universal again refused.

¶ 10 At the second settlement mediation, the **Sharbonos** asked for Universal's underwriting files from Glenn Reid, a Universal representative who attended the mediation. Universal again refused to produce its underwriting file. After the second failed mediation, Falecki again wrote Universal

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 11

asking for its underwriting files. In the same letter, Falecki advised Universal that if it failed to cooperate, the **Sharbonos** would assert bad faith claims against Universal. Universal still refused to produce the file and advised Falecki that if the **Sharbonos** sued for bad faith, it would counterclaim for abuse of process.

¶ 11 Aware of the dispute about coverage, the Tomyns' attorney threatened to sue the **Sharbonos** unless Universal *392 cooperated. Universal again refused, and the Tomyns sued the **Sharbonos**.

¶ 12 The Tomyns subpoenaed Universal's underwriting file, and Universal moved to **412 quash the subpoena on the ground that its files were not discoverable in a suit against its insureds. The trial court denied the motion to quash and ordered Universal to produce the underwriting files. Universal then sought discretionary review; a commissioner of this court, finding probable error in the trial court's order to produce, granted review and stayed enforcement of the subpoena.

¶ 13 Before we considered the appeal, the Tomyns and **Sharbonos** settled. The **Sharbonos** agreed to confess judgment for \$4,525,000 and to assign their insurance claims to the Tomyns in exchange for covenants not to execute (as to James and Deborah **Sharbono**) and to forebear (as to Cassandra **Sharbono**). The agreement also required the **Sharbonos** to sue Universal to recover insurance proceeds to satisfy the confessed judgment amount.

¶ 14 The **Sharbonos** then commenced this action against Universal and Van de Wege, alleging (1) breach of contract, (2) violation of the Consumer Protection Act (CPA), (3) negligence or negligent misrepresentation, (4) bad faith, (5) breach of quasi-fiduciary duty (Universal), (6) breach of fiduciary duty (Van de Wege), and (7) reformation.

¶ 15 The **Sharbonos** moved for summary judgment to establish \$3,000,000 of coverage under each of their commercial policies' Umbrella Coverage Part 980. The trial court granted the **Sharbonos**

' motion, stating that each policy's Umbrella Coverage Part 980 provided personal liability coverage to the **Sharbonos**. In a later ruling, the trial court found that the **Sharbonos** could combine the policies' limits for \$6,000,000 in addition to the \$1,000,000 personal umbrella coverage that Universal conceded was available.

¶ 16 The **Sharbonos** moved for an order declaring their settlement with the Tomyns reasonable under RCW 4.22.060. The trial court ruled that the settlement was reasonable.

*393 ¶ 17 Before trial, the **Sharbonos** filed a second motion for summary judgment, declaring that Universal had acted in bad faith when it refused to turn over its underwriting file to the Tomyns' attorney and when it allegedly did not explain why it denied coverage under its umbrella policies. The **Sharbonos** also alleged that Universal violated the CPA by forcing them to litigate to recover insurance proceeds, failing to provide the underwriting documents, and failing to provide a reasonable explanation for its position. See WAC 284-30-330(6), (7), (13). Universal also moved for summary judgment, seeking dismissal of the **Sharbonos**' claims for negligence or negligent misrepresentation, breach of quasi-fiduciary duty, and reformation, as well as dismissal of all claims against Van de Wege.

¶ 18 The trial court granted both motions in part. The court found Universal liable for bad faith and for violating the CPA by refusing to produce its underwriting file and for not paying the Tomyn judgment. The trial court dismissed the **Sharbonos**' claims for negligence, breach of fiduciary duty, reformation, and all claims against Van de Wege, explaining that its "previous rulings establish[ed] insurance sufficient to cover the underlying judgment against the **Sharbonos** in the Tomyn lawsuit, such that any relief the court could provide on [the **Sharbonos**]' claims for additional insurance would be duplicative of relief already granted." CP at 2177.

¶ 19 At trial, the court directed a verdict for the

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 12

Sharbonos as to the unpaid balance of the consent judgment-\$3,275,000 together with interest from the date of judgment. The court reasoned that the **Sharbonos** were entitled to the award as presumptive damages because of Universal's bad faith. Universal has not assigned error to the ruling.

¶ 20 A jury awarded the **Sharbonos** \$4,500,000 for damages suffered due to Universal's bad faith. The trial court then granted the **Sharbonos**' motion for attorney fees, costs, and treble damages under the CPA. The trial court entered a \$9,393,298.63 judgment, which included the \$4,525,000 settlement, \$204,090 in attorney fees and costs, and \$10,000 in treble damages.

*394 ANALYSIS

I. STANDARD OF REVIEW AND GENERAL PRINCIPLES OF INSURANCE POLICY INTERPRETATION

A. Summary Judgment

¶ 21 On summary judgment, the trial court decided that Umbrella Coverage Part 980 applied to the **Sharbonos**' liability for Cassandra's accident.

¶ 22 We review an order granting summary judgment de novo. **413Go2Net, Inc. v. FreeYellow.com, Inc., 158 Wash.2d 247, 252, 143 P.3d 590 (2006) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wash.2d 345, 350, 111 P.3d 1173 (2005)). Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. Insurance Policy Interpretation

[1][2] ¶ 23 We interpret insurance policies as a matter of law. *Kitsap County v. Allstate Ins. Co.*, 136 Wash.2d 567, 575, 964 P.2d 1173 (1998). Insurance policies are contracts, and courts seek to determine the contracting parties' intent by resorting to a fair, reasonable, and sensible construction of the contract's language, as the average insurance purchaser would understand. *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc.*, 134 Wash.2d 413, 427, 951 P.2d 250 (1998) (citations

omitted).

[3][4] ¶ 24 In general, we will enforce an insurance contract as written if the contract is clear and unambiguous. *Allstate Ins. Co. v. Peasley*, 131 Wash.2d 420, 424, 932 P.2d 1244 (1997) (citing *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wash.2d 452, 456, 760 P.2d 337 (1988)). If an insurance contract's language is neither ambiguous nor difficult to comprehend, we will enforce the intent expressed in the policy regardless of what coverage the insured may have thought he had. *Dennis v. Great Am. Ins. Cos.*, 8 Wash.App. 71, 74, 503 P.2d 1114 (1972) (citing *Jeffries v. Gen. Cas. Co. of Am.*, 46 Wash.2d 543, 283 P.2d 128 (1955)).

*395 [5][6][7][8] ¶ 25 If ambiguities exist in the policy language, we may resort to extrinsic evidence to ascertain the parties' intent. *Am. Nat'l Fire Ins. Co.*, 134 Wash.2d at 427, 951 P.2d 250 (citing *Findlay v. United Pac. Ins. Co.*, 129 Wash.2d 368, 374, 917 P.2d 116 (1996)). An ambiguity exists where the insurance policy's language is susceptible to more than one reasonable interpretation. *Vadheim v. Cont'l Ins. Co.*, 107 Wash.2d 836, 841, 734 P.2d 17 (1987) (citing *Morgan v. Prudential Ins. Co. of Am.*, 86 Wash.2d 432, 435, 545 P.2d 1193 (1976)). We resolve any ambiguities in the insured's favor. *Am. Nat'l Fire Ins. Co.*, 134 Wash.2d at 428, 951 P.2d 250 (citing *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wash.2d 50, 68, 882 P.2d 703 (1994), 126 Wash.2d 50, 891 P.2d 718 (1995)). If possible, we interpret a policy to harmonize the policy's provisions and avoid creating ambiguities. *Tyrrell v. Farmers Ins. Co. of Wash.*, 140 Wash.2d 129, 133, 994 P.2d 833 (2000); see *Dobosh v. Rocky Mountain Fire & Cas. Co.*, 43 Wash.App. 467, 471, 717 P.2d 793 (1986) (citations omitted).

II. INSURANCE POLICY COVERAGE-UMBRELLA COVERAGE PART 980

¶ 26 The **Sharbonos** moved for partial summary judgment to establish that Umbrella Coverage Part 980 of both the All Transmission & Automot-

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 13

ive and The Trans-Plant insurance policies applied to the accident and provided the **Sharbonos** with coverage of \$3,000,000 per occurrence per policy. The trial court granted the **Sharbonos'** motion.

¶ 27 The parties agree that the Universal insurance policies' terms are clear and unambiguous. But Universal argues that the trial court erred in finding coverage for the **Sharbonos** under Umbrella Coverage Part 980 for Cassandra's personal use of a family car. Specifically, Universal argues that the trial court misinterpreted Umbrella Coverage Part 980, which Universal calls the "commercial umbrella" and that, according to Universal, does not apply to Cassandra's personal use of a family vehicle.

¶ 28 The **Sharbonos** argue that Umbrella Coverage Part 980 covers their liability for Cassandra's accident because it is not strictly a "commercial umbrella" but a general *396 umbrella that provides coverage for both personal and commercial losses.

¶ 29 The first paragraph of both the All Automotive & Transmission and The Trans-Plant insurance policy declarations states that: "This policy insures only those coverages and property shown in the declarations made a part of this policy. such insurance applies only to those insureds, security interests, and locations designated for each coverage as identified in item 2 by letter(s) or number." CP at 31. Item 2 in each policy lists James & Deborah **Sharbono** as named **414 insureds. The declarations page of each policy also sets forth the coverage limits.

¶ 30 The Umbrella Coverage Part 980 in the All Transmission & Automotive policy has a \$3,000,000 coverage limit and lists All Transmission & Automotive as the insured. The Trans-Plant policy has an Umbrella Coverage Part 980 with \$3,000,000 coverage that lists The Trans-Plant as the insured. The Umbrella Coverage Part 980 in the two policies is identical.^{FN2}

FN2. Because Umbrella Coverage Part 980

is identical in both policies, we refer to that coverage part singular.

¶ 31 The initial paragraph of Umbrella Coverage Part 980 states that it "applies only when it is shown in the declarations. Such insurance applies only to those insureds, security interests and locations designated for each coverage as identified in declarations item 2 by letter(s) or number." CP at 119.

¶ 32 Coverage Part 980 generally defines an insured as follows:

WHO IS AN INSURED-

...

With respect to any AUTO or watercraft:

(a) YOU;

...

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

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

CP at 122.

[9] ¶ 33 The parties disagree as to the definition of "You." Br. of Appellant at 34; Br. of Respondent at 29. Although neither Personal Umbrella Coverage Part 970 nor Umbrella Coverage Part 980 defines "You," the insurance policies' general definitions contain the following definition: "'YOU' and 'YOUR' means the person or organization shown in the declarations as the Named Insured." CP at 56.

¶ 34 The **Sharbonos** argue that the term "You" describes them, individually, because both the All Transmission & Automotive and The Trans-Plant insurance policies list them as "Named Insureds."

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 14

CP at 31. And according to the **Sharbonos**, Personal Umbrella Coverage Part 980 covers them for any auto they own if the personal use is by a "Designated Person." Although Cassandra is not a designated person, the declarations page of the policies lists James and Deborah **Sharbono** as designated persons. Thus, according to the **Sharbonos**, the terms "You" (named insureds) and "Designated Persons" cover their use, which in this case is their entrustment of the vehicle to Cassandra.^{FN3}

FN3. The **Sharbonos** cite *Farmers Ins. Group v. Johnson*, 43 Wash.App. 39, 715 P.2d 144 (1986) for the proposition that "entrustment of a vehicle is use of the vehicle." Br. of Respondent at 31. *Farmers* is inapposite. The court in that case never stated that entrustment is a use. Rather, the case stands for the proposition that a claim based on negligent entrustment of a vehicle is not a separate and independent cause of an injury that precludes operation of an exclusionary provision relating to injuries caused by use of that vehicle. *Farmers*, 43 Wash.App. at 42-44, 715 P.2d 144.

¶ 35 The **Sharbonos** are correct that the declarations pages of both policies identify All Transmission & Automotive and The Trans-Plant as "01" in the "Named Insured" section, and identify James and Deborah **Sharbono** as "02" in the "Named Insured" section. CP at 31, 171. But the declarations section regarding Umbrella Coverage Part 980 in both policies states that "01" is the only insured under *398 Umbrella Coverage Part 980.^{FN4} Accordingly, in the context of Umbrella Coverage Part 980, "You" describes only the businesses: All Transmission & Automotive and The Trans-Plant. In Umbrella Coverage Part 980, "You" does not refer to the **Sharbonos** individually.

FN4. Compare the declarations section regarding Umbrella Coverage Part 970 in both policies that states that "02" is the only insured under Umbrella Coverage Part 970.

¶ 36 Thus, with respect to any auto,^{FN5} Umbrella Coverage Part 980 insures All Transmission **415 & Automotive or The Trans-Plant (depending on the insurance policy). And with respect to "personal use of any [a]uto owned ... by" All Transmission & Automotive or The Trans-Plant, Umbrella Coverage Part 980 insures "any person or organization shown in the declarations for ... Coverage Part [980] as a 'Designated Person.'" CP at 122, 258. The declarations for Umbrella Coverage Part 980 list James and Deborah **Sharbono** as "Designated Persons." CP at 42, 179-80. In other words, Umbrella Coverage Part 980 provides coverage to James and Deborah **Sharbono** with respect to their personal use of any auto owned or hired by either All Transmission & Automotive or The Trans-Plant.

FN5. "Auto," as defined in Umbrella Coverage Part 980, "means a land motor vehicle, trailer or semi-trailer, designed for travel on public roads and includes permanently attached equipment." CP at 119, 255. The truck involved in the accident is an auto under this definition.

¶ 37 James and Deborah **Sharbono** own the truck Cassandra was driving when the accident occurred, and Cassandra testified that she normally used that truck for personal purposes. Because neither All Transmission & Automotive nor The Trans-Plant owned or hired that truck, Umbrella Coverage Part 980 does not cover Cassandra, James, or Deborah **Sharbono's** use of that truck.

¶ 38 The **Sharbonos'** argument requires the policy reader to ignore the plain language that "[s]uch insurance applies only to those insureds ... designated for each coverage as identified in ... item 2 by letter(s) or number." Under the **Sharbonos'** theory, all named insureds on the general declarationpage *399 would be covered under each coverage within the policy. And this is not only inconsistent with the above language, it violates the structure and overriding theme of the policy; a commercial garage policy that affords limited cov-

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 15

erage to various persons and business entities associated with the garages as owners, employees, lenders, and lessors, with some limited coverage for the **Sharbonos'** personal use of a vehicle the business owned.^{FN6}

FN6. The insurance policies state that "insurance applies only to those insureds, security interests, and locations designated for each coverage as identified in [i]tem 2 by letter(s) or number." CP at 31. In the All-Transmission policy, for instance, item 2 includes the following insureds: All Transmission & Automotive, Shar Enterprises, Inc., All Automotive, Inc., James & Deborah **Sharbono**, and SAR Investments, Inc. Item 2 also lists the following security interests: The Leasing Company, Inc., Minolta Business Systems, J.D. Shotwell Co., First Community Bank (Lacey, WA), Lease Commercial, First Community Bank (Tacoma, WA), U.S. Bank of Washington, SFNB, and Keybank USA. The Trans-Plant policy similarly lists multiple insureds and security interests.

¶ 39 Moreover, we find no ambiguity in the policy that would mislead the average insurance purchaser. The definition of "You," as the **Sharbonos** point out, means those persons shown in the declarations. But it does not follow that all coverages thereby insure all named insureds. The limiting language says just the opposite. We conclude that an average insurance purchaser would recognize Universal's clear intent to provide its different coverages only to those named insureds designated either by number or letter in the specific coverage.

¶ 40 The trial court erred in determining that Umbrella Coverage Part 980 in both the All Transmission & Automotive and The Trans-Plant insurance policies obligated Universal to indemnify James and Deborah **Sharbono** for losses arising out of Cassandra's automobile accident. As a matter of law, Umbrella Coverage Part 980 does not apply to the Tomyns' claims against the **Sharbonos**. We re-

verse the trial court's summary judgment declaring that Universal's Umbrella Coverage Part 980 applies to the **Sharbonos'** liability for Cassandra's accident with Cynthia Tomyn. We also reverse the trial court's ruling permitting the **Sharbonos** to *400 stack the two coverage parts to provide an additional \$6,000,000 in available coverage.

III. REASONABLENESS OF THE TOMYN-SHARBONO SETTLEMENT

¶ 41 Universal argues that the trial court erred in ruling that the Tomyn-**Sharbono** settlement for \$4,525,000 was reasonable. Universal argues that the "settlement amount was driven more by what insurance coverage the Tomyns and **Sharbonos** claimed was potentially available than the actual value of the Tomyn claim." Br. of Appellant at 44. Universal maintains that the "**Sharbonos** **416 settled for an inflated amount to escape exposure." Br. of Appellant at 48.

[10] ¶ 42 At trial, the **Sharbonos** bore the burden of proving the settlement's reasonableness. RCW 4.22.060(1). We will uphold the trial court's factual determination of a settlement's reasonableness if substantial evidence supports that determination. *Brewer v. Fibreboard Corp.*, 127 Wash.2d 512, 524, 901 P.2d 297 (1995) (citing *Glover v. Tacoma Gen. Hosp.*, 98 Wash.2d 708, 718, 658 P.2d 1230 (1983)). Substantial evidence is evidence that would persuade a fair-minded person of the asserted statement's truth. *Reg'l Transit Auth. v. Miller*, 156 Wash.2d 403, 419, 128 P.3d 588 (2006) (quoting *State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994)).

[11][12][13][14] ¶ 43 Where an insured negotiates a settlement and seeks reimbursement, the insurer is liable only for the amount of the settlement that is reasonable and paid in good faith. *Besel v. Viking Ins. Co.*, 146 Wash.2d 730, 738, 49 P.3d 887 (2002) (citing *Evans v. Cont'l Cas. Co.*, 40 Wash.2d 614, 628, 245 P.2d 470 (1952)). To determine a settlement's reasonableness in the context of a consent judgment and covenant not to execute, the court considers:

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 16

[1] [T]he releasing person's damages; [2] the merits of the releasing person's liability theory; [3] the merits of the released person's defense theory; [4] the released person's relative faults; [5] the risks and expenses of continued litigation; [6] the released person's ability to pay; [7] any evidence of bad faith, collusion, or fraud; [8] the extent of the releasing *401 person's investigation and preparation of the case; and [9] the interests of the parties not being released.

Chaussee v. Maryland Cas. Co., 60 Wash.App. 504, 512, 803 P.2d 1339 (1991) (quoting *Glover*, 98 Wash.2d at 717, 658 P.2d 1230). Ensuring reasonable settlements protects insurers from liability for excessive judgments. *Besel*, 146 Wash.2d at 737-38, 49 P.3d 887 (“Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important. A carrier is liable only for reasonable settlements that are paid in good faith.”). “No one factor controls and the trial court has the discretion to weigh each case individually.” *Chaussee*, 60 Wash.App. at 512, 803 P.2d 1339 (citing *Glover*, 98 Wash.2d at 717, 658 P.2d 1230).

[15] ¶ 44 Although the **Sharbonos** claim that the trial court addressed each *Chaussee/Glover* factor in making its determination, the record does not contain the pertinent Report of Proceedings. And the trial court's order merely stated that the court reviewed the files and records before ruling on the settlement's reasonableness.^{FN7} Accordingly, the trial court's considerations in weighing the factors are unclear. But the record contains enough evidence to support the court's conclusion that the settlement was reasonable. See *Glover*, 98 Wash.2d at 718, 658 P.2d 1230, *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wash.2d 695, 756 P.2d 717 (1988).

FN7. The record contains the evidence and argument that the **Sharbonos** and Universal submitted to the trial court regarding this issue.

A. *The Chaussee/Glover Factors*

¶ 45 Universal focuses on the trial court's alleged failure to consider (1) the Tomyns' damages, (2) the merits of the **Sharbonos**' defense, (3) the risks and expenses of continued litigation, (4) the **Sharbonos**' ability to pay, and (5) any evidence of bad faith, collusion, or fraud. We address only the factors that Universal claims the trial court failed to properly consider. See *Besel*, 146 Wash.2d at 739 n. 2, 49 P.3d 887 (all nine criteria are not necessarily relevant in every case).

*402 1. The Tomyns' Damages

¶ 46 Universal admits that the Tomyns “certainly experienced significant damages,” but it argues that the **Sharbonos**' economist inflated the economic impact of Cynthia Tomyn's death by assuming, without any evidence, that Cynthia would have started working full time in September 2002. Supp. Br. of Appellant at 6-7. Universal also complains**417 that the analysis erroneously applied a man's, rather than a woman's, work life expectancy.^{FN8}

FN8. The economic consultant reasoned that because “standard work life expectancies for women substantially understate a woman's lifetime ability to earn income and have a significant downward bias for women who are strongly attached to market work[,] ... [he felt] that it [was] appropriate to use male work life expectancies to determine economic damages in personal injury cases involving both males and females.” CP at 542

¶ 47 The **Sharbonos** submitted evidence that Cynthia was 33 years old, that she had been married to her husband for 15 years, that they had 3 children, and that the Tomyns were a very close family. They also submitted a guardian ad litem's evaluations of the three children's emotional distress resulting from Cynthia's death.

¶ 48 To show the economic effect of Cynthia's death, the **Sharbonos** offered an economist's report

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 17

estimating the economic loss to the Tomyns at \$1,050,228. The economist reached that figure using a 33-year-old female with equivalent education, life expectancy, work life expectancy, and income. The report discounted from that income the average personal consumption of a similarly situated person. The report included in its damages calculation certain "nonmarket services" such as house and yard work, child care, cooking, and marketing. CP at 544.

¶ 49 Universal disputed the economist's report's accuracy but offered no conflicting evidence.

2. The Merits of the **Sharbonos**' Defense

¶ 50 Universal argues that the **Sharbonos** had a legitimate defense theory because both Cassandra and her *403 passenger testified that a vehicle in front of them lost control in the adverse weather and road conditions, causing vehicles to stop in front of them and creating an emergency situation.

¶ 51 The **Sharbonos** submitted a letter from James La Porte-defense counsel that State Farm appointed to defend the **Sharbonos**-to State Farm stating that "I do not have any delusions that [the **Sharbonos**] will be successful in avoiding a liability ruling.... The remaining issue is whether any third party entities contributed; and as indicated above and previously, that remains to be seen but it is very questionable." CP at 565-56.

¶ 52 The police cited Cassandra for second degree negligent driving. Additionally, a trial court had previously entered summary judgment regarding the **Sharbonos**' liability. Indeed, the **Sharbonos** admitted that Cassandra "was at least partially at fault" for the accident. CP at 557. The **Sharbonos** only hope was that the court would apportion fault, not absolve them of it.

¶ 53 Aside from its assertion that the **Sharbonos** may have had a defense based on an "emergency situation," Universal presented no authority or legal analysis supporting its argument that the **Sharbonos** had defenses to liability. Uni-

versal fails to show that the **Sharbonos** had viable defenses that could have mitigated the settlement value of the Tomyns' claims.

3. The Risks and Expenses of Continued Litigation

¶ 54 Universal maintains that "[a]lthough the **Sharbonos** certainly faced the possibility of liability, their exposure was not as great as they portrayed it to be." Br. of Appellant at 45-46.

¶ 55 Universal argues that the **Sharbonos** had no litigation expenses because State Farm provided them a defense without a reservation of rights. Although State Farm hired counsel to represent the **Sharbonos**, it also told the **Sharbonos** that "because the amount claimed against *404 [them] ... is in excess of the protection afforded by [the State Farm] policy, there may be a personal liability for damages on [the **Sharbonos**]' part." Exhibit 39. Accordingly, State Farm recommended that the **Sharbonos** hire an attorney, at their own expense, to represent them for any personal exposure beyond the State Farm policy limits. And the **Sharbonos** incurred litigation expenses in working toward a settlement and then pursuing the coverage claims against Universal as the settlement required.^{FN9} Thus, until the **Sharbonos****418 settled with the Tomyns, they faced continuing litigation with the Tomyns with a substantial exposure above their State Farm limits of \$250,000 and the \$1,000,000 umbrella coverage that Universal conceded.

FN9. The settlement agreement, however, limited the **Sharbonos**' personal contribution to a maximum of \$50,000 for attorney fees in the actions they agreed to pursue against Universal.

¶ 56 Correspondence between the Tomyns and **Sharbonos** reflects this expense and exposure. For instance, several letters show that the **Sharbonos** believed that they would have to file for bankruptcy if the Tomyns pursued litigation. And attorneys for both the Tomyns and **Sharbonos** repeatedly acknowledged that the **Sharbonos** faced a reasonable risk of a jury rendering a substantial judgment

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 18

against them.

¶ 57 Moreover, the Sharbonos presented jury verdict research that supported the settlement amount. Universal takes exception to the representative jury verdicts the Sharbonos supplied and argued below that the jury verdicts it supplied were more instructive. Universal takes particular issue with the Sharbonos' reliance on *Joyce v. Dep't of Corr.*, 155 Wash.2d 306, 119 P.3d 825 (2005), as a representative verdict justifying the settlement amount. Before the trial court, Universal argued that *Joyce* involved very different and unusual circumstances.

¶ 58 In *Joyce*, the plaintiff recovered a \$22,453,645 judgment against the Department of Corrections for its negligence in allowing a psychotic felon under community placement to repeatedly violate his probation conditions without *405 taking action. *Joyce v. Dep't of Corr.*, 116 Wash.App. 569, 586, 75 P.3d 548 (2003), *rev'd in part by Joyce*, 155 Wash.2d at 326, 119 P.3d 825. Eventually, the felon stole a vehicle in Seattle and sped down the freeway to Tacoma, where he drove 60 to 70 miles per hour through a residential area, ignoring traffic signs and lights, and struck Mrs. Joyce's vehicle and killed her. *Joyce*, 155 Wash.2d at 314, 119 P.3d 825. Universal argues that the \$22,435,645 judgment recovered under the anomalous facts of the case skewed the trial court's evaluation of the risk the Sharbonos faced. Although the *Joyce* verdict was admittedly large, it did not necessarily skew the trial court's evaluation of the Sharbonos' exposure. Even experienced trial attorneys cannot predict with any degree of certainty the amount a jury will award in these cases. And the lesson of *Joyce* is that a defendant must consider the full range of possible verdicts in negotiating a reasonable settlement.

¶ 59 In addition to *Joyce*, the Sharbonos submitted representative verdicts and settlements ranging from \$450,000 to \$4,742,867, with an average plaintiff's award of \$2,036,936.84. The representative verdicts and settlements that Universal submit-

ted ranged from defense verdicts to \$2,750,000, with an average plaintiff's award of \$742,162.26. We are satisfied that the submitted jury verdict ranges support the trial court's finding that the settlement amount was reasonable.

4. The Sharbonos' Ability to Pay

¶ 60 Universal argues that, although the Sharbonos claimed they could not afford to pay a personal judgment in the millions and that a trial would have forced them into bankruptcy, the Sharbonos in fact had considerable personal assets. Universal's argument misses the point. The Sharbonos documented their personal assets when they moved for an order finding the proposed settlement reasonable. The Sharbonos also provided copies of correspondence with their attorneys, and between their attorneys and the Tomyns' attorneys, establishing their limited ability to pay a judgment in excess of their liability coverage. The record *406 supports the Sharbonos' belief that a verdict for the Tomyns in excess of the Sharbonos' liability coverage would likely force the Sharbonos into bankruptcy.

5. Evidence of Bad Faith, Collusion, or Fraud

¶ 61 Universal stated below that “[a]s the term is commonly defined, Universal does not allege any specific fraudulent activity in the settlement ... [t]he attorneys for the Tomyns and the Sharbonos engaged in settlement discussions, which resulted in the eventual consent judgment and covenant not to execute.” CP at 639. Still, Universal argues that the Tomyns' knowledge about **419 the amount of undisputed coverage (\$1,250,000) and the disputed \$3,000,000 in excess coverage lends a “collusive air” to the settlement that suggests an inflated settlement.

¶ 62 Correspondence between the Sharbonos' and Tomyns' attorneys demonstrates a good faith settlement negotiated at arm's-length. At one point, the Tomyns' attorneys demanded that the Sharbonos proceed with negotiations in good faith rather than “perpetually changing terms” of their proposed settlement to better their position. CP at 614. The Tomyns' attorneys initially suggested sub-

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 19

mitting the proposed settlement to arbitration but later repeatedly threatened to proceed with litigation when the **Sharbonos** failed to agree with proposed settlement offers.

¶ 63 Universal also argues that “[t]he strongest evidence ... of the collusive relationship between the Tomyns and the **Sharbonos** is the fact that the **Sharbonos** negotiated a share of the settlement proceeds.” Supp. Br. of Appellant at 8. But the **Sharbonos** did not negotiate a share of the \$4,525,000 settlement. Rather, they reserved the right to “assert claims against ... Universal as [the **Sharbonos**] deem prudent” and to “retain unto themselves all right of recovery from such claims,” presumably referring to the **Sharbonos**' bad faith claim against Universal. CP at 492. And the **Sharbonos**' bad faith claim did not share any element of damages with the Tomyns' claims. We disagree with Universal that the **Sharbonos** negotiated a share of any proceeds the Tomyns might receive from Universal.

¶ 64 *407 Furthermore, Universal is mistaken that the Tomyns and **Sharbonos** settled for the highest amount of insurance the **Sharbonos** could recover because the **Sharbonos** had two \$3,000,000 umbrellas, and the trial court determined, albeit erroneously, that Universal was potentially liable to the **Sharbonos** for up to \$7,000,000.

¶ 65 Universal's bare allegation that the **Sharbonos** and Tomyns engaged in collusive negotiations fails.

B. The Court's Determination on the Settlement's Reasonableness

¶ 66 Although the record does not conclusively establish that the trial court explicitly considered the nine *Chaussee/Glover* factors, sufficient evidence supports the court's conclusion that the settlement was reasonable. See *Glover*, 98 Wash.2d at 718, 658 P.2d 1230. The **Sharbonos** presented substantial evidence of each of the nine *Chaussee/Glover* factors. And we are not willing to speculate that the trial court ignored the extensive briefing and argument from both parties and found the set-

tlement reasonable on some basis other than the *Chaussee/Glover* factors. In any event, as we have discussed, the record amply supports the court's finding of reasonableness.

[16] ¶ 67 Universal also argues that the **Sharbonos** failed to give Universal the statutorily required notice of their settlement with the Tomyns. This argument is without merit because RCW 4.22.060(1) requires that all *parties* receive notice of the settlement. Universal was not a party to the lawsuit between the Tomyns and **Sharbonos**. Universal admits as much in its brief to the trial court regarding the settlement's reasonableness.

IV. BAD FAITH AND CONSUMER PROTECTION ACT CLAIMS

A. Bad Faith

¶ 68 Universal contends that the trial court erred when it determined, as a matter of law, that it was liable for bad faith. Universal asserts that, to prove bad faith, the insured *408 must demonstrate that the insurer unreasonably, frivolously, and without foundation, breached its contract with the insured. Thus, argues Universal, whether the insurer's conduct amounted to bad faith is ordinarily a question of fact. The **Sharbonos** argue that Universal exercised bad faith, as a matter of law, when it failed to assist them in settling with the Tomyns by disclosing information that could have helped in the negotiations.

¶ 69 The **Sharbonos** presented the following facts in their summary judgment motion. The **Sharbonos** retained Maureen Falecki as private counsel after a dispute arose about the amount of the **Sharbonos**' umbrella coverage**420 with Universal. When the **Sharbonos** began settlement negotiations with the Tomyns, they believed they had \$3,000,000 in personal liability umbrella coverage from Universal. Universal stated that the **Sharbonos**' claim that they had three separate \$1,000,000 personal umbrella policies made “no logical sense as the personal exposure covered by a Personal Umbrella is unrelated to the business exposure covered by the commercial policies.” CP at

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 20

977. Universal admitted that the **Sharbonos'** commercial umbrella had a \$3,000,000 coverage limit, but it argued that the coverage did not apply to claims from Cassandra's accident.

¶ 70 Falecki, on the **Sharbonos'** behalf, asked Universal to provide the complete underwriting files for the **Sharbonos'** three insurance policies so that she could determine how much personal umbrella coverage the **Sharbonos** had. Universal repeatedly refused to provide the underwriting files, stating that they contained proprietary information and that it was "not aware of any authority that [would] give [the **Sharbonos**] access to those records." CP at 977, 982.

¶ 71 Falecki responded that while she did not know of any specific legal authority requiring Universal to produce the underwriting files, there was "a genuine and bona[]fide dispute over the amount of coverage [that Universal's agent] represented he would provide the **Sharbonos** via the umbrella policies." CP at 984. Falecki informed Universal *409 that the **Sharbonos** believed they had an additional \$2,000,000 personal umbrella policy with Universal, but Universal records showed that the \$2,000,000 personal umbrella policy was canceled less than three weeks before the fatal accident. The **Sharbonos** claimed that they did not authorize cancellation of the \$2,000,000 personal umbrella policy. Accordingly, Falecki asked for all documents relating to the cancellation of the \$2,000,000 policy and again asked for the complete underwriting files for the **Sharbonos'** insurance policies.

¶ 72 Universal denied that the \$2,000,000 policy had been cancelled, stating that it had amended the personal umbrella policies at the insureds' request to provide three separate \$1,000,000 policies, one under each commercial policy and intended to cover three separate owners.^{FN10} Universal explained in detail to the **Sharbonos** why it believed that the **Sharbonos** were eligible for only \$1,000,000 in coverage. Universal submitted three separate personal umbrella applications to support its position. Universal again refused the **Sharbonos**

' request for the production of its underwriting files related to their policies.

FN10. Universal claimed that the **Sharbonos** had a \$1,000,000 personal umbrella on the All Transmission & Automotive policy, Clarence and Claudia Ray had a \$1,000,000 personal umbrella on the Trans-Plant policy, and Robert and Debra Huke had a \$1,000,000 personal umbrella on the Parkland Transmission policy.

¶ 73 After a second failed mediation, Falecki informed Universal that the mediation failed, in part, because of the unresolved coverage issues. At the second mediation, the **Sharbonos** requested Universal's underwriting files from Glenn Reid, a Universal representative present at the mediation. Reid rejected the request.

¶ 74 In a letter to Universal following the failed mediation, Falecki again asked for the underwriting files. Falecki stated that the requested records were directly relevant to the action because the **Sharbonos** needed them to analyze the facts surrounding their coverage, the Tomy children's guardians ad litem needed them before they could recommend that the court approve any proposed settlement, and *410 both parties needed them to settle the case. In the same letter, Falecki told Universal that if it failed to cooperate, the **Sharbonos** would assert bad faith claims against Universal. Universal again refused to produce the files, stating that the **Sharbonos** had not provided any authority to support their request; Universal also said that if the **Sharbonos** sued, it would counterclaim for abuse of process.

¶ 75 The Tomyms then joined the fray, threatening to sue Universal unless it cooperated. The Tomyms explained that they had not yet sued the **Sharbonos** because they wanted to resolve the matter amicably and in good faith but that Universal's "intransigence **421 in providing the information that will obviously be required to be produced through litigation discovery[] will only serve to

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 21

prejudice [its] insureds and expose their personal assets." CP at 1005. Universal again refused to produce the requested files. The Tomyns then sued the **Sharbonos**.

¶ 76 In their summary judgment motion, the **Sharbonos** argued that Universal acted in bad faith and violated Washington's CPA^{FN11} when, among other things, it refused to assist them in determining how much coverage they had by providing the underwriting file. The trial court agreed and ruled that Universal's refusal to assist the **Sharbonos** in settling by providing its underwriting files amounted to bad faith as a matter of law.

FN11. Chapter 19.86 RCW.

[17] ¶ 77 Whether an insurer acted in bad faith is generally a question of fact. *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 484, 78 P.3d 1274 (2003) (citing *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wash.2d 784, 796, 16 P.3d 574 (2001)). But a trial court may determine a factual question as a matter of law if reasonable minds could reach but one conclusion. *Smith*, 150 Wash.2d at 485, 78 P.3d 1274 (citing *Ruff v. County of King*, 125 Wash.2d 697, 703-04, 887 P.2d 886 (1995)). Thus, the issue is whether Universal established a material issue of fact sufficient to defeat summary judgment.

[18][19][20][21] ¶ 78 Insurers owe a statutory duty of good faith to their insureds. RCW 48.01.030. An insurer may breach its broad duty to act in good faith by conduct short of *411 intentional bad faith or fraud, although not by a good faith mistake. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash.App. 323, 329, 2 P.3d 1029 (2000) (citing *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wash.2d 269, 280, 961 P.2d 933 (1998) and *Industrial Indem. Co. of the N.W., Inc. v. Kallevig*, 114 Wash.2d 907, 916-917, 792 P.2d 520 (1990)). An insurer must give equal consideration to its policyholder's interests as well as its own. *Am. States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wash.2d 462, 470, 78 P.3d 1266 (2003) (quoting *Van Noy*, 142 Wash.2d at 793, 16 P.3d 574). The question in bad

faith claims is always whether the insurer acted reasonably under the facts and circumstances of the case. *Kallevig*, 114 Wash.2d at 920, 792 P.2d 520. Here, the trial court determined that Universal did not establish a genuine issue of material fact regarding whether it "failed to give equal consideration to the interests of its insureds, or that its actions were not frivolous, unfounded or unreasonable." CP at 2176.

¶ 79 Universal argues that it correctly and reasonably withheld its proprietary underwriting files either because CR 26(b)(2) did not obligate it to produce the files or because Universal had a reasonable basis for believing CR 26 did not require it to do so. Universal cites our commissioner's ruling, on discretionary review, that the trial court in the **Tomyn-Sharbono** lawsuit committed probable error in ordering Universal to produce its underwriting files relevant to the **Sharbonos'** insurance policies. But Universal misinterprets our commissioner's narrow holding. The issue here is whether the duty of good faith required Universal to disclose its underwriting files to its insured. The issue the commissioner addressed was whether CR 26(b)(2) required Universal to disclose an underwriting file to a person suing one of its insureds in a personal injury lawsuit. The commissioner's ruling and CR 26 have no bearing on the instant case. *Cf. Smith v. Safeco Ins. Co.*, 112 Wash.App. 645, 652 n. 31, 50 P.3d 277 (2002), (CR 26(b)(2) applies to disclosure of policy limits only *after* a lawsuit is filed), *rev'd on other grounds*, 150 Wash.2d 478, 78 P.3d 1274 (2003).

[22] ¶ 80 Universal also argues that it did not act in bad faith because the **Sharbonos** did not articulate reasons for requesting*412 the underwriting files. This argument is disingenuous given that **Falecki** advised Universal that the **Sharbonos** believed they had applied for an additional \$2,000,000 personal umbrella; the **Sharbonos** needed the files to analyze the facts surrounding their coverage; the **Tomyn** children's guardians ad litem needed the files to evaluate any proposed set-

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 22

tlement; and both parties needed them to effect a settlement. And while the **Sharbonos****422 admittedly failed to provide any legal authority explicitly stating that an insurer has an obligation to produce underwriting files related to the insured's policies, insurers owe a general duty of good faith to their insureds due to the fiduciary relationship insurers and insureds share. See *Coventry*, 136 Wash.2d at 280, 961 P.2d 933; *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wash.2d 751, 765, 58 P.3d 276 (2002).

¶ 81 Here, the **Sharbonos** believed they had applied for and purchased more than a single \$1,000,000 personal umbrella policy. They expressed their concerns to Universal and stated that they could not settle the Tomyns' claims without the underwriting information. Under these circumstances, Universal had to do more than simply assert that the **Sharbonos** needed to provide legal authority for their request.

¶ 82 But Universal maintains that “[u]nderwriting files can often contain information reflecting an insurer’s procedures used to evaluate risks, a vital internal business practice.” Reply Br. of Appellant at 26. Universal argues that “[d]isclosure of such information would put the insurer at a commercial disadvantage.” Reply Br. of Appellant at 26. The argument is plausible and fits with Universal's explanation to the **Sharbonos** that the underwriting file contained proprietary information. But Universal fails to point to a single document in the underwriting file that contains sensitive information or information that could have impacted its business interests. Additionally, during the proceedings below, Universal produced the entire underwriting file without seeking protection for any document in the file and offered the entire file into evidence. Thus, *413 Universal failed to show that it had some interest in particular documents or information that outweighed the **Sharbonos**' benefits from disclosure. See *Coventry*, 136 Wash.2d at 280, 961 P.2d 933 (an insurer acts in bad faith when it overemphasizes its own interests).

¶ 83 Universal also argues that “[e]ven if this [c]ourt were to find Universal's conduct to be unreasonable and unfounded, it was not the cause of any harm to its insureds.” Br. of Appellant at 54 (citing *Anderson*, 101 Wash.App. at 334-35, 2 P.3d 1029). But the **Sharbonos** did not move for summary judgment on the issue of damages. Rather, the **Sharbonos** sought judgment only on whether Universal's actions constituted bad faith, reserving for the jury the determination of damages. The jury ultimately decided that Universal's actions caused the **Sharbonos** significant economic and non-economic damages. Universal does not argue that substantial evidence did not support those decisions. Nor could it, since the record contains substantial evidence that Universal's conduct harmed the **Sharbonos**. The Tomyns' attorney testified that Universal's refusal to produce the underwriting file delayed the Tomyns' ability to determine the amount of insurance available to the **Sharbonos**, thus “making it impossible to resolve the claim.” Report of Proceedings (RP) at 869-70.

¶ 84 In *Smith v. Safeco Insurance Co.*, we held that “[i]n the absence of a statute or rule requiring disclosure ... the insurer must disclose the insured's policy limits if a reasonable person in the same or similar circumstances would believe that disclosure is in the insured's ... best interests.” *Smith*, 112 Wash.App. at 653, 50 P.3d 277. Although the *Smith* court addressed a claimant's request, as opposed to an insured's, the court's underlying rationale supports the **Sharbonos**' position. Based on the **Sharbonos**' repeated requests for the underwriting file, together with their reasons for needing the documents, a reasonable person could only conclude that disclosure was in the **Sharbonos**' best interest. And more importantly, Universal failed to demonstrate any significant need to protect the contents of its underwriting *414 files and that such need weighed as heavily as the **Sharbonos**' interests. See *Coventry*, 136 Wash.2d at 280, 961 P.2d 933. The trial court did not err in granting the **Sharbonos** summary judgment on their claim that Universal acted in bad faith.

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 23

B. Consumer Protection Act

¶ 85 The **Sharbonos** argue that the trial court did not err in ruling that Universal violated WAC 284-30-330(7). Universal concedes that insureds have a cause of action **423 under the CPA when insurers breach their duty to act in good faith. But Universal maintains that it did not violate WAC 284-30-330(7) and that, in any event, whether it violated that regulation is a question of fact that the court should not have decided on summary judgment.

[23] ¶ 86 An insurer commits a per se violation of the CPA when the insurer violates a statute that contains a specific legislative declaration of public interest impact. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 791, 719 P.2d 531 (1986) (citing *Haner v. Quincy Farm Chems., Inc.*, 97 Wash.2d 753, 762, 649 P.2d 828 (1982)); *Salois v. Mut. of Omaha Ins. Co.*, 90 Wash.2d 355, 358-59, 581 P.2d 1349 (1978). A violation of WAC 284-30-330(7) is a per se violation of the CPA. See WAC 284-30-330 (the provisions within WAC 284-30-330 are unfair or deceptive acts or practices in the business of insurance) and RCW 48.01.030 (the business of insurance is one affected by the public interest); see also *Hangman Ridge*, 105 Wash.2d at 786, 719 P.2d 531 (when the legislature says that a violation of a particular statute constitutes an unfair or deceptive act in trade or commerce, violation of that statute is a per se CPA violation).

¶ 87 Contrary to the **Sharbonos'** assertion-and the trial court's summary judgment ruling-WAC 284-30-330(7) does not apply here. That regulation provides as follows:

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

...

*415 (7) Compelling insureds to institute or sub-

mit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

WAC 284-30-330(7).

[24] ¶ 88 First, Universal did not compel the **Sharbonos** to submit to litigation, arbitration, or appraisal to recover any amount of money by offering substantially less than the amount the **Sharbonos** ultimately recovered. As we have discussed, the **Sharbonos** are entitled to only the \$1,000,000 from Personal Umbrella Coverage Part 970, not the additional coverage amounts in Umbrella Coverage Part 980. Because WAC 284-30-330(7) does not apply, the trial court erred in granting summary judgment on the **Sharbonos'** CPA claim and in awarding the **Sharbonos** treble damages.

[25][26] ¶ 89 But even if an insured cannot prove a per se violation of the CPA, the insured may still recover for a CPA violation if the insured can show that the insurer (1) engaged in an unfair or deceptive act or practice (2) in trade or commerce, and (3) that the act or practice affects the public interest. *Hangman Ridge*, 105 Wash.2d at 784, 719 P.2d 531 (citing *Anhold v. Daniels*, 94 Wash.2d 40, 614 P.2d 184 (1980)). The insured must also prove (4) a resulting damage to the insured's business or property, and (5) that a causal link exists between the unfair or deceptive act and the injury suffered. *Hangman Ridge*, 105 Wash.2d at 784-85, 719 P.2d 531.

¶ 90 The trial court's error in granting summary judgment on Universal's alleged violation of WAC 284-30-330(7) requires that we vacate the bad faith judgment. The trial court instructed the jury that it could consider Universal's CPA violation in awarding damages. Yet the jury verdict form did not ask the jury to apportion damages between bad faith and the CPA violation. Accordingly, we do not know what amount the jury awarded as CPA damages. But because the **Sharbonos'** complaint does not limit their CPA claim to Universal's alleged vi-

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 24

olation of WAC 284-30-330(7), on remand they may attempt to show that Universal *416 violated the CPA by establishing the five elements enunciated in *Hangman Ridge*, 105 Wash.2d at 784-85, 719 P.2d 531.

¶ 91 In the following, we discuss only those issues likely to arise on retrial.

V. ALLEGED TRIAL ERRORS

A. *Commissioner Skerlec's Ruling*

[27] ¶ 92 Universal contends the trial court erred in not allowing it to introduce **424 evidence that our commissioner granted discretionary review of the trial court's ruling compelling Universal to produce its underwriting file in the Tomy-Sharbone action. At trial, the Sharbonos introduced evidence that the trial court had ordered Universal to produce the underwriting files. Universal wanted to introduce the grant of discretionary review to let the jury know that the trial court probably erred in doing so.

¶ 93 The grant of discretionary review is of minimal, if any, relevance. The trial court had already ruled as a matter of law that Universal committed bad faith. The only issue for the jury was whether Universal's bad faith conduct damaged the Sharbonos. The commissioner's ruling had nothing to do with that issue.

B. *Mediation Evidence*

¶ 94 Universal argues that the trial court erred when it permitted the Sharbonos, Falecki, and Barcus, the Tomyns' attorney, to describe what happened at the two mediations. Universal argues that the Sharbonos used the mediation evidence to establish Universal's liability. Universal maintains that RCW 5.60.070(1) and ER 408 prohibit the court from allowing the allegedly objectionable testimony.

¶ 95 Universal takes particular issue with testimony regarding the impact that a videotape of Cynthia Tomy's family discussing her death had on the Sharbonos. At trial, Falecki testified that the

Tomyns' attorney played the videotape during the mediation. In the film, the Tomyns *417 talked about the loss of Cynthia and its effect on them. Falecki testified that the tape had "a very emotional impact" on the Sharbonos and that she could "see that they were very taken by everything that was said in the video." RP at 708. The trial court overruled defense counsel's relevancy objection. Barcus also testified that the Sharbonos "appeared to be emotional" when he played the video. RP at 779.

¶ 96 Universal also argues that the trial court violated RCW 5.60.070 by allowing James Sharbone and Falecki to testify that Glenn Reid, the Universal representative at the mediations, told the parties that the Sharbonos would have to sue Universal to obtain the file.

¶ 97 At trial, James Sharbone twice testified that Reid said that the only way the Sharbonos would get the underwriting files was to sue Universal. Falecki also testified that Reid said she would have to sue to get Universal's underwriting files. The Sharbonos' counsel argued that he elicited that testimony to show the Sharbonos' understanding of Universal's position. The court apparently agreed with counsel. Finally, when asked about her feelings at that mediation, Deborah Sharbone testified that she was shocked when Reid said that the Sharbonos would have to sue to obtain the underwriting files. She said she felt that Universal was "hiding things." RP at 1127.

¶ 98 RCW 5.60.070(1) states that

If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding[.]

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 25

The statute also contains several exceptions to this exclusionary rule, none of which applies here. See RCW 5.60.070(1)(a)-(g).

[28] ¶ 99 *418 Universal fails to provide any evidence establishing that the mediation was a result of a court order, a written agreement between the parties, or a mandate under RCW 7.70.100. See RCW 5.60.070(1). Universal argues that “[t]here is no record of a written agreement between the parties or a court order in this case because the Sharbonos raise this contention for the first time on appeal in violation of RAP 2.5(a).” Reply Br. of Appellant at 33 n. 13. But the Sharbonos would have had no reason to raise this argument until now, when Universal first argued that RCW 5.60.070(1) compels exclusion of the testimony. Further, Universal bears the burden on appeal of establishing that the court abused its discretion by failing to apply RCW 5.60.070(1). See **425 *Guillen v. Pierce County*, 144 Wash.2d 696, 716, 31 P.3d 628 (2001) (the burden of showing that a privilege applies in any given situation rests entirely upon the party asserting the privilege), *rev'd in part, Pierce County v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003). Thus, Universal had the obligation to produce a court order, written agreement, or mandate. It did not.

[29] ¶ 100 ER 408 states, in relevant part:

Evidence of conduct or statements made in compromise negotiations is ... not admissible [to prove liability for or invalidity of the claim or its amount]. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness [or] negating a contention of undue delay[.]

The comment to former ER 408 (2006) states that the rule's final sentence is consistent with previous Washington law admitting evidence of com-

promise and offers of compromise when offered for some purpose other than liability. Former ER 408, cmts. (2006) (citing *Matteson v. Ziebarth*, 40 Wash.2d 286, 242 P.2d 1025 (1952) (to prove lack of good faith where good faith in issue)).

¶ 101 Here, the trial court found Universal liable. The issue at trial was whether Universal's bad faith damaged *419 the Sharbonos and, if so, in what amount. The Sharbonos presented the mediation evidence to show the importance of Universal's underwriting file and the harm that Universal's refusal to produce the file cause the Sharbonos. The court admitted the mediation testimony as evidence of the Sharbonos' state of mind during the time they attempted to obtain the underwriting files from Universal. Because the trial court admitted the testimony for purposes other than liability, the trial court did not abuse its discretion.

C. Proximate Cause Instruction

¶ 102 Universal maintains that the court erred in giving the “substantial factor” proximate cause instruction. The trial court instructed the jury on proximate cause as follows: “The term ‘proximate cause’ means a cause that was a substantial factor in bringing about the damages or injury even if the result would have occurred without it.” CP at 2279. Universal objected to this instruction and offered instead the CPA proximate cause instruction in WPI 310.07 or, in the alternative, WPI 15.01.

¶ 103 In *Daugert v. Pappas*, 104 Wash.2d 254, 262, 704 P.2d 600 (1985), our Supreme Court stated that the substantial factor test for determining proximate cause “is normally justified only when a plaintiff is unable to show that one event alone was the cause of the injury.” The court noted that the substantial factor test is appropriate in three types of cases:

First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the “but for” test. In such cases, it is quite clear that each cause has played so important a part in

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 26

producing the result that responsibility should be imposed on it. Second, the test is used where a similar, but not identical, result would have followed without the defendant's act. Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.

*420 *Daugert*, 104 Wash.2d at 262, 704 P.2d 600 (citing *W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS* § 41 (5th ed.1984)).

[30] ¶ 104 Washington courts have adopted the substantial factor test in cases involving discrimination or unfair employment practices. *See, e.g., Mackay v. Acorn Custom Cabinetry*, 127 Wash.2d 302, 310, 898 P.2d 284 (1995) (gender discrimination); *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wash.2d 46, 69-72, 821 P.2d 18 (1991) (retaliatory discharge for filing workers' compensation claim); *Allison v. Hous. Auth.*, 118 Wash.2d 79, 95, 821 P.2d 34 (1991) (retaliatory discharge for filing an age discrimination complaint); *City of Federal Way v. Pub. Employment Relations Comm'n*, 93 Wash.App. 509, 513-14, 970 P.2d 752 (1998) (retaliation**426 for union organizing activity); *Capers v. Bon Marche*, 91 Wash.App. 138, 143-44, 955 P.2d 822 (1998) (racial discrimination). The substantial factor test is appropriate in these cases, where causation is difficult to prove, largely due to public policy considerations that strongly favor eradication of discrimination and unfair employment practices. *See, e.g., Mackay*, 127 Wash.2d at 309-10, 898 P.2d 284; *Wilmot*, 118 Wash.2d at 70, 821 P.2d 18; *Allison*, 118 Wash.2d at 94, 821 P.2d 34 (substantial factor test is based more on policy considerations than on the factual inquiry of the "but for" test).

¶ 105 Courts have also used a substantial factor test in securities cases. *See, e.g., Hines v. Data Line Sys., Inc.*, 114 Wash.2d 127, 148-49, 787 P.2d 8 (1990); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 131-32, 744 P.2d 1032

(1987), 750 P.2d 254 (1988); *Herrington v. David D. Hawthorne, CPA, P.S.*, 111 Wash.App. 824, 47 P.3d 567 (2002). But in these cases, the courts instructed on substantial factor to assist the jury in determining whether a defendant was liable as a "seller" under the Washington Securities Act, not to determine proximate cause in tort liability cases. *See Haberman*, 109 Wash.2d at 130-31, 744 P.2d 1032 (rejecting the "strict privity" approach to determining whether a defendant was a "seller" of securities in favor of the "substantial factor-proximate cause" analysis and *421 attaching liability to any actor whose conduct is a "substantial contributive factor" in the sales transaction).

¶ 106 Courts have also used the substantial factor definition of proximate cause in toxic tort cases, including asbestos exposure cases. *See, e.g., Hue v. Farmboy Spray Co., Inc.*, 127 Wash.2d 67, 91-92, 896 P.2d 682 (1995); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wash.App. 22, 32, 935 P.2d 684 (1997). In those cases, the substantial factor test was appropriate because two or more causes may have combined to cause an injury, and any one of them operating alone might not have caused the alleged injury. *Hue*, 127 Wash.2d at 91-92, 896 P.2d 682 (without expressly stating "substantial factor test," the court required the plaintiff to prove that an individual defendant used a pesticide that became part of the drifting pesticide cloud that caused plaintiff's damages); *Mavroudis*, 86 Wash.App. at 28, 935 P.2d 684 (plaintiff required to prove that exposure to a particular asbestos supplier's asbestos played a role in causing injuries suffered from multiple exposures to asbestos from multiple suppliers).

¶ 107 Finally, Washington courts have employed the substantial factor test for determining proximate cause in medical malpractice cases where the malpractice reduces a decedent's chance of survival. *See, e.g., Herskovits v. Group Health Coop.*, 99 Wash.2d 609, 617, 664 P.2d 474 (1983). In *Herskovits*, the decedent's estate sued the defendant for failing to diagnose lung cancer that eventu-

161 P.3d 406
 139 Wash.App. 383, 161 P.3d 406
 (Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 27

ally caused the decedent's death approximately two years later. *Herskovits*, 99 Wash.2d at 611, 664 P.2d 474. The plaintiff submitted evidence that the defendant's failure to diagnose lung cancer when the decedent visited the defendant's health care provider reduced the decedent's chance of survival from 39 to 25 percent. *Herskovits*, 99 Wash.2d at 612, 664 P.2d 474. The court held that the substantial factor test is an appropriate method to determine proximate cause when the causation question requires the jury to consider not only what occurred but also what might have occurred. *Herskovits*, 99 Wash.2d at 616, 664 P.2d 474. The court explained that where a plaintiff demonstrates that the defendant's acts or omissions increase*422 the risk of harm to the plaintiff, the evidence allows the jury to find that the increased risk was a substantial factor in causing the resulting harm. *Herskovits*, 99 Wash.2d at 616-17, 664 P.2d 474.

[31] ¶ 108 The **Sharbonos** claim that Universal's failure to disclose the requested files damaged them in that it delayed the settlement. This delay caused the **Sharbonos** significant emotional distress and caused them to lose two of their three businesses because "they lost all interest and ... all ability ... to continue on with their business [because they believed] that they were ultimately at the end going to lose it." RP at 1810. The question then was for the jury to decide whether it believed that Universal's actions proximately caused the **Sharbonos**' injuries.

427 ¶ 109 Neither party presented evidence that two inseparable causes contributed to the delayed settlement. The **Sharbonos claimed that Universal's failure to produce its underwriting file prevented the parties from settling at the mediations. Universal contended that nothing in its file would have affected the settlement negotiations. Thus, the **Sharbonos** did not face two causes, either of which would have caused the harm, making it impossible for them to prove "but for" causation; nor did they face a similar, but not identical result, without Universal's refusal to produce the

documents; finally, no other defendant contributed in an insignificant way to the result. See *Daugert*, 104 Wash.2d at 262, 704 P.2d 600. We conclude that the trial court erred in giving the "substantial factor" instruction.

VI. CROSS-APPEAL

A. *Sharbonos*' Dismissed Causes of Action

[32] ¶ 110 The **Sharbonos**' complaint included causes of action against Len Van de Wege, Universal's agent, for negligence, negligent misrepresentation, and breach of fiduciary duty. After ruling that the **Sharbonos** had sufficient insurance to cover the settlement, the trial court dismissed these claims. The trial court erred in doing so. The **Sharbonos**' claims *423 against Van de Wege are independent of their claims for coverage under Universal's umbrella policies. Moreover, we have now reversed the trial court's coverage decision. Accordingly, we reverse the dismissal of these claims and remand for further proceedings.

B. Attorney Fees

¶ 111 The trial court awarded the **Sharbonos** \$203,585 in attorney fees under RCW 19.86.090 and *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wash.2d 37, 811 P.2d 673 (1991). The **Sharbonos** argue that the trial court erred in failing to calculate a lodestar figure and by ordering an award based on counsel's actual fees billed.

¶ 112 Because the trial court incorrectly decided the coverage and stacking issues, and erroneously determined that Universal violated the CPA (WAC 284-30-330(7)), we vacate the trial court's attorney fee award.

VII. ATTORNEY FEES ON APPEAL

¶ 113 Both parties request costs, including attorney fees, on appeal. The **Sharbonos** argue that "[r]easonable attorney's fees and costs are mandatory for prevailing plaintiffs." Br. of Respondent at 98-99.

[33][34] ¶ 114 RAP 18.1(a) allows us to award attorney fees and costs on appeal "[i]f applicable

161 P.3d 406
139 Wash.App. 383, 161 P.3d 406
(Cite as: 139 Wash.App. 383, 161 P.3d 406)

Page 28

law grants to a party the right to recover reasonable attorney fees or expenses." The **Sharbonos** are correct that, in general, where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal. *Richter v. Trimberger*, 50 Wash.App. 780, 786, 750 P.2d 1279 (1988) (citing *West Coast Stationary Eng'rs Welfare Fund v. City of Kennewick*, 39 Wash.App. 466, 477, 694 P.2d 1101 (1985)). Although the **Sharbonos** prevail on the reasonableness of their settlement and on the trial court's determination that Universal acted in bad faith, Universal has prevailed on the coverage, stacking, and CPA issues. Because neither party totally prevailed on appeal, we decline to award attorney fees under RAP 18.1.

¶ 115 *424 In conclusion, we affirm the trial court's rulings that the Tomyne-**Sharbono** settlement is reasonable and that Universal acted in bad faith, as a matter of law, when it refused to produce its underwriting files. We reverse the trial court's summary judgment ruling that Umbrella Coverage Part 980 provided personal liability coverage to the **Sharbonos** and the trial court's determination that Universal violated the CPA. We also reverse the trial court's summary judgment dismissal of the **Sharbonos'** negligence claims against Len Van de Wege. Finally, we vacate the damage award of \$4,500,000 based on the jury verdict. Because Universal did not assign error to the directed verdict in the amount of \$3,275,000, together with interest, we affirm that judgment and remand for further proceedings.

BRIDGEWATER, P.J., and QUINN-BRINTNALL,
J., concur.

Wash.App. Div. 2, 2007.
Sharbono v. Universal Underwriters Ins. Co.
139 Wash.App. 383, 161 P.3d 406

END OF DOCUMENT

Appendix 5

Pierce County Superior Court Civil Case 99-2-12800-7



Case Title: CLINTON L TOMYN AL VS CASSANDRA SHARBONO ET AL
 Case Type: Tort Motor Vehicle
 Access: Public
 Track Assignment: Standard
 Jury Size: 12
 Estimated Trial Length: 3.0 days
 Dept Judge: **09 SERGIO ARMIJO**
 Resolution: 03/30/2001 Parties Settled/AJ Pre-Trial
 Completion: 03/30/2001 Judgment/Order/Decree Filed

Litigants

| Name | Type | Status |
|---|-------------------------------|------------|
| TOMYN, CLINTON | Plaintiff | |
| Attorneys for TOMYN, CLINTON | Type | Bar Number |
| <u>BENJAMIN FRANKLIN BARCUS</u> | Atty for Plaintiff/Petitioner | 15576 |
| <u>PAUL ALEXANDER LINDENMUTH</u> | Atty for Plaintiff/Petitioner | 15817 |
| TOMYN, CYNTHIA L | Plaintiff | |
| Attorney for TOMYN, CYNTHIA L | Type | Bar Number |
| <u>BENJAMIN FRANKLIN BARCUS</u> | Atty for Plaintiff/Petitioner | 15576 |
| SHARBONO, CASSANDRA | Defendant | |
| Attorneys for SHARBONO, CASSANDRA | Type | Bar Number |
| <u>DENNIS J. LA PORTE</u> | Atty for Defendant | 2971 |
| <u>TIMOTHY R. GOSELIN</u> | Atty for Defendant | 13730 |
| SHARBONO, JAMES | Defendant | |
| Attorneys for SHARBONO, JAMES | Type | Bar Number |
| <u>DENNIS J. LA PORTE</u> | Atty for Defendant | 2971 |
| <u>TIMOTHY R. GOSELIN</u> | Atty for Defendant | 13730 |
| SHARBONO, DEBORAH | Defendant | |
| Attorneys for SHARBONO, DEBORAH | Type | Bar Number |
| <u>DENNIS J. LA PORTE</u> | Atty for Defendant | 2971 |
| <u>TIMOTHY R. GOSELIN</u> | Atty for Defendant | 13730 |
| TOMYN, NATHAN | Minor | |
| Attorneys for TOMYN, NATHAN | Type | Bar Number |
| <u>RUTH NIELSEN</u> | Atty for Involved Party | 11136 |
| <u>PAMELA A. OKANO</u> | Atty for Involved Party | 7718 |
| TOMYN, AARON | Minor | |
| TOMYN, CHRISTIAN | Minor | |
| BUFALINI, DAVID A | Guardian Ad Litem | |
| UNIVERSAL UNDERWRITERS | Involved Party | |
| Attorneys for UNIVERSAL UNDERWRITERS | Type | Bar Number |
| <u>RUTH NIELSEN</u> | Atty for Involved Party | 11136 |
| <u>PAMELA A. OKANO</u> | Atty for Involved Party | 7718 |

Filings | e-file document | download filings | E-Serve documents

| Filing Date | Filing | Access | Pages | Microfilm |
|-------------|-----------------------------|--------|-------|-----------|
| 11/10/1999 | FILING FEE RECEIVED | Public | | |
| 11/10/1999 | SUMMONS & COMPLAINT | Public | | |
| 11/10/1999 | ORDER SETTING CASE SCHEDULE | Public | | |
| 11/10/1999 | | Public | | |

| | | | |
|------------|--|--------|-----------|
| | REQUEST FOR ASSIGN TO CIVIL TRACK | | |
| 11/23/1999 | NOTICE OF APPEARANCE | Public | |
| 11/23/1999 | ACCEPTANCE OF SERVICE | Public | 1939-4027 |
| 12/06/1999 | ANSWER | Public | |
| 03/15/2000 | JURY DEMAND RECEIVED - TWELVE | Public | 1979-3719 |
| 04/14/2000 | MOTION AND AFFIDAVIT/DECLARATION | Public | |
| 04/14/2000 | ORDER APPOINTING GUARDIAN AD LITEM | Public | 1992-2065 |
| 06/02/2000 | NOTICE OF ISSUE | Public | |
| 06/02/2000 | DECLARATION OF RUTH NIELSEN | Public | |
| 06/02/2000 | MOTION TO QUASH | Public | |
| 06/09/2000 | ASSIGNED TO DEPT 18 | Public | |
| 06/09/2000 | ORDER AMENDING CASE SCHEDULE | Public | |
| 06/09/2000 | ORDER RE RECUSAL | Public | 2014-446 |
| 06/16/2000 | NOTICE OF ASSOCIATION OF COUNSEL | Public | |
| 06/22/2000 | NOTICE OF ISSUE | Public | |
| 06/23/2000 | ASSIGNED TO DEPT 9 | Public | |
| 07/06/2000 | DECLARATION OF JAMES SHARBONO | Public | |
| 07/06/2000 | MEMORANDUM IN OPP | Public | |
| 07/06/2000 | DECLARATION OF MAUREEN FALECKI | Public | |
| 07/06/2000 | DECLARATION OF DEBORAH SHARBONO | Public | |
| 07/06/2000 | DECLARATION OF CLARENCE RAY | Public | |
| 07/06/2000 | DECLARATION OF ROBERT HUKU | Public | |
| 07/06/2000 | DECLARATION OF DEBRA HUKU | Public | |
| 07/07/2000 | REPLY | Public | |
| 07/07/2000 | AFFIDAVIT | Public | |
| 07/12/2000 | BRIEF IN SUPPORT | Public | |
| 07/12/2000 | DECLARATION OF RUTH NIELSEN | Public | |
| 07/14/2000 | MOTION HEARING | Public | |
| 07/20/2000 | VERBATIM REPORT IN COURT FILE *07-14-00* | Public | |
| 07/21/2000 | ORDER AMENDING CASE SCHEDULE | Public | |
| 07/24/2000 | MEMORANDUM OF AUTHORITIES | Public | |
| 07/24/2000 | MOTION FOR SUMMARY JUDGMENT | Public | |
| 07/24/2000 | AFFIDAVIT OF PAUL LINDENMUTH | Public | |
| 07/24/2000 | AFFIDAVIT IN SUPPORT | Public | |
| 07/24/2000 | NOTICE OF ISSUE | Public | |
| 07/24/2000 | ***** VOLUME 2 ***** MICK | Public | |
| 07/27/2000 | ORDER DENYING MOTION/PETITION | Public | 2031-2512 |
| 08/04/2000 | MOTION FOR RECUSAL | Public | |
| 08/07/2000 | MOTION FOR RECONSIDERATION | Public | |
| 08/07/2000 | DECLARATION OF RUTH NEILSEN | Public | |
| 08/07/2000 | NOTICE OF ISSUE | Public | |
| 08/11/2000 | NOTICE OF ISSUE | Public | |
| 08/11/2000 | MOTION TO COMPEL | Public | |

| | | | |
|------------|---|--------|-------------|
| 08/14/2000 | DECLARATION OF DENNIS LAPORTE | Public | |
| 08/14/2000 | RESPONSE | Public | |
| 08/16/2000 | DECLARATION OF EDWARD STEVENS | Public | |
| 08/18/2000 | LETTER RE HEARING | Public | |
| 08/18/2000 | LETTER | Public | |
| 09/06/2000 | DECLARATION OF RUTH NIELSEN | Public | |
| 09/06/2000 | RESPONSE | Public | |
| 09/06/2000 | REPLY | Public | |
| 09/08/2000 | DECLARATION OF EDWARD STEVENS | Public | |
| 09/08/2000 | ORDER TO COMPEL COMPLIANCE | Public | 2047-2607 |
| 09/08/2000 | SUMMARY JUDGMENT HEARING | Public | |
| 09/08/2000 | MOTION HEARING | Public | |
| 09/15/2000 | VERBATIM RPT TRANSMITTED IN CT FILE | Public | |
| 09/22/2000 | NOTICE OF ASSOCIATION OF COUNSEL | Public | |
| 09/22/2000 | AFFIDAVIT/DECLARATION OF SERVICE | Public | 2053-150 |
| 09/22/2000 | NT OF DISCR. REVIEW TO COA #26487-1 | Public | 2052-4011 |
| 03/28/2001 | REPORT OF GUARDIAN AD LITEM | Public | |
| 03/29/2001 | REPORT OF GUARDIAN AD LITEM | Public | |
| 03/29/2001 | MOTION FOR ENTRY OF JUDGEMENT | Public | |
| 03/29/2001 | ***** VOLUME 3 ***** MICK | Public | |
| 03/29/2001 | REPORT OF GUARDIAN AD LITEM | Public | |
| 03/30/2001 | ORDER APPROVING SETTLEMENT | Public | 2135-3985 |
| 03/30/2001 |  CONFESSION OF JUDGMENT | Public | 5 2135-3990 |
| 03/30/2001 | ORDER STRIKING TRIAL DATE | Public | 2138-430 |
| 03/30/2001 | MOTION FOR ENTRY OF JDGMT | Public | |
| 03/30/2001 | SETTLEMENT CONFERENCE/HEARING HELD | Public | |
| 03/30/2001 | ATTACHMENTS FOR REPORT | Public | |
| 04/17/2001 | SETTLEMENT CONFERENCE/HEARING HELD | Public | |
| 04/17/2001 | ORDER APPROVING SETTLEMENT | Public | 2144-1818 |
| 05/04/2001 | COPY RULING GRANTING REVIEW COA | Public | |
| 05/15/2001 | DESIGNATION OF CLERK S PAPERS | Public | 2157-1754 |
| 07/30/2001 | VERBATIM RPT TRANSMITTED TO DIV II | Public | |
| 10/03/2001 | CERTIFICATE OF FINALITY | Public | 2212-1959 |
| 10/03/2001 | RETURNED TO ACTIVE | Public | |
| 04/28/2003 |  ORDER AUTHORIZING REMOVAL OF COURT FILE | Public | 1 |
| 08/02/2006 |  ARCHIVE RECORD VOLUME 2 7/24/00 TO 3/28/01 | Public | 383 |
| 08/02/2006 |  ARCHIVE RECORD VOLUME 3 3/29/01 TO 10/3/01 | Public | 174 |
| 08/02/2006 |  ARCHIVED RECORD 11/10/99 TO 7/21/00 | Public | 253 |
| 03/15/2011 |  PARTIAL SATISFACTION OF JUDGMENT | Public | 3 |
| 04/11/2011 |  NOTICE OF APPEAL | Public | 22 |
| 04/12/2011 |  TRANSMITTAL LETTER COPY FILED | Public | 1 |
| 05/13/2011 |  DESIGNATION OF CLERK'S PAPERS | Public | 2 |
| 05/27/2011 | | Public | 2 |

 **CLERK'S PAPERS PREPARED**

05/27/2011

 **CLERK'S PAPERS SENT**

Public 1

06/09/2011

 **CLERK'S PAPERS PREPARED - CORRECTED**

Public 2

**PURCHASE COPIES****Proceedings**

| Date | Calendar | Outcome |
|--------------------|---|----------------------------|
| Week Of 04/05/2000 | JUDGE TOLLEFSON Unconfirmed Status Conference | Cancelled/Stricken |
| Week Of 04/05/2000 | JUDGE STROMBOM Unconfirmed Status Conference | Cancelled/Amend Case Sched |
| 06/23/2000 | JUDGE ARMIJO Confirmed 9:00 Motion | Cancelled/Stricken |
| 07/14/2000 | JUDGE ARMIJO Confirmed 9:00 Motion | Motion Held |
| 08/25/2000 | JUDGE ARMIJO Confirmed 9:00 Motion - Compel | Continued |
| 08/25/2000 | JUDGE ARMIJO Unconfirmed 9:00 Motion - Part Summary Judgment | Continued |
| 09/08/2000 | JUDGE ARMIJO Confirmed 9:00 Motion - Compel | Motion Held |
| 09/08/2000 | JUDGE ARMIJO Unconfirmed 9:00 Motion - Reconsideration | Motion Held |
| 09/08/2000 | JUDGE ARMIJO Unconfirmed 9:00 Motion - Part Summary Judgment | Summary Judgment Held |
| Week Of 10/11/2000 | JUDGE STROMBOM Unconfirmed Settlement Conference | Cancelled/Amend Case Sched |
| Week Of 10/11/2000 | JUDGE TOLLEFSON Unconfirmed Settlement Conference | Cancelled/Amend Case Sched |
| Week Of 10/25/2000 | JUDGE ARMIJO Unconfirmed Pretrial Conference | Cancelled/Amend Case Sched |
| Week Of 10/25/2000 | JUDGE STROMBOM Unconfirmed Pretrial Conference | Cancelled/Amend Case Sched |
| 11/08/2000 | JUDGE STROMBOM Confirmed 9:30 Trial | Cancelled/Amend Case Sched |
| 12/04/2000 | JUDGE ARMIJO Confirmed 9:30 Trial | Cancelled/Amend Case Sched |

| | | |
|--------------------|---|----------------------|
| Week Of 12/14/2000 | JUDGE ARMIJO Unconfirmed Status Conference | Cancelled/Stricken |
| 03/30/2001 | JUDGE ARMIJO Confirmed 11:00 Settlement Conference | Settlement Conf Held |
| Week Of 07/05/2001 | JUDGE ARMIJO Unconfirmed Pretrial Conference | Cancelled/Stricken |
| 07/19/2001 | JUDGE ARMIJO Confirmed 9:30 Trial | Cancelled/Stricken |

Pending Case Schedule Items

| | |
|-------|---------------|
| Event | Schedule Date |
|-------|---------------|

Judgments

| | | | | |
|---------|--------|--------|-----------|-------|
| Cause # | Status | Signed | Effective | Filed |
|---------|--------|--------|-----------|-------|

This calendar lists Confirmed and Unconfirmed Proceedings. Attorneys may **obtain access rights** to confirm/strike selected proceedings. Currently, any proceedings for the Commissioners' calendars can be stricken, but only Show Cause proceedings for the Commissioners' calendars can be confirmed.

Unconfirmed Proceedings will not be heard unless confirmed as required by **the Local Rules of the Superior Court for Pierce County.**

- Hearing and location information displayed in this calendar is subject to change without notice. Any changes to this information after the creation date and time may not display in current version.
- Confidential cases and Juvenile Offender proceeding information is not displayed on this calendar. Confidential case types are: Adoption, Paternity, Involuntary Commitment, Dependency, and Truancy.
- The names provided in this calendar cannot be associated with any particular individuals without individual case research.
- Neither the court nor clerk makes any representation as to the accuracy and completeness of the data except for court purposes.

Created: Thursday October 6, 2011 2:53PM

Copyright © 1996-2011 Pierce County Washington. All rights reserved.

Appendix 6

**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 Tomya, the Estate of Cynthia Tomya, by and through Clinton Tomya its personal representative; Nathan Tomya, by and through David Bufalini, his guardian ad litem; Aaron Tomya, by and through Stanley J. Rumbaugh, his guardian ad litem; and Christian Tomya, 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 Sharbono; James Sharbono, individually and on behalf of his marital community, and Deborah Sharbono, 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. The accident resulted in the death of Cynthia Tomya, the wife of Clinton Tomya, and the natural mother of Nathan, Aaron and Christian Tomya.

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

initialed:

PTF01525

Original 2 of 2
Page 1 of 5

EN. 1

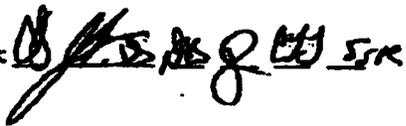
defendants was sold through fraud, misrepresentation, negligence or other misconduct on the part of Universal, the selling agent or others.

Plaintiffs suffered damages as a result of the death of Cynthia Tomyn. 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

trial:  SRK

PTF01528

Original 2 of 2
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

Initials

MS G. J. SJR

PTF01527

Original 2 of 2
Page 3 of 5

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 SPPR 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 continue 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 Execute: In consideration of the foregoing, the plaintiffs agree and covenant to forebear from executing or enforcing the judgment referred to in paragraph 1 above against the defendant Cassandra Sharbono, her successor, 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. Confession Proceedings: This agreement, and all acts taken in furtherance of it as set forth herein is conditioned upon the immediate tender of the undeposited Embassy coverage from the Defendants' carrier, 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 Lien and Charge: 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.

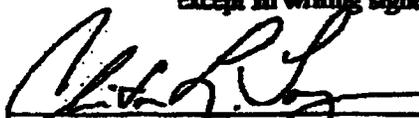
PTFD1528

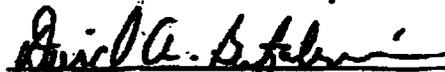
Original 2 of 2
Page 4 of 5

wink

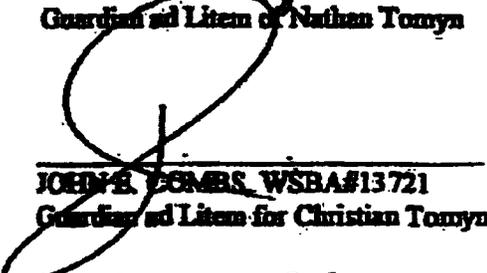


- 9. **Resolution of All Claims:** The parties intend that this agreement fully and finally resolve all claims among them. In the event any such claim is not specifically provided for herein, the parties agree it is compromised, fully released and finally discharged.
- 10. **Advice and Counsel:** Plaintiffs have executed this agreement after advice and counsel by their attorneys, Ben F. Barcus 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. BUEALINI, WSBA #8262
 Guardian ad Litem of Nathan Tomyn


 STANLEY J. REMBARGER, WSBA #5980
 Guardian ad Litem for Aaron Tomyn


 JOHN B. COMBS, 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 30th day of MARCH, 2001.


 Print Name: Timothy R. Gosselin
 Notary Public in and for the State of Washington
 Residing at Taloma WA 98107
 My Commission Expires: 9-6-03

Initials: 

Appendix 7



FILED
IN COUNTY CLERK'S OFFICE

A.M. MAY 20 2005 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

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 Tomyv 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\PLEADINGS\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

1 5. Attorney Fees and Costs:

\$ 204,090.⁰⁰/_{FK}

2 6. Other Recovery Amounts:

\$ 10,000.⁰⁰/_{FK}

3 7. Post- Judgment Interest:

4 Post-judgment interest shall accrue on \$4,893,298.63
5 of the principle judgment amount, and on such
6 additional amounts as become due and owing under
7 paragraph 1 below, at the rate of 12% per annum. Post-
8 judgment interest shall accrue on \$4,500,000.00 of the
9 principle judgment amount, and on attorney fees, costs
10 and other recovery amounts, at the rate of 5.125
11 percent per annum from the date of entry of this
12 judgment until said judgment is paid.

13 8. Attorney for Judgment Debtor: Dan'l W. Bridges, 11100 NE 8th Street, Suite 300
14 Bellevue, WA 98004

15 **II. JUDGMENT**

16 This matter was tried to a jury of 12 before the Honorable Roseanne Buckner beginning on
17 March 28, 2005. Plaintiffs, James, Deborah and Cassandra Sharbono, appeared personally or through
18 their attorney, Timothy R. Gosselin. Defendants Universal Underwriters Insurance Company, Len Van
19 de Wege and "Jane Doe" Van de Wege appeared personally or through their attorney Dan'l W. Bridges.

20 On December 27, 2002, January 24, 2003, May 2, 2003 and March 28, 2005, the court entered
21 orders on motions for full or partial summary judgment resolving certain issues and claims. During
22 trial, the court dismissed the claims against defendants Van de Wege, and dismissed the claims of
23 Cassandra Sharbono for general damages. During trial the court also determined as a matter of law that
24 Universal Underwriters Insurance Company was obligated to pay the unpaid portion of the Judgment
25 by Confession entered on March 30, 2001 in the matter of Tomyn v. Sharbono, Pierce County Cause
26 No. 99-2-12800-7.

27 Following trial on the merits on the issues of whether Universal Underwriter's bad faith and
28 violations of Washington's Consumer Protection Act were a proximate cause of injury and damage to
the plaintiffs, the jury returned a verdict in favor of the plaintiffs. A copy of the verdict is attached
hereto and incorporated herein. Also following trial, the court made additional rulings regarding
attorney fees, costs and other relief. Based upon these rulings, decisions and the verdict of the jury, the

JUDGMENT - Page 2 of 4

S:\WP\CASES\218\1\Sharbono v. Universal\PLEADINGS\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

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 Tomyn 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.

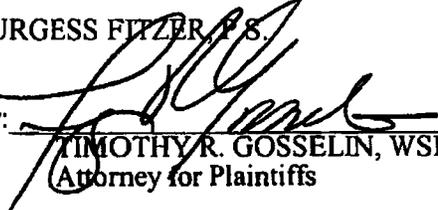
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Signed this 20th day of May, 2005.


HONORABLE ROSANNE BUCKNER

PRESENTED BY:

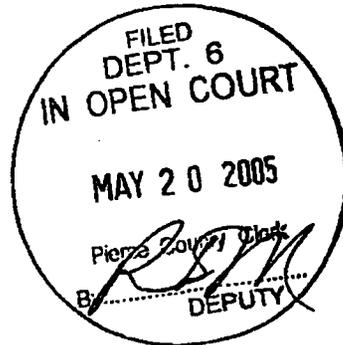
BURGESS FITZER, P.S.

By: 
TIMOTHY R. GOSSELIN, 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



Appendix 8



01-2-07954-4 30418447 MT 08/28/08

01-2-07954-4 30418447

The Honorable Rosanne Buckner
Noted for: Friday, Sept. 5, 2008
9:00 AM

FILED
IN COUNTY CLERK'S OFFICE
A.M. AUG 26 2008 P.M.
PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, 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.

NO. 01-2-07954-4

PLAINTIFFS' MOTION TO EXECUTE
ON APPEAL BOND

ORIGINAL

RELIEF REQUESTED

James and Deborah Sharbono, plaintiffs above-named, move this court pursuant to Civil Rule 65.1 for an order directing the Universal's surety on appeal, Ohio Casualty Insurance Company, to pay and satisfy the sums awarded in 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 portion of the judgment was affirmed on appeal by the Court of Appeals in its decision filed June 27, 2007, and its Order Amending Opinion filed October 9, 2007. Plaintiff's have submitted a proposed form of

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

1 order with the bench copies of this motion.

2 **STATEMENT OF FACTS**

3 On May 20, 2005, this court entered judgment in favor of the Sharbonos. (See attached
4 **Exhibit 1.**) The judgment contains two principal awards:

5 1. Judgment is hereby entered in favor of plaintiffs and against
6 defendant Universal Underwriters Insurance Company in the amount of the
7 unpaid balance of the Judgment by Confession entered against plaintiffs in
8 the matter of *Tomyn v. Sharbono*, Pierce County Cause No. 99-2-12800-7, to
9 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.

10 2. Judgment is hereby entered in favor of plaintiffs James and Deborah
11 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.

12 **(Exhibit 1 at 3).**

13 Universal appealed. By decision of the Court of Appeals filed June 27, 2007 (see attached
14 **Exhibit 2**), and Order Amending Opinion filed October 9, 2007 (see attached **Exhibit 3**), the Court
15 affirmed the first part of the judgment and reversed the second.

16 [W]e vacate the damage award of \$4,500,000 based on the jury verdict. Because
17 Universal did not assign error to the directed verdict in the amount of \$3,275,000,
together with interest, we affirm that judgment and remand for further proceedings.

18 **Exhibit 3, Order Denying Respondents' Motion for Reconsideration, Order Granting Motion for**
19 **Clarification, and Order Amending Opinion (Oct. 9, 2007), at 2.** Thus the first portion of the
20 judgment is now due.

21 When Universal appealed, it posted a supersedeas bond in the amount of \$10,850,578.03 to
22 stay enforcement of the judgment. (See **Exhibit 4**). The surety is Ohio Casualty Insurance
23 Company. The bond is number 3-883-836-6.

24 **GROUND S FOR RELIEF AND ARGUMENT**

25 Rule 8.6 of the Rules of Appellate Procedure provides: "The issuance of the mandate as
26

1 provided in rule 12.5 terminates any delay of enforcement of a trial court decision obtained pursuant
 2 to rule 8.1 [Supersedeas Procedure] and terminates orders entered pursuant to rule 8.3 [Appellate
 3 Court Orders Needed for Effective Review].” The Court of Appeals issued its mandate on August
 4 21, 2008. (Exhibit 5) Thus, the judgment against Universal is now enforceable.

5 “The purpose of a supersedeas bond is to pay the judgment if affirmed on appeal . . .” *Nyby*
 6 *v. Allied Fidelity Ins. Co.*, 42 Wn. App. 543, 547, 712 P.2d 861 (1986). Civil Rule 65.1 provides:

7 Whenever these rules require or permit the giving of security by a party, and security
 8 is given in the form of a bond or stipulation or other undertaking with one or more
 9 sureties, each surety submits himself to the jurisdiction of the court and irrevocably
 10 appoints the clerk of the court as his agent upon whom any papers affecting his
 11 liability on the bond or undertaking may be served. His liability may be enforced on
 12 motion without the necessity of an independent action. The motion and such notice
 13 of the motion as the court prescribes may be served on the clerk of the court, who
 14 shall forthwith mail copies to the sureties if their addresses are known.

11 Thus, the judgment is properly executed against Ohio Casualty.

12 As to the amount of the judgment, paragraph 1 of the Judgment entered against Universal
 13 describes the principle judgment amount as “the amount of the unpaid balance of the Judgment by
 14 Confession entered against plaintiffs in the matter of *Tomyn v. Sharbono*, Pierce County Cause No.
 15 99-2-12800-7, to wit \$3,275,000.00, together with interest that has accrued thereon since the date
 16 of entry, March 30, 2001, which, as of May 13, 2005, (four years, 43 days @ 12 %/yr.) totals \$
 17 1,618,298.63, and together with interest that continues to accrue thereon as set forth in said judgment
 18 until said judgment is paid.” Exhibit 1 at 3. Post-judgment interest is provided for in paragraph
 19 7. It states: “Amounts awarded pursuant to paragraph 1 shall bear post-judgment interest pursuant
 20 to RCW 4.56.110(4) and RCW 19.52.020 at the rate of 12 percent per annum.” Exhibit 1 at 3

21 There currently exists a disagreement between the Sharbonos and their judgment creditors,
 22 the Tomyns, as to the amount that is owed pursuant to paragraph 1. The Sharbonos expect the
 23 Tomyns will ask to intervene for the limited purpose of establishing the amount they claim is owned.
 24 In the event the Tomyns intervene, they will speak for themselves regarding their analysis of the
 25 amounts due. However, the following briefly describes the Sharbonos’ views and the Tomyns’
 26

1 views as your author understands them.

2 The Sharbonos believe the principle amount of judgment is calculated by taking the amount
3 of the unpaid balance of the Judgment by Confession entered in the matter of Tomyn v. Sharbono,
4 Pierce County Cause No. 99-2-12800-7 (Exhibit 6) – \$3,275,000.00 – and calculating the interest
5 that has accrued on that amount since the date the Tomyn judgement was entered, March 30, 2001,
6 at the rate set forth in that judgment, 12%. Interest on \$3,275,000 from March 30, 2001 through
7 September 15, 2008 (seven years, 5 months, 16 days) totals \$2,931,977.36. This brings the total
8 amount due on the Tomyn judgment (Exhibit 6) to **\$6,206,977.36. This amount becomes the**
9 **principle judgment amount of the Sharbono judgment (Exhibit 1).**

10 You author believes, the Tomyns, on the other hand, contend that the principle amount of the
11 Sharbono judgment is calculated by taking the value of the Tomyn judgment (Exhibit 6) at the time
12 the Sharbono judgment (Exhibit 1) was entered and calculating interest on that amount at 12%.
13 When this court signed the Sharbono judgment (Exhibit 1) on May 20, 2005, it recognized and
14 identified in paragraph 1 that the then-current value of the Tomyn judgment (Exhibit 6) was
15 \$4,893,298.63 (\$3,275,000 + \$1,618,298.63). Thus, the Tomyns contend the court should calculate
16 the principle amount owing under paragraph 1 of the Sharbono judgment by taking \$4,893,298.63
17 and applying 12% interest from May 20, 2005 to the present. Through September 15, 2008, (3years,
18 3 mos., 26 days) that would result in a total **principle judgment amount for the Sharbono**
19 **judgment (Exhibit 1) of \$6,843,512.87**, about \$636,000 more than the Sharbonos calculate.

20 Regardless of which amount the Court concludes is correct, post-judgment interest then
21 applies pursuant to paragraph 7. If the court accepts the Sharbonos' calculations, post judgment
22 interest brings the total of principle and post-judgment interest to \$8,550,139.63. If the court accepts
23 the Tomyns' calculations, interest will bring the total amount owing to \$9,288,652.90.

24 For obvious reasons, the Sharbonos have no preference as to how the principle judgment
25 amount is calculated. They merely want to execute on the judgment consistent with its terms. Thus,
26 they ask the court to issue an order directing Universal's appeal surety, Ohio Casualty Insurance

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Company, to forthwith pay either \$8,550,139.63 or \$9,288,652.90 if paid by September 15, 2008 and an additional either \$3,111/day or \$3,853/day for each day up to 15 days, after September 15th. The Sharbonos ask that Ohio Casualty be ordered to pay such amounts forthwith as the Sharbonos and the Tomyns instruct.

Dated this 25th day of August, 2008.

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

DECLARATION OF SERVICE

I hereby certify that on the date stated below I deposited a copy of this document in the mails of the United States of America, addressed to each counsel of record, postage prepaid, (2) with a recognized legal messenger service for delivery to each counsel of record, and/or (3) via facsimile.

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

Dated August 25, 2008 at Tacoma, Washington


TIMOTHY R. GOSSELIN

EXHIBIT 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FILED
IN COUNTY CLERK'S OFFICE

A.M. MAY 20 2005 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

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,

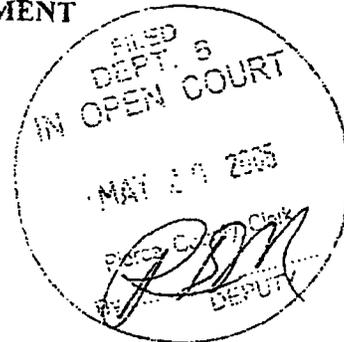
vs.

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\PLEADINGS\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

1 5. Attorney Fees and Costs:

\$ 204,090.⁰⁰/_{xx}

2 6. Other Recovery Amounts:

\$ 10,000.⁰⁰/_{xx}

3 7. Post- Judgment Interest:

4 Post-judgment interest shall accrue on \$4,893,298.63
5 of the principle judgment amount, and on such
6 additional amounts as become due and owing under
7 paragraph 1 below, at the rate of 12% per annum. Post-
8 judgment interest shall accrue on \$4,500,000.00 of the
9 principle judgment amount, and on attorney fees, costs
10 and other recovery amounts, at the rate of 5.125
11 percent per annum from the date of entry of this
12 judgment until said judgment is paid.

13 8. Attorney for Judgment Debtor: Dan'l W. Bridges, 11100 NE 8th Street, Suite 300
14 Bellevue, W A 98004

15 II. JUDGMENT

16 This matter was tried to a jury of 12 before the Honorable Roseanne Buckner beginning on
17 March 28, 2005. Plaintiffs, James, Deborah and Cassandra Sharbono, appeared personally or through
18 their attorney, Timothy R. Gosselin. Defendants Universal Underwriters Insurance Company, Len Van
19 de Wege and "Jane Doe" Van de Wege appeared personally or through their attorney Dan'l W. Bridges.

20 On December 27, 2002, January 24, 2003, May 2, 2003 and March 28, 2005, the court entered
21 orders on motions for full or partial summary judgment resolving certain issues and claims. During
22 trial, the court dismissed the claims against defendants Van de Wege, and dismissed the claims of
23 Cassandra Sharbono for general damages. During trial the court also determined as a matter of law that
24 Universal Underwriters Insurance Company was obligated to pay the unpaid portion of the Judgment
25 by Confession entered on March 30, 2001 in the matter of Tomvn v. Sharbono, Pierce County Cause
26 No. 99-2-12800-7.

27 Following trial on the merits on the issues of whether Universal Underwriter's bad faith and
28 violations of Washington's Consumer Protection Act were a proximate cause of injury and damage to
the plaintiffs, the jury returned a verdict in favor of the plaintiffs. A copy of the verdict is attached
hereto and incorporated herein. Also following trial, the court made additional rulings regarding
attorney fees, costs and other relief. Based upon these rulings, decisions and the verdict of the jury, the

JUDGMENT -- Page 2 of 4

SMWP\CASES\C18\Sharbono v. Universal.PLEADINGS\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

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 Tomyn 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/_{xx}.

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/_{xx} 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/_{xx} 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.

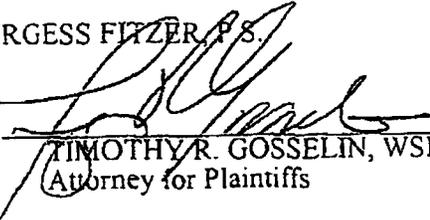
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Signed this 20th day of May, 2005.


HONORABLE ROSANNE BUCKNER

PRESENTED BY:

BURGESS FITZER, P.S.

By: 
TIMOTHY R. GOSSELIN, 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



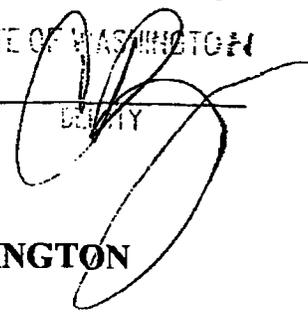

EXHIBIT 2

FILED
COURT OF APPEALS
DIVISION II

07 JUN 26 AM 10:19

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
composed thereof; CASSANDRA
SHARBONO,

Respondents/Cross-Appellants,

v.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign insurer,

Appellant/Cross-Respondent,

And

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

Appellants.

No. 33379-1-II

PUBLISHED OPINION

ARMSTRONG, J. -- Cassandra Sharbono lost control of her truck, crossed into the oncoming traffic lane, and hit a car Cynthia Tomyn was driving. Cynthia Tomyn died as a result of the accident and her family claimed damages against Cassandra's parents, James and Deborah Sharbono (the Sharbonos), who owned the vehicle Cassandra was driving. The Sharbonos had primary liability coverage with State Farm Insurance Company and umbrella coverage under their commercial and personal liability policies with Universal Underwriters Insurance Company. The Sharbonos claimed that they had three umbrella policies; Universal advised them

No. 33379-1-II

they had only one umbrella policy with a \$1,000,000 limit. During settlement negotiations with the Tomyns, the Sharbonos several times asked Universal to produce its underwriting file so that they and the Tomyns would know the extent of the Sharbonos' liability coverage. Universal refused. The Tomyns and the Sharbonos ultimately settled for \$4,525,000, and the Sharbonos then sued Universal to establish coverage and to recover damages for Universal's alleged bad faith in refusing to produce its underwriting file. The trial judge granted the Sharbonos summary judgment, declaring that they had coverage under three policies for a total of \$7,000,000; the trial court also ruled that Universal was liable for bad faith as a matter of law, and found the Tomyn-Sharbono settlement reasonable. At the conclusion of the damages trial, the jury awarded the Sharbonos \$4,500,000 for Universal's bad faith. Universal appeals the jury's verdict and the trial court's summary judgments establishing coverage and finding Universal liable for bad faith. Universal also appeals the trial court's determination that the settlement was reasonable. We *affirm the summary judgment declaring Universal liable for bad faith and the trial court's ruling that the Tomyn-Sharbono settlement was reasonable.* We also affirm the trial court's ruling regarding the settlement's reasonableness. But we reverse the trial court's judgment establishing coverage at \$7,000,000; we hold that under the policy's plain language, the Sharbonos had umbrella coverage of \$1,000,000 under only one policy. And we reverse the trial court's determination that Universal violated the Consumer Protection Act. Finally, we reverse the jury verdict for bad faith damages and the trial court's dismissal of the Sharbonos' claim against their agent for negligently procuring the Universal umbrella policy.

FACTS

James and Deborah Sharbono owned three transmission shops: "All Transmission & Automotive," "The Trans-Plant," and "Parkland Transmission." The Sharbonos had business

No. 33379-1-II

partners in the latter two businesses: Clarence and Claudia Ray in The Trans-Plant, and Robert and Debra Huke in Parkland Transmission.

In the mid-1990s, the Sharbonos and their partners bought commercial insurance from Universal, an insurer specializing in coverage for automobile dealers, auto repair shops, and associated enterprises. Universal insured the three transmission shops under separate but similar insurance policies.¹

In 1997, the Sharbonos asked their Universal sales agent, Len Van de Wege, about transferring the family's personal umbrella coverage from State Farm to Universal. Universal offered personal umbrella coverage to the Sharbonos as an adjunct to the Sharbono companies' commercial policies. The Sharbonos claim that they asked Van de Wege for \$3,000,000 of personal umbrella coverage. According to the Sharbonos, Van de Wege agreed to add a \$1,000,000 personal umbrella to each business policy, providing a total of \$3,000,000 in personal umbrella coverage. According to Van de Wege, the Sharbonos did not seek \$3,000,000 in personal umbrella coverage.

When the Sharbonos renewed their Universal policies in 1998, they added their personal motor vehicles to their personal umbrella coverage.

On December 11, 1998, Cassandra Sharbono, the Sharbonos' daughter, lost control of the family truck and swerved into oncoming traffic, striking an approaching car head-on and killing Cynthia Tomy. The police cited Cassandra for second degree negligent driving, and the Sharbonos later admitted that Cassandra was "at least partially at fault" for the accident. Clerk's

¹ The Sharbonos conceded below that they had no coverage under the Parkland Transmission policy because they were not named insureds in that policy. Thus, that policy is irrelevant for purposes of this appeal.

No. 33379-1-II

Papers (CP) at 557. Cynthia Tomy, who was 34 years old, was survived by her husband Clinton and their three minor children.

The Tomyms retained attorney Ben Barcus to pursue a wrongful death claim against the Sharbonos. The Tomyms initially attempted to settle with the Sharbonos, negotiating with the Sharbonos' primary auto liability carrier, State Farm, and the Sharbonos' personal attorneys, Timothy Gosselin and Maureen Falecki.

Over the next few months, Falecki wrote to Universal asking for documents pertaining to the Sharbonos' insurance coverage. Specifically, Falecki asked Universal to produce its underwriting files on the Sharbonos' policies, explaining that the Sharbonos believed they had \$3,000,000 of personal umbrella coverage. Universal produced copies of the Sharbonos' application for the personal umbrella coverage and offered to provide the Sharbonos with any other documents they had signed or submitted. But Universal refused to produce its underwriting files, explaining that the files contained proprietary information and that it was unaware of any authority that supported Falecki's request.

The Sharbonos and Tomyms participated in two mediation sessions. At the first session, Universal offered to pay the Sharbonos' \$1,000,000 umbrella limit toward any settlement above State Farm's \$250,000 in primary coverage. The first mediation failed and Falecki again asked Universal to produce its underwriting files, stating that Universal's failure to disclose the files was one reason the mediation failed. Universal again refused.

At the second settlement mediation, the Sharbonos asked for Universal's underwriting files from Glenn Reid, a Universal representative who attended the mediation. Universal again refused to produce its underwriting file. After the second failed mediation, Falecki again wrote Universal asking for its underwriting files. In the same letter, Falecki advised Universal that if it

No. 33379-1-II

failed to cooperate, the Sharbonos would assert bad faith claims against Universal. Universal still refused to produce the file and advised Falecki that if the Sharbonos sued for bad faith, it would counterclaim for abuse of process.

Aware of the dispute about coverage, the Tomyns' attorney threatened to sue the Sharbonos unless Universal cooperated. Universal again refused, and the Tomyns sued the Sharbonos.

The Tomyns subpoenaed Universal's underwriting file, and Universal moved to quash the subpoena on the ground that its files were not discoverable in a suit against its insureds. The trial court denied the motion to quash and ordered Universal to produce the underwriting files. Universal then sought discretionary review; a commissioner of this court, finding probable error in the trial court's order to produce, granted review and stayed enforcement of the subpoena.

Before we considered the appeal, the Tomyns and Sharbonos settled. The Sharbonos agreed to confess judgment for \$4,525,000 and to assign their insurance claims to the Tomyns in exchange for covenants not to execute (as to James and Deborah Sharbono) and to forebear (as to Cassandra Sharbono). The agreement also required the Sharbonos to sue Universal to recover insurance proceeds to satisfy the confessed judgment amount.

The Sharbonos then commenced this action against Universal and Van de Wege, alleging (1) breach of contract, (2) violation of the Consumer Protection Act (CPA), (3) negligence or negligent misrepresentation, (4) bad faith, (5) breach of quasi-fiduciary duty (Universal), (6) breach of fiduciary duty (Van de Wege), and (7) reformation.

The Sharbonos moved for summary judgment to establish \$3,000,000 of coverage under each of their commercial policies' Umbrella Coverage Part 980. The trial court granted the Sharbonos' motion, stating that each policy's Umbrella Coverage Part 980 provided personal

No. 33379-1-II

liability coverage to the Sharbonos. In a later ruling, the trial court found that the Sharbonos could combine the policies' limits for \$6,000,000 in addition to the \$1,000,000 personal umbrella coverage that Universal conceded was available.

The Sharbonos moved for an order declaring their settlement with the Tomyns reasonable under RCW 4.22.060. The trial court ruled that the settlement was reasonable.

Before trial, the Sharbonos filed a second motion for summary judgment, declaring that Universal had acted in bad faith when it refused to turn over its underwriting file to the Tomyns' attorney and when it allegedly did not explain why it denied coverage under its umbrella policies. The Sharbonos also alleged that Universal violated the CPA by forcing them to litigate to recover insurance proceeds, failing to provide the underwriting documents, and failing to provide a reasonable explanation for its position. See WAC 284-30-330(6), (7), (13). Universal also moved for summary judgment, seeking dismissal of the Sharbonos' claims for negligence or negligent misrepresentation, breach of quasi-fiduciary duty, and reformation, as well as dismissal of all claims against Van de Wege.

The trial court granted both motions in part. The court found Universal liable for bad faith and for violating the CPA by refusing to produce its underwriting file and for not paying the Tomyn judgment. The trial court dismissed the Sharbonos' claims for negligence, breach of fiduciary duty, reformation, and all claims against Van de Wege, explaining that its "previous rulings establish[ed] insurance sufficient to cover the underlying judgment against the Sharbonos in the Tomyn lawsuit, such that any relief the court could provide on [the Sharbonos'] claims for additional insurance would be duplicative of relief already granted." CP at 2177.

A jury awarded the Sharbonos \$4,500,000 for damages suffered due to Universal's bad faith. The trial court then granted the Sharbonos' motion for attorney fees, costs, and treble

No. 33379-1-II

damages under the CPA. The trial court entered a \$9,393,298.63 judgment, which included the \$4,525,000 settlement, \$204,090 in attorney fees and costs, and \$10,000 in treble damages.

ANALYSIS

I. STANDARD OF REVIEW AND GENERAL PRINCIPLES OF INSURANCE POLICY INTERPRETATION

A. Summary Judgment

On summary judgment, the trial court decided that Umbrella Coverage Part 980 applied to the Sharbonos' liability for Cassandra's accident.

We review an order granting summary judgment de novo. *Go2Net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 252, 143 P.3d 590 (2006) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005)). Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c).

B. Insurance Policy Interpretation

We interpret insurance policies as a matter of law. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998). Insurance policies are contracts, and courts seek to determine the contracting parties' intent by resorting to a fair, reasonable, and sensible construction of the contract's language, as the average insurance purchaser would understand. *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998) (citations omitted).

In general, we will enforce an insurance contract as written if the contract is clear and unambiguous. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997) (citing *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988)). If an insurance contract's language is neither ambiguous nor difficult to comprehend,

No. 33379-1-II

we will enforce the intent expressed in the policy regardless of what coverage the insured may have thought he had. *Dennis v. Great Am. Ins. Cos.*, 8 Wn. App. 71, 74, 503 P.2d 1114 (1972) (citing *Jeffries v. Gen. Cas. Co. of Am.*, 46 Wn.2d 543, 283 P.2d 128 (1955)).

If ambiguities exist in the policy language, we may resort to extrinsic evidence to ascertain the parties' intent. *Am. Nat'l Fire Ins. Co.*, 134 Wn.2d at 427 (citing *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 374, 917 P.2d 116 (1996)). An ambiguity exists where the insurance policy's language is susceptible to more than one reasonable interpretation. *Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 841, 734 P.2d 17 (1987) (citing *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976)). We resolve any ambiguities in the insured's favor. *Am. Nat'l Fire Ins. Co.*, 134 Wn.2d at 428 (citing *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 68, 882 P.2d 703 (1994), 891 P.2d 718 (1995)). If possible, we interpret a policy to harmonize the policy's provisions and avoid creating ambiguities. *Tyrrell v. Farmers Ins. Co. of Wash.*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000); see *Dobosh v. Rocky Mountain Fire & Cas. Co.*, 43 Wn. App. 467, 471, 717 P.2d 793 (1986) (citations omitted).

II. INSURANCE POLICY COVERAGE - UMBRELLA COVERAGE PART 980

The Sharbonos moved for partial summary judgment to establish that Umbrella Coverage Part 980 of both the All Transmission & Automotive and The Trans-Plant insurance policies applied to the accident and provided the Sharbonos with coverage of \$3,000,000 per occurrence per policy. The trial court granted the Sharbonos' motion.

The parties agree that the Universal insurance policies' terms are clear and unambiguous. But Universal argues that the trial court erred in finding coverage for the Sharbonos under Umbrella Coverage Part 980 for Cassandra's personal use of a family car. Specifically, Universal argues that the trial court misinterpreted Umbrella Coverage Part 980, which Universal

No. 33379-1-II

calls the "commercial umbrella" and that, according to Universal, does not apply to Cassandra's personal use of a family vehicle.

The Sharbonos argue that Umbrella Coverage Part 980 covers their liability for Cassandra's accident because it is not strictly a "commercial umbrella" but a general umbrella that provides coverage for both personal and commercial losses.

The first paragraph of both the All Automotive & Transmission and The Trans-Plant insurance policy declarations states that: "This policy insures only those coverages and property shown in the declarations made a part of this policy. such insurance applies only to those insureds, security interests, and locations designated for each coverage as identified in item 2 by letter(s) or number." CP at 31. Item 2 in each policy lists James & Deborah Sharbono as named insureds. The declarations page of each policy also sets forth the coverage limits.

The Umbrella Coverage Part 980 in the All Transmission & Automotive policy has a \$3,000,000 coverage limit and lists All Transmission & Automotive as the insured. The Trans-Plant policy has an Umbrella Coverage Part 980 with \$3,000,000 coverage that lists The Trans-Plant as the insured. The Umbrella Coverage Part 980 in the two policies is identical.²

The initial paragraph of Umbrella Coverage Part 980 states that it "applies only when it is shown in the declarations. Such insurance applies only to those insureds, security interests and locations designated for each coverage as identified in declarations item 2 by letter(s) or number." CP at 119.

Coverage Part 980 generally defines an insured as follows:

WHO IS AN INSURED -

With respect to any AUTO or watercraft:

² Because Umbrella Coverage Part 980 is identical in both policies, we refer to that coverage part singular.

No. 33379-1-II

(a) YOU;

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

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

CP at 122.

The parties disagree as to the definition of "You." Br. of Appellant at 34; Br. of Respondent at 29. Although neither Personal Umbrella Coverage Part 970 nor Umbrella Coverage Part 980 defines "You," the insurance policies' general definitions contain the following definition: "'YOU' and 'YOUR' means the person or organization shown in the declarations as the Named Insured." CP at 56.

The Sharbonos argue that the term "You" describes them, individually, because both the All Transmission & Automotive and The Trans-Plant insurance policies list them as "Named Insureds." CP at 31. And according to the Sharbonos, Personal Umbrella Coverage Part 980 covers them for any auto they own if the personal use is by a "Designated Person." Although Cassandra is not a designated person, the declarations page of the policies lists James and Deborah Sharbono as designated persons. Thus, according to the Sharbonos, the terms "You" (named insureds) and "Designated Persons" cover their use, which in this case is their entrustment of the vehicle to Cassandra.³

The Sharbonos are correct that the declarations pages of both policies identify All Transmission & Automotive and The Trans-Plant as "01" in the "Named Insured" section, and

³ The Sharbonos cite *Farmers Ins. Group v. Johnson*, 43 Wn. App. 39, 715 P.2d 144 (1986) for the proposition that "entrustment of a vehicle is use of the vehicle." Br. of Respondent at 31. *Farmers* is inapposite. The court in that case never stated that entrustment is a use. Rather, the case stands for the proposition that a claim based on negligent entrustment of a vehicle is not a separate and independent cause of an injury that precludes operation of an exclusionary provision relating to injuries caused by use of that vehicle. *Farmers*, 43 Wn. App. at 42-44.

No. 33379-1-II

identify James and Deborah Sharbono as "02" in the "Named Insured" section. CP at 31, 171. But the declarations section regarding Umbrella Coverage Part 980 in both policies states that "01" is the only insured under Umbrella Coverage Part 980.⁴ Accordingly, in the context of Umbrella Coverage Part 980, "You" describes only the businesses: All Transmission & Automotive and The Trans-Plant. In Umbrella Coverage Part 980, "You" does not refer to the Sharbonos individually.

Thus, with respect to any auto,⁵ Umbrella Coverage Part 980 insures All Transmission & Automotive or The Trans-Plant (depending on the insurance policy). And with respect to "personal use of any [a]uto owned . . . by" All Transmission & Automotive or The Trans-Plant, Umbrella Coverage Part 980 insures "any person or organization shown in the declarations for . . . Coverage Part [980] as a 'Designated Person.'" CP at 122, 258. The declarations for Umbrella Coverage Part 980 list James and Deborah Sharbono as "Designated Persons." CP at 42, 179-80. In other words, Umbrella Coverage Part 980 provides coverage to James and Deborah Sharbono with respect to their personal use of any auto owned or hired by either All Transmission & Automotive or The Trans-Plant.

James and Deborah Sharbono own the truck Cassandra was driving when the accident occurred, and Cassandra testified that she normally used that truck for personal purposes.

⁴ Compare the declarations section regarding Umbrella Coverage Part 970 in both policies that states that "02" is the only insured under Umbrella Coverage Part 970.

⁵ "Auto," as defined in Umbrella Coverage Part 980, "means a land motor vehicle, trailer or semi-trailer, designed for travel on public roads and includes permanently attached equipment." CP at 119, 255. The truck involved in the accident is an auto under this definition.

No. 33379-1-II

Because neither All Transmission & Automotive nor The Trans-Plant owned or hired that truck, Umbrella Coverage Part 980 does not cover Cassandra, James, or Deborah Sharbono's use of that truck.

The Sharbonos' argument requires the policy reader to ignore the plain language that "[s]uch insurance applies only to those insureds . . . designated for each coverage as identified in . . . item 2 by letter(s) or number." Under the Sharbonos' theory, all named insureds on the general declaration page would be covered under each coverage within the policy. And this is not only inconsistent with the above language, it violates the structure and overriding theme of the policy; a commercial garage policy that affords limited coverage to various persons and business entities associated with the garages as owners, employees, lenders, and lessors, with some limited coverage for the Sharbonos' personal use of a vehicle the business owned.⁶

Moreover, we find no ambiguity in the policy that would mislead the average insurance purchaser. The definition of "You," as the Sharbonos point out, means those persons shown in the declarations. But it does not follow that all coverages thereby insure all named insureds. The limiting language says just the opposite. We conclude that an average insurance purchaser would recognize Universal's clear intent to provide its different coverages only to those named insureds designated either by number or letter in the specific coverage.

⁶ The insurance policies state that "insurance applies only to those insureds, security interests, and locations designated for each coverage as identified in [i]tem 2 by letter(s) or number." CP at 31. In the All-Transmission policy, for instance, item 2 includes the following insureds: All Transmission & Automotive, Shar Enterprises, Inc., All Automotive, Inc., James & Deborah Sharbono, and SAR Investments, Inc. Item 2 also lists the following security interests: The Leasing Company, Inc., Minolta Business Systems, J.D. Shotwell Co., First Community Bank (Lacey, WA), Lease Commercial, First Community Bank (Tacoma, WA), US Bank of Washington, SFNB, and Keybank USA. The Trans-Plant policy similarly lists multiple insureds and security interests.

No. 33379-1-II

The trial court erred in determining that Umbrella Coverage Part 980 in both the All Transmission & Automotive and The Trans-Plant insurance policies obligated Universal to indemnify James and Deborah Sharbono for losses arising out of Cassandra's automobile accident. As a matter of law, Umbrella Coverage Part 980 does not apply to the Tomyns' claims against the Sharbonos. We reverse the trial court's summary judgment declaring that Universal's Umbrella Coverage Part 980 applies to the Sharbonos' liability for Cassandra's accident with Cynthia Tomyn. We also reverse the trial court's ruling permitting the Sharbonos to stack the two coverage parts to provide an additional \$6,000,000 in available coverage.

III. REASONABLENESS OF THE TOMYN-SHARBONO SETTLEMENT

Universal argues that the trial court erred in ruling that the Tomyn-Sharbono settlement for \$4,525,000 was reasonable. Universal argues that the "settlement amount was driven more by what insurance coverage the Tomyns and Sharbonos claimed was potentially available than the actual value of the Tomyn claim." Br. of Appellant at 44. Universal maintains that the "Sharbonos settled for an inflated amount to escape exposure." Br. of Appellant at 48.

At trial, the Sharbonos bore the burden of proving the settlement's reasonableness. RCW 4.22.060(1). We will uphold the trial court's factual determination of a settlement's reasonableness if substantial evidence supports that determination. *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 524, 901 P.2d 297 (1995) (citing *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 718, 658 P.2d 1230 (1983)). Substantial evidence is evidence that would persuade a fair-minded person of the asserted statement's truth. *Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403, 419, 128 P.3d 588 (2006) (quoting *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

Where an insured negotiates a settlement and seeks reimbursement, the insurer is liable only for the amount of the settlement that is reasonable and paid in good faith. *Besel v. Viking*

No. 33379-1-II

Ins. Co., 146 Wn.2d 730, 738, 49 P.3d 887 (2002) (citing *Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 628, 245 P.2d 470 (1952)). To determine a settlement's reasonableness in the context of a consent judgment and covenant not to execute, the court considers:

[1] [T]he releasing person's damages; [2] the merits of the releasing person's liability theory; [3] the merits of the released person's defense theory; [4] the released person's relative faults; [5] the risks and expenses of continued litigation; [6] the released person's ability to pay; [7] any evidence of bad faith, collusion, or fraud; [8] the extent of the releasing person's investigation and preparation of the case; and [9] the interests of the parties not being released.

Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 512, 803 P.2d 1339 (1991) (quoting *Glover*, 98 Wn.2d at 717). Ensuring reasonable settlements protects insurers from liability for excessive judgments. *Besel*, 146 Wn.2d at 737-38 ("Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important. A carrier is liable only for reasonable settlements that are paid in good faith."). "No one factor controls and the trial court has the discretion to weigh each case individually." *Chaussee*, 60 Wn. App. at 512 (citing *Glover*, 98 Wn.2d at 717).

Although the Sharbonos claim that the trial court addressed each *Chaussee/Glover* factor in making its determination, the record does not contain the pertinent Report of Proceedings. And the trial court's order merely stated that the court reviewed the files and records before ruling on the settlement's reasonableness.⁷ Accordingly, the trial court's considerations in weighing the factors are unclear. But the record contains enough evidence to support the court's conclusion that the settlement was reasonable. See *Glover*, 98 Wn.2d at 718, *overruled on other grounds* by *Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988).

⁷ The record contains the evidence and argument that the Sharbonos and Universal submitted to the trial court regarding this issue.

No. 33379-1-II

A. The Chaussee/Glover Factors

Universal focuses on the trial court's alleged failure to consider (1) the Tomyns' damages, (2) the merits of the Sharbonos' defense, (3) the risks and expenses of continued litigation, (4) the Sharbonos' ability to pay, and (5) any evidence of bad faith, collusion, or fraud. We address only the factors that Universal claims the trial court failed to properly consider. See *Besel*, 146 Wn.2d at 739 n.2 (all nine criteria are not necessarily relevant in every case).

1. The Tomyns' Damages

Universal admits that the Tomyns "certainly experienced significant damages," but it argues that the Sharbonos' economist inflated the economic impact of Cynthia Tomyn's death by assuming, without any evidence, that Cynthia would have started working full time in September 2002. Supp. Br. of Appellant at 6-7. Universal also complains that the analysis erroneously applied a man's, rather than a woman's, work life expectancy.⁸

The Sharbonos submitted evidence that Cynthia was 33 years old, that she had been married to her husband for 15 years, that they had 3 children, and that the Tomyns were a very close family. They also submitted a guardian ad litem's evaluations of the three children's emotional distress resulting from Cynthia's death.

To show the economic effect of Cynthia's death, the Sharbonos offered an economist's report estimating the economic loss to the Tomyns at \$1,050,228. The economist reached that figure using a 33-year-old female with equivalent education, life expectancy, work life expectancy, and income. The report discounted from that income the average personal

⁸ The economic consultant reasoned that because "standard work life expectancies for women substantially understate a woman's lifetime ability to earn income and have a significant downward bias for women who are strongly attached to market work[,] . . . [he felt] that it [was] appropriate to use male work life expectancies to determine economic damages in personal injury cases involving both males and females." CP at 542

No. 33379-1-II

consumption of a similarly situated person. The report included in its damages calculation certain "nonmarket services" such as house and yard work, child care, cooking, and marketing. CP at 544.

Universal disputed the economist's report's accuracy but offered no conflicting evidence.

2. The Merits of the Sharbonos' Defense

Universal argues that the Sharbonos had a legitimate defense theory because both Cassandra and her passenger testified that a vehicle in front of them lost control in the adverse weather and road conditions, causing vehicles to stop in front of them and creating an emergency situation.

The Sharbonos submitted a letter from James La Porte – defense counsel that State Farm appointed to defend the Sharbonos – to State Farm stating that "I do not have any delusions that [the Sharbonos] will be successful in avoiding a liability ruling. . . . The remaining issue is whether any third party entities contributed; and as indicated above and previously, that remains to be seen but it is very questionable." CP at 565-56.

The police cited Cassandra for second degree negligent driving. Additionally, a trial court had previously entered summary judgment regarding the Sharbonos' liability. Indeed, the Sharbonos admitted that Cassandra "was at least partially at fault" for the accident. CP at 557. The Sharbonos only hope was that the court would apportion fault, not absolve them of it.

Aside from its assertion that the Sharbonos may have had a defense based on an "emergency situation," Universal presented no authority or legal analysis supporting its argument that the Sharbonos had defenses to liability. Universal fails to show that the Sharbonos had viable defenses that could have mitigated the settlement value of the Tomyns' claims.

No. 33379-1-II

3. The Risks and Expenses of Continued Litigation

Universal maintains that “[a]lthough the Sharbonos certainly faced the possibility of liability, their exposure was not as great as they portrayed it to be.” Br. of Appellant at 45-46.

Universal argues that the Sharbonos had no litigation expenses because State Farm provided them a defense without a reservation of rights. Although State Farm hired counsel to represent the Sharbonos, it also told the Sharbonos that “because the amount claimed against [them] . . . is in excess of the protection afforded by [the State Farm] policy, there may be a personal liability for damages on [the Sharbonos’] part.” Exhibit 39. Accordingly, State Farm recommended that the Sharbonos hire an attorney, at their own expense, to represent them for any personal exposure beyond the State Farm policy limits. And the Sharbonos incurred litigation expenses in working toward a settlement and then pursuing the coverage claims against Universal as the settlement required.⁹ Thus, until the Sharbonos settled with the Tomyns, they faced continuing litigation with the Tomyns with a substantial exposure above their State Farm limits of \$250,000 and the \$1,000,000 umbrella coverage that Universal conceded.

Correspondence between the Tomyns and Sharbonos reflects this expense and exposure. For instance, several letters show that the Sharbonos believed that they would have to file for bankruptcy if the Tomyns pursued litigation. And attorneys for both the Tomyns and Sharbonos repeatedly acknowledged that the Sharbonos faced a reasonable risk of a jury rendering a substantial judgment against them.

⁹ The settlement agreement, however, limited the Sharbonos’ personal contribution to a maximum of \$50,000 for attorney fees in the actions they agreed to pursue against Universal.

No. 33379-1-II

Moreover, the Sharbonos presented jury verdict research that supported the settlement amount. Universal takes exception to the representative jury verdicts the Sharbonos supplied and argued below that the jury verdicts it supplied were more instructive. Universal takes particular issue with the Sharbonos' reliance on *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 119 P.3d 825 (2005), as a representative verdict justifying the settlement amount. Before the trial court, Universal argued that *Joyce* involved very different and unusual circumstances.

In *Joyce*, the plaintiff recovered a \$22,453,645 judgment against the Department of Corrections for its negligence in allowing a psychotic felon under community placement to repeatedly violate his probation conditions without taking action. *Joyce v. Dep't of Corr.*, 116 Wn. App. 569, 586, 75 P.3d 548 (2003), *rev'd in part by Joyce*, 155 Wn.2d at 326. Eventually, the felon stole a vehicle in Seattle and sped down the freeway to Tacoma, where he drove 60 to 70 miles per hour through a residential area, ignoring traffic signs and lights, and struck Mrs. Joyce's vehicle and killed her. *Joyce*, 155 Wn.2d at 314. Universal argues that the \$22,435,645 judgment recovered under the anomalous facts of the case skewed the trial court's evaluation of the risk the Sharbonos faced. Although the *Joyce* verdict was admittedly large, it did not necessarily skew the trial court's evaluation of the Sharbonos' exposure. Even experienced trial attorneys cannot predict with any degree of certainty the amount a jury will award in these cases. And the lesson of *Joyce* is that a defendant must consider the full range of possible verdicts in negotiating a reasonable settlement.

In addition to *Joyce*, the Sharbonos submitted representative verdicts and settlements ranging from \$450,000 to \$4,742,867, with an average plaintiff's award of \$2,036,936.84. The representative verdicts and settlements that Universal submitted ranged from defense verdicts to \$2,750,000, with an average plaintiff's award of \$742,162.26. We are satisfied that the

No. 33379-1-II

submitted jury verdict ranges support the trial court's finding that the settlement amount was reasonable.

4. The Sharbonos' Ability to Pay

Universal argues that, although the Sharbonos claimed they could not afford to pay a personal judgment in the millions and that a trial would have forced them into bankruptcy, the Sharbonos in fact had considerable personal assets. Universal's argument misses the point. The Sharbonos documented their personal assets when they moved for an order finding the proposed settlement reasonable. The Sharbonos also provided copies of correspondence with their attorneys, and between their attorneys and the Tomyns' attorneys, establishing their limited ability to pay a judgment in excess of their liability coverage. The record supports the Sharbonos' belief that a verdict for the Tomyns in excess of the Sharbonos' liability coverage would likely force the Sharbonos into bankruptcy.

5. Evidence of Bad Faith, Collusion, or Fraud

Universal stated below that "[a]s the term is commonly defined, Universal does not allege any specific fraudulent activity in the settlement . . . [t]he attorneys for the Tomyns and the Sharbonos engaged in settlement discussions, which resulted in the eventual consent judgment and covenant not to execute." CP at 639. Still, Universal argues that the Tomyns' knowledge about the amount of undisputed coverage (\$1,250,000) and the disputed \$3,000,000 in excess coverage lends a "collusive air" to the settlement that suggests an inflated settlement.

Correspondence between the Sharbonos' and Tomyns' attorneys demonstrates a good faith settlement negotiated at arm's-length. At one point, the Tomyns' attorneys demanded that the Sharbonos proceed with negotiations in good faith rather than "perpetually changing terms" of their proposed settlement to better their position. CP at 614. The Tomyns' attorneys initially

No. 33379-1-II

suggested submitting the proposed settlement to arbitration but later repeatedly threatened to proceed with litigation when the Sharbonos failed to agree with proposed settlement offers.

Universal also argues that “[t]he strongest evidence . . . of the collusive relationship between the Tomyns and the Sharbonos is the fact that the Sharbonos negotiated a share of the settlement proceeds.” *Supp. Br. of Appellant* at 8. But the Sharbonos did not negotiate a share of the \$4,525,000 settlement. Rather, they reserved the right to “assert claims against . . . Universal as [the Sharbonos] deem prudent” and to “retain unto themselves all right of recovery from such claims,” presumably referring to the Sharbonos’ bad faith claim against Universal. CP at 492. And the Sharbonos’ bad faith claim did not share any element of damages with the Tomyns’ claims. We disagree with Universal that the Sharbonos negotiated a share of any proceeds the Tomyns might receive from Universal.

Furthermore, Universal is mistaken that the Tomyns and Sharbonos settled for the highest amount of insurance the Sharbonos could recover because the Sharbonos had two \$3,000,000 umbrellas, and the trial court determined, albeit erroneously, that Universal was potentially liable to the Sharbonos for up to \$7,000,000.

Universal’s bare allegation that the Sharbonos and Tomyns engaged in collusive negotiations fails.

B. The Court’s Determination on the Settlement’s Reasonableness

Although the record does not conclusively establish that the trial court explicitly considered the nine *Chaussee/Glover* factors, sufficient evidence supports the court’s conclusion that the settlement was reasonable. *See Glover*, 98 Wn.2d at 718. The Sharbonos presented substantial evidence of each of the nine *Chaussee/Glover* factors. And we are not willing to speculate that the trial court ignored the extensive briefing and argument from both parties and

No. 33379-1-II

found the settlement reasonable on some basis other than the *Chaussee/Glover* factors. In any event, as we have discussed, the record amply supports the court's finding of reasonableness.

Universal also argues that the Sharbonos failed to give Universal the statutorily required notice of their settlement with the Tomyns. This argument is without merit because RCW 4.22.060(1) requires that all *parties* receive notice of the settlement. Universal was not a party to the lawsuit between the Tomyns and Sharbonos. Universal admits as much in its brief to the trial court regarding the settlement's reasonableness.

IV. BAD FAITH AND CONSUMER PROTECTION ACT CLAIMS

A. Bad Faith

Universal contends that the trial court erred when it determined, as a matter of law, that it was liable for bad faith. Universal asserts that, to prove bad faith, the insured must demonstrate that the insurer unreasonably, frivolously, and without foundation, breached its contract with the insured. Thus, argues Universal, whether the insurer's conduct amounted to bad faith is ordinarily a question of fact. The Sharbonos argue that Universal exercised bad faith, as a matter of law, when it failed to assist them in settling with the Tomyns by disclosing information that could have helped in the negotiations.

The Sharbonos presented the following facts in their summary judgment motion. The Sharbonos retained Maureen Falecki as private counsel after a dispute arose about the amount of the Sharbonos' umbrella coverage with Universal. When the Sharbonos began settlement negotiations with the Tomyns, they believed they had \$3,000,000 in personal liability umbrella coverage from Universal. Universal stated that the Sharbonos' claim that they had three separate \$1,000,000 personal umbrella policies made "no logical sense as the personal exposure covered by a Personal Umbrella is unrelated to the business exposure covered by the commercial

No. 33379-1-II

policies.” CP at 977. Universal admitted that the Sharbonos’ commercial umbrella had a \$3,000,000 coverage limit, but it argued that the coverage did not apply to claims from Cassandra’s accident.

Falecki, on the Sharbonos’ behalf, asked Universal to provide the complete underwriting files for the Sharbonos’ three insurance policies so that she could determine how much personal umbrella coverage the Sharbonos had. Universal repeatedly refused to provide the underwriting files, stating that they contained proprietary information and that it was “not aware of any authority that [would] give [the Sharbonos] access to those records.” CP at 977, 982.

Falecki responded that while she did not know of any specific legal authority requiring Universal to produce the underwriting files, there was “a genuine and bona[fide] dispute over the amount of coverage [that Universal’s agent] represented he would provide the Sharbonos via the umbrella policies.” CP at 984. Falecki informed Universal that the Sharbonos believed they had an additional \$2,000,000 personal umbrella policy with Universal, but Universal records showed that the \$2,000,000 personal umbrella policy was canceled less than three weeks before the fatal accident. The Sharbonos claimed that they did not authorize cancellation of the \$2,000,000 personal umbrella policy. Accordingly, Falecki asked for all documents relating to the cancellation of the \$2,000,000 policy and again asked for the complete underwriting files for the Sharbonos’ insurance policies.

Universal denied that the \$2,000,000 policy had been cancelled, stating that it had amended the personal umbrella policies at the insureds’ request to provide three separate \$1,000,000 policies, one under each commercial policy and intended to cover three separate

No. 33379-1-II

owners.¹⁰ Universal explained in detail to the Sharbonos why it believed that the Sharbonos were eligible for only \$1,000,000 in coverage. Universal submitted three separate personal umbrella applications to support its position. Universal again refused the Sharbonos' request for the production of its underwriting files related to their policies.

After a second failed mediation, Falecki informed Universal that the mediation failed, in part, because of the unresolved coverage issues. At the second mediation, the Sharbonos requested Universal's underwriting files from Glenn Reid, a Universal representative present at the mediation. Reid rejected the request.

In a letter to Universal following the failed mediation, Falecki again asked for the underwriting files. Falecki stated that the requested records were directly relevant to the action because the Sharbonos needed them to analyze the facts surrounding their coverage, the Tomyrn children's guardians ad litem needed them before they could recommend that the court approve any proposed settlement, and both parties needed them to settle the case. In the same letter, Falecki told Universal that if it failed to cooperate, the Sharbonos would assert bad faith claims against Universal. Universal again refused to produce the files, stating that the Sharbonos had not provided any authority to support their request; Universal also said that if the Sharbonos sued, it would counterclaim for abuse of process.

The Tomyrn then joined the fray, threatening to sue Universal unless it cooperated. The Tomyrn explained that they had not yet sued the Sharbonos because they wanted to resolve the

¹⁰ Universal claimed that the Sharbonos had a \$1,000,000 personal umbrella on the All Transmission & Automotive policy, Clarence and Claudia Ray had a \$1,000,000 personal umbrella on the Trans-Plant policy, and Robert and Debra Huke had a \$1,000,000 personal umbrella on the Parkland Transmission policy.

No. 33379-1-II

matter amicably and in good faith but that Universal's "intransigence in providing the information that will obviously be required to be produced through litigation discovery[] will only serve to prejudice [its] insureds and expose their personal assets." CP at 1005. Universal again refused to produce the requested files. The Tomyns then sued the Sharbonos.

In their summary judgment motion, the Sharbonos argued that Universal acted in bad faith and violated Washington's CPA¹¹ when, among other things, it refused to assist them in determining how much coverage they had by providing the underwriting file. The trial court agreed and ruled that Universal's refusal to assist the Sharbonos in settling by providing its underwriting files amounted to bad faith as a matter of law.

Whether an insurer acted in bad faith is generally a question of fact. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003) (citing *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 796, 16 P.3d 574 (2001)). But a trial court may determine a factual question as a matter of law if reasonable minds could reach but one conclusion. *Smith*, 150 Wn.2d at 485 (citing *Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995)). Thus, the issue is whether Universal established a material issue of fact sufficient to defeat summary judgment.

Insurers owe a statutory duty of good faith to their insureds. RCW 48.01.030. An insurer may breach its broad duty to act in good faith by conduct short of intentional bad faith or fraud, although not by a good faith mistake. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000) (citing *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 280, 961 P.2d 933 (1998) and *Industrial Indem. Co. of the N.W., Inc. v. Kallevig*, 114 Wn.2d 907, 916-917, 792 P.2d 520 (1990)). An insurer must give equal consideration to its policyholder's

¹¹ Chapter 19.86 RCW.

No. 33379-1-II

interests as well as its own. *Am. States Ins. Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 470, 78 P.3d 1266 (2003) (quoting *Van Noy*, 142 Wn.2d at 793). The question in bad faith claims is always whether the insurer acted reasonably under the facts and circumstances of the case. *Kallevig*, 114 Wn.2d at 920. Here, the trial court determined that Universal did not establish a genuine issue of material fact regarding whether it “failed to give equal consideration to the interests of its insureds, or that its actions were not frivolous, unfounded or unreasonable.” CP at 2176.

Universal argues that it correctly and reasonably withheld its proprietary underwriting files either because CR 26(b)(2) did not obligate it to produce the files or because Universal had a reasonable basis for believing CR 26 did not require it to do so. Universal cites our commissioner’s ruling, on discretionary review, that the trial court in the Tomy-Sharbono lawsuit committed probable error in ordering Universal to produce its underwriting files relevant to the Sharbonos’ insurance policies. But Universal misinterprets our commissioner’s narrow holding. The issue here is whether the duty of good faith required Universal to disclose its underwriting files to its insured. The issue the commissioner addressed was whether CR 26(b)(2) required Universal to disclose an underwriting file to a person suing one of its insureds in a personal injury lawsuit. The commissioner’s ruling and CR 26 have no bearing on the instant case. *Cf. Smith v. Safeco Ins. Co.*, 112 Wn. App. 645, 652 n.31, 50 P.3d 277 (2002), (CR 26(b)(2) applies to disclosure of policy limits only *after* a lawsuit is filed), *rev’d on other grounds*, 150 Wn.2d 478 (2003).

Universal also argues that it did not act in bad faith because the Sharbonos did not articulate reasons for requesting the underwriting files. This argument is disingenuous given that Falecki advised Universal that the Sharbonos believed they had applied for an additional

No. 33379-1-II

\$2,000,000 personal umbrella; the Sharbonos needed the files to analyze the facts surrounding their coverage; the Tomy children's guardians ad litem needed the files to evaluate any proposed settlement; and both parties needed them to effect a settlement. And while the Sharbonos admittedly failed to provide any legal authority explicitly stating that an insurer has an obligation to produce underwriting files related to the insured's policies, insurers owe a general duty of good faith to their insureds due to the fiduciary relationship insurers and insureds share. See *Coventry*, 136 Wn.2d at 280; *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002).

Here, the Sharbonos believed they had applied for and purchased more than a single \$1,000,000 personal umbrella policy. They expressed their concerns to Universal and stated that they could not settle the Tomy's claims without the underwriting information. Under these circumstances, Universal had to do more than simply assert that the Sharbonos needed to provide legal authority for their request.

But Universal maintains that "[u]nderwriting files can often contain information reflecting an insurer's procedures used to evaluate risks, a vital internal business practice." Reply Br. of Appellant at 26. Universal argues that "[d]isclosure of such information would put the insurer at a commercial disadvantage." Reply Br. of Appellant at 26. The argument is plausible and fits with Universal's explanation to the Sharbonos that the underwriting file contained proprietary information. But Universal fails to point to a single document in the underwriting file that contains sensitive information or information that could have impacted its business interests. Additionally, during the proceedings below, Universal produced the entire underwriting file without seeking protection for any document in the file and offered the entire file into evidence. Thus, Universal failed to show that it had some interest in particular

No. 33379-1-II

documents or information that outweighed the Sharbonos' benefits from disclosure. See *Coventry*, 136 Wn.2d at 280 (an insurer acts in bad faith when it overemphasizes its own interests).

Universal also argues that "[e]ven if this [c]ourt were to find Universal's conduct to be unreasonable and unfounded, it was not the cause of any harm to its insureds." Br. of Appellant at 54 (citing *Anderson*, 101 Wn. App. at 334-35). But the Sharbonos did not move for summary judgment on the issue of damages. Rather, the Sharbonos sought judgment only on whether Universal's actions constituted bad faith, reserving for the jury the determination of damages. The jury ultimately decided that Universal's actions caused the Sharbonos significant economic and non-economic damages. Universal does not argue that substantial evidence did not support those decisions. Nor could it, since the record contains substantial evidence that Universal's conduct harmed the Sharbonos. The Tomyns' attorney testified that Universal's refusal to produce the underwriting file delayed the Tomyns' ability to determine the amount of insurance available to the Sharbonos, thus "making it impossible to resolve the claim." Report of Proceedings (RP) at 869-70.

In *Smith v. Safeco Insurance Co.*, we held that "[i]n the absence of a statute or rule requiring disclosure . . . the insurer must disclose the insured's policy limits if a reasonable person in the same or similar circumstances would believe that disclosure is in the insured's . . . best interests." *Smith*, 112 Wn. App. at 653. Although the *Smith* court addressed a claimant's request, as opposed to an insured's, the court's underlying rationale supports the Sharbonos' position. Based on the Sharbonos' repeated requests for the underwriting file, together with their reasons for needing the documents, a reasonable person could only conclude that disclosure was in the Sharbonos' best interest. And more importantly, Universal failed to demonstrate any

No. 33379-1-II

significant need to protect the contents of its underwriting files and that such need weighed as heavily as the Sharbonos' interests. *See Coventry*, 136 Wn.2d at 280. The trial court did not err in granting the Sharbonos summary judgment on their claim that Universal acted in bad faith.

B. Consumer Protection Act

The Sharbonos argue that the trial court did not err in ruling that Universal violated WAC 284-30-330(7). Universal concedes that insureds have a cause of action under the CPA when insurers breach their duty to act in good faith. But Universal maintains that it did not violate WAC 284-30-330(7) and that, in any event, whether it violated that regulation is a question of fact that the court should not have decided on summary judgment.

An insurer commits a per se violation of the CPA when the insurer violates a statute that contains a specific legislative declaration of public interest impact. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 791, 719 P.2d 531 (1986) (citing *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 762, 649 P.2d 828 (1982)); *Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 358-59, 581 P.2d 1349 (1978). A violation of WAC 284-30-330(7) is a per se violation of the CPA. *See* WAC 284-30-330 (the provisions within WAC 284-30-330 are unfair or deceptive acts or practices in the business of insurance) *and* RCW 48.01.030 (the business of insurance is one affected by the public interest); *see also Hangman Ridge*, 105 Wn.2d at 786 (when the legislature says that a violation of a particular statute constitutes an unfair or deceptive act in trade or commerce, violation of that statute is a per se CPA violation).

Contrary to the Sharbonos' assertion – and the trial court's summary judgment ruling – WAC 284-30-330(7) does not apply here. That regulation provides as follows:

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

...

No. 33379-1-II

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

WAC 284-30-330(7).

First, Universal did not compel the Sharbonos to submit to litigation, arbitration, or appraisal to recover any amount of money by offering substantially less than the amount the Sharbonos ultimately recovered. As we have discussed, the Sharbonos are entitled to only the \$1,000,000 from Personal Umbrella Coverage Part 970, not the additional coverage amounts in Umbrella Coverage Part 980. Because WAC 284-30-330(7) does not apply, the trial court erred in granting summary judgment on the Sharbonos' CPA claim and in awarding the Sharbonos treble damages.

But even if an insured cannot prove a per se violation of the CPA, the insured may still recover for a CPA violation if the insured can show that the insurer (1) engaged in an unfair or deceptive act or practice (2) in trade or commerce, and (3) that the act or practice affects the public interest. *Hangman Ridge*, 105 Wn.2d at 784 (citing *Anhold v. Daniels*, 94 Wn.2d 40, 614 P.2d 184 (1980)). The insured must also prove (4) a resulting damage to the insured's business or property, and (5) that a causal link exists between the unfair or deceptive act and the injury suffered. *Hangman Ridge*, 105 Wn.2d at 784-85.

The trial court's error in granting summary judgment on Universal's alleged violation of WAC 284-30-330(7) requires that we vacate the bad faith judgment. The trial court instructed the jury that it could consider Universal's CPA violation in awarding damages. Yet the jury verdict form did not ask the jury to apportion damages between bad faith and the CPA violation. Accordingly, we do not know what amount the jury awarded as CPA damages. But because the Sharbonos' complaint does not limit their CPA claim to Universal's alleged violation of WAC

No. 33379-1-II

284-30-330(7), on remand they may attempt to show that Universal violated the CPA by establishing the five elements enunciated in *Hangman Ridge*, 105 Wn.2d at 784-85.

In the following, we discuss only those issues likely to arise on retrial.

V. ALLEGED TRIAL ERRORS

A. Commissioner Skerlec's Ruling

Universal contends the trial court erred in not allowing it to introduce evidence that our commissioner granted discretionary review of the trial court's ruling compelling Universal to produce its underwriting file in the Tomyne-Sharbono action. At trial, the Sharbonos introduced evidence that the trial court had ordered Universal to produce the underwriting files. Universal wanted to introduce the grant of discretionary review to let the jury know that the trial court probably erred in doing so.

The grant of discretionary review is of minimal, if any, relevance. The trial court had already ruled as a matter of law that Universal committed bad faith. The only issue for the jury was whether Universal's bad faith conduct damaged the Sharbonos. The commissioner's ruling had nothing to do with that issue.

B. Mediation Evidence

Universal argues that the trial court erred when it permitted the Sharbonos, Falecki, and Barcus, the Tomyne's attorney, to describe what happened at the two mediations. Universal argues that the Sharbonos used the mediation evidence to establish Universal's liability. Universal maintains that RCW 5.60.070(1) and ER 408 prohibit the court from allowing the allegedly objectionable testimony.

Universal takes particular issue with testimony regarding the impact that a videotape of Cynthia Tomyne's family discussing her death had on the Sharbonos. At trial, Falecki testified

No. 33379-1-II

that the Tomyns' attorney played the videotape during the mediation. In the film, the Tomyns talked about the loss of Cynthia and its effect on them. Falecki testified that the tape had "a very emotional impact" on the Sharbonos and that she could "see that they were very taken by everything that was said in the video." RP at 708. The trial court overruled defense counsel's relevancy objection. Barcus also testified that the Sharbonos "appeared to be emotional" when he played the video. RP at 779.

Universal also argues that the trial court violated RCW 5.60.070 by allowing James Sharbono and Falecki to testify that Glenn Reid, the Universal representative at the mediations, told the parties that the Sharbonos would have to sue Universal to obtain the file.

At trial, James Sharbono twice testified that Reid said that the only way the Sharbonos would get the underwriting files was to sue Universal. Falecki also testified that Reid said she would have to sue to get Universal's underwriting files. The Sharbonos' counsel argued that he elicited that testimony to show the Sharbonos' understanding of Universal's position. The court apparently agreed with counsel. Finally, when asked about her feelings at that mediation, Deborah Sharbono testified that she was shocked when Reid said that the Sharbonos would have to sue to obtain the underwriting files. She said she felt that Universal was "hiding things." RP at 1127.

RCW 5.60.070(1) states that

If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding[.]

No. 33379-1-II

The statute also contains several exceptions to this exclusionary rule, none of which applies here.

See RCW 5.60.070(1)(a)-(g).

Universal fails to provide any evidence establishing that the mediation was a result of a court order, a written agreement between the parties, or a mandate under RCW 7.70.100. See RCW 5.60.070(1). Universal argues that “[i]here is no record of a written agreement between the parties or a court order in this case because the Sharbonos raise this contention for the first time on appeal in violation of RAP 2.5(a).” Reply Br. of Appellant at 33 n.13. But the Sharbonos would have had no reason to raise this argument until now, when Universal first argued that RCW 5.60.070(1) compels exclusion of the testimony. Further, Universal bears the burden on appeal of establishing that the court abused its discretion by failing to apply RCW 5.60.070(1). See *Guillen v. Pierce County*, 144 Wn.2d 696, 716, 31 P.3d 628 (2001) (the burden of showing that a privilege applies in any given situation rests entirely upon the party asserting the privilege), *rev'd in part, Pierce County v. Guillen*, 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003). Thus, Universal had the obligation to produce a court order, written agreement, or mandate. It did not.

ER 408 states, in relevant part:

Evidence of conduct or statements made in compromise negotiations is . . . not admissible [to prove liability for or invalidity of the claim or its amount]. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness [or] negating a contention of undue delay[.]

The comment to former ER 408 (2006) states that the rule’s final sentence is consistent with previous Washington law admitting evidence of compromise and offers of compromise when offered for some purpose other than liability. Former ER 408, cmts. (2006) (citing *Matteson v.*

No. 33379-1-II

Ziebarth, 40 Wn.2d 286, 242 P.2d 1025 (1952) (to prove lack of good faith where good faith in issue)).

Here, the trial court found Universal liable. The issue at trial was whether Universal's bad faith damaged the Sharbonos and, if so, in what amount. The Sharbonos presented the mediation evidence to show the importance of Universal's underwriting file and the harm that Universal's refusal to produce the file cause the Sharbonos. The court admitted the mediation testimony as evidence of the Sharbonos' state of mind during the time they attempted to obtain the underwriting files from Universal. Because the trial court admitted the testimony for purposes other than liability, the trial court did not abuse its discretion.

C. Proximate Cause Instruction

Universal maintains that the court erred in giving the "substantial factor" proximate cause instruction. The trial court instructed the jury on proximate cause as follows: "The term 'proximate cause' means a cause that was a substantial factor in bringing about the damages or injury even if the result would have occurred without it." CP at 2279. Universal objected to this instruction and offered instead the CPA proximate cause instruction in WPI 310.07 or, in the alternative, WPI 15.01.

In *Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985), our Supreme Court stated that the substantial factor test for determining proximate cause "is normally justified only when a plaintiff is unable to show that one event alone was the cause of the injury." The court noted that the substantial factor test is appropriate in three types of cases:

First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the "but for" test. In such cases, it is quite clear that each cause has played so important a part in producing the result that responsibility should be imposed on it. Second, the test is used where a similar, but not identical, result would have followed without the defendant's act. Third, the test is used where one defendant has made a clearly

No. 33379-1-II

proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.

Daugert, 104 Wn.2d 262 (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 41 (5th ed. 1984)).

Washington courts have adopted the substantial factor test in cases involving discrimination or unfair employment practices. See, e.g., *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995) (gender discrimination); *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d 46, 69-72, 821 P.2d 18 (1991) (retaliatory discharge for filing workers' compensation claim); *Allison v. Hous. Auth.*, 118 Wn.2d 79, 95, 821 P.2d 34 (1991) (retaliatory discharge for filing an age discrimination complaint); *City of Federal Way v. Pub. Employment Relations Comm'n*, 93 Wn. App. 509, 513-14, 970 P.2d 752 (1998) (retaliation for union organizing activity); *Capers v. Bon Marche*, 91 Wn. App. 138, 143-44, 955 P.2d 822 (1998) (racial discrimination). The substantial factor test is appropriate in these cases, where causation is difficult to prove, largely due to public policy considerations that strongly favor eradication of discrimination and unfair employment practices. See, e.g., *Mackay*, 127 Wn.2d at 309-10; *Wilmot*, 118 Wn.2d at 70; *Allison*, 118 Wn.2d at 94 (substantial factor test is based more on policy considerations than on the factual inquiry of the "but for" test).

Courts have also used a substantial factor test in securities cases. See, e.g., *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 148-49, 787 P.2d 8, 750 P.2d 254 (1990); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 131-32, 744 P.2d 1032 (1987); *Herrington v. David D. Hawthorne, CPA, P.S.*, 111 Wn. App. 824, 47 P.3d 567 (2002). But in these cases, the courts instructed on substantial factor to assist the jury in determining whether a defendant was liable as a "seller" under the Washington Securities Act, not to determine proximate cause in tort liability cases. See *Haberman*, 109 Wn.2d at 130-31 (rejecting the "strict privity" approach to

No. 33379-1-II

determining whether a defendant was a "seller" of securities in favor of the "substantial factor-proximate cause" analysis and attaching liability to any actor whose conduct is a "substantial contributive factor" in the sales transaction).

Courts have also used the substantial factor definition of proximate cause in toxic tort cases, including asbestos exposure cases. *See, e.g., Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 91-92, 896 P.2d 682 (1995); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 32, 935 P.2d 684 (1997). In those cases, the substantial factor test was appropriate because two or more causes may have combined to cause an injury, and any one of them operating alone might not have caused the alleged injury. *Hue*, 127 Wn.2d at 91-92 (without expressly stating "substantial factor test," the court required the plaintiff to prove that an individual defendant used a pesticide that became part of the drifting pesticide cloud that caused plaintiff's damages); *Mavroudis*, 86 Wn. App. at 28 (plaintiff required to prove that exposure to a particular asbestos supplier's asbestos played a role in causing injuries suffered from multiple exposures to asbestos from multiple suppliers).

Finally, Washington courts have employed the substantial factor test for determining proximate cause in medical malpractice cases where the malpractice reduces a decedent's chance of survival. *See, e.g., Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 617, 664 P.2d 474 (1983). In *Herskovits*, the decedent's estate sued the defendant for failing to diagnose lung cancer that eventually caused the decedent's death approximately two years later. *Herskovits*, 99 Wn.2d at 611. The plaintiff submitted evidence that the defendant's failure to diagnose lung cancer when the decedent visited the defendant's health care provider reduced the decedent's chance of survival from 39 to 25 percent. *Herskovits*, 99 Wn.2d at 612. The court held that the substantial factor test is an appropriate method to determine proximate cause when the causation

No. 33379-1-II

question requires the jury to consider not only what occurred but also what might have occurred. *Herskovits*, 99 Wn.2d at 616. The court explained that where a plaintiff demonstrates that the defendant's acts or omissions increase the risk of harm to the plaintiff, the evidence allows the jury to find that the increased risk was a substantial factor in causing the resulting harm. *Herskovits*, 99 Wn.2d at 616-17.

The Sharbonos claim that Universal's failure to disclose the requested files damaged them in that it delayed the settlement. This delay caused the Sharbonos significant emotional distress and caused them to lose two of their three businesses because "they lost all interest and . . . all ability . . . to continue on with their business [because they believed] that they were ultimately at the end going to lose it." RP at 1810. The question then was for the jury to decide whether it believed that Universal's actions proximately caused the Sharbonos' injuries.

Neither party presented evidence that two inseparable causes contributed to the delayed settlement. The Sharbonos claimed that Universal's failure to produce its underwriting file prevented the parties from settling at the mediations. Universal contended that nothing in its file would have affected the settlement negotiations. Thus, the Sharbonos did not face two causes, either of which would have caused the harm, making it impossible for them to prove "but for" causation; nor did they face a similar, but not identical result, without Universal's refusal to produce the documents; finally, no other defendant contributed in an insignificant way to the result. See *Daugert*, 104 Wn.2d at 262. We conclude that the trial court erred in giving the "substantial factor" instruction.

No. 33379-1-II

VI. CROSS-APPEAL

A. Sharbonos' Dismissed Causes of Action

The Sharbonos' complaint included causes of action against Len Van de Wege, Universal's agent, for negligence, negligent misrepresentation, and breach of fiduciary duty. After ruling that the Sharbonos had sufficient insurance to cover the settlement, the trial court dismissed these claims. The trial court erred in doing so. The Sharbonos' claims against Van de Wege are independent of their claims for coverage under Universal's umbrella policies. Moreover, we have now reversed the trial court's coverage decision. Accordingly, we reverse the dismissal of these claims and remand for further proceedings.

B. Attorney Fees

The trial court awarded the Sharbonos \$203,585 in attorney fees under RCW 19.86.090 and *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). The Sharbonos argue that the trial court erred in failing to calculate a lodestar figure and by ordering an award based on counsel's actual fees billed.

Because the trial court incorrectly decided the coverage and stacking issues, and erroneously determined that Universal violated the CPA (WAC 284-30-330(7)), we vacate the trial court's attorney fee award.

VII. ATTORNEY FEES ON APPEAL

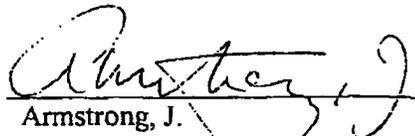
Both parties request costs, including attorney fees, on appeal. The Sharbonos argue that "[r]easonable attorney's fees and costs are mandatory for prevailing plaintiffs." Br. of Respondent at 98-99.

RAP 18.1(a) allows us to award attorney fees and costs on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses." The Sharbonos are

No. 33379-1-II

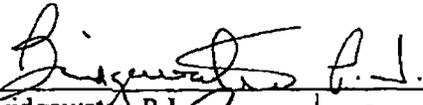
correct that, in general, where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal. *Richter v. Trimberger*, 50 Wn. App. 780, 786, 750 P.2d 1279 (1988) (citing *West Coast Stationary Eng'rs Welfare Fund v. City of Kennewick*, 39 Wn. App. 466, 477, 694 P.2d 1101 (1985)). Although the Sharbonos prevail on the reasonableness of their settlement and on the trial court's determination that Universal acted in bad faith, Universal has prevailed on the coverage, stacking, and CPA issues. Because neither party totally prevailed on appeal, we decline to award attorney fees under RAP 18.1.

In conclusion, we affirm the trial court's rulings that the Tornyn-Sharbono settlement is reasonable and that Universal acted in bad faith, as a matter of law, when it refused to produce its underwriting files. We reverse the trial court's summary judgment ruling that Umbrella Coverage Part 980 provided personal liability coverage to the Sharbonos and the trial court's determination that Universal violated the CPA. We also reverse the trial court's summary judgment dismissal of the Sharbonos' negligence claims against Len Van de Wege. Finally, we vacate the damage award and remand for further proceedings.



Armstrong, J.

We concur:



Bridgewater, P.J.



Quinn-Brintnall, J.

EXHIBIT 3

2/8/07
RECEIVED
OCT 13 2007

FILED
COURT OF APPEALS
DIVISION II

07 OCT -9 AM 8:30

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BY _____
DEPUTY

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

Respondents/Cross-Appellants,

No. 33379-1-II

v.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign insurer,

Appellant/Cross-Respondent,

ORDER DENYING RESPONDENTS'
MOTION FOR RECONSIDERATION,
ORDER GRANTING MOTION FOR
CLARIFICATION, AND ORDER
AMENDING OPINION

And

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

Appellants.

THIS MATTER having come before this court on the Respondents' motion for reconsideration and clarification of the opinion, which was filed on June 26, 2007, and the court having considered the motion, it is hereby

ORDERED that Respondents' motion for reconsideration is denied; it is further

ORDERED that Respondents' motion for clarification is granted; it is further

ORDERED that the opinion filed on June 26, 2007, shall be amended as follows:

On page 6, line 22, the following paragraph shall be inserted:

At trial, the court directed a verdict for the Sharbonos as to the unpaid balance of the consent judgment--\$3,275,000 together with interest from the date of judgment. The court reasoned that the Sharbonos were entitled to the award as

No. 33379-1-II

presumptive damages because of Universal's bad faith. Universal has not assigned error to the ruling.

On page 38, line 13 and 14, the following text shall be deleted:

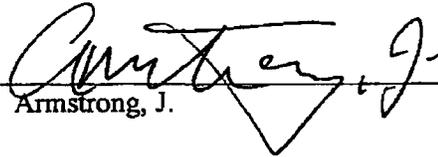
Finally, we vacate the damage award and remand for further proceedings.

On page 38, line 13, the following text shall be added:

Finally, we vacate the damage award of \$4,500,000 based on the jury verdict. Because Universal did not assign error to the directed verdict in the amount of \$3,275,000, together with interest, we affirm that judgment and remand for further proceedings.

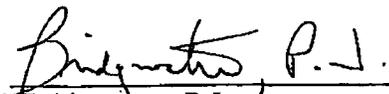
IT IS SO ORDERED.

Dated this 9TH day of OCTOBER, 2007.



Armstrong, J.

We concur:



Bridgewater, P.J.



Quinn-Brintnall, J.

86 8/28/2008 180053

EXHIBIT 4

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

BURGESS FITZGERALD, P.C.
JUL 29
Copy Received
By [Signature]

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.)

CASE # 01-02-07954-4

BOND # 3-883-836-6

BOND OF APPEAL

KNOW ALL MEN BY THESE PRESENTS, That UNIVERSAL UNDERWRITERS INSURANCE COMPANY as Principal, and THE OHIO CASUALTY INSURANCE COMPANY; as Surety, are held and firmly bound unto JAMES and DEBORAH SHARBONO, and CASSANDRA SHARBONO (currently known as CASSANDRA BARNEY), in the sum of TEN MILLION EIGHT HUNDRED FIFTY THOUSAND FIVE HUNDRED SEVENTY EIGHT and 03/100 (\$10,850,578.03) Dollars, for the payment of which well and truly to be made we do hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, on May 20th, 2005, a decision in favor of JAMES and DEBORAH SHARBONO, and CASSANDRA SHARBONO (currently known as CASSANDRA BARNEY), against UNIVERSAL UNDERWRITERS INSURANCE COMPANY in the amount of \$9,607,388.63, inclusive of all costs and fees awarded by the court.

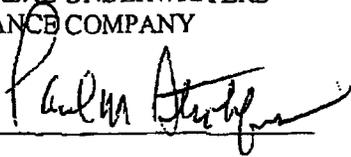
NOW, THEREFORE, the condition of this obligation is such that: if the Principal shall satisfy said judgement in full together with any costs, interest and damages for delay if for any reason the appeal is dismissed or the judgement is affirmed and shall satisfy in full such modification of the judgement and costs, interest and damages as the appellate court may adjudge and award, or if the judgement be set aside, then this obligation shall be null and void; otherwise to remain in full force and effect.

PROVIDED, HOWEVER, in no event shall the liability of the surety exceed the penalty of the bond.

SIGNED AND SEALED this 30th day of June 2005.

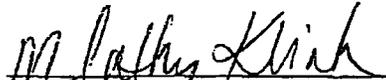
UNIVERSAL UNDERWRITERS
INSURANCE COMPANY

By:



THE OHIO CASUALTY INSURANCE
COMPANY

By:


M. Cathy Klink, Attorney-In-Fact

POWER OF ATTORNEY
THE OHIO CASUALTY INSURANCE COMPANY
WEST AMERICAN INSURANCE COMPANY

86 8/28/2008 100056

No. 36-215

Know All Men by These Presents: That THE OHIO CASUALTY INSURANCE COMPANY, an Ohio Corporation, and WEST AMERICAN INSURANCE COMPANY, an Indiana Corporation, in pursuance of authority granted by Article VI, Section 7 of the By-Laws of The Ohio Casualty Insurance Company and Article VI, Section 1 of West American Insurance Company, do hereby nominate, constitute and appoint: **M. Cathy Klink of Lombard, Illinois** its true and lawful agent (s) and attorney (s)-in-fact, to make, execute, seal and deliver for and on its behalf as surety, and as its act and deed any and all BONDS, UNDERTAKINGS, and RECOGNIZANCES excluding, however, any bond(s) or undertaking(s) guaranteeing the payment of notes and interest thereon

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Companies, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Companies at their administrative offices in Hamilton, Ohio, in their own proper persons. The authority granted hereunder supersedes any previous authority heretofore granted the above named attorney(s)-in-fact.

IN WITNESS WHEREOF, the undersigned officer of the said The Ohio Casualty Insurance Company and West American Insurance Company has hereunto subscribed his name and affixed the Corporate Seal of each Company this 6th day of May, 2002.



Sam Lawrence
Sam Lawrence, Assistant Secretary

STATE OF OHIO,
COUNTY OF BUTLER

On this 6th day of May, 2002 before the subscriber, a Notary Public of the State of Ohio, in and for the County of Butler, duly commissioned and qualified, came Sam Lawrence, Assistant Secretary of THE OHIO CASUALTY INSURANCE COMPANY and WEST AMERICAN INSURANCE COMPANY, to me personally known to be the individual and officer described in, and who executed the preceding instrument, and he acknowledged the execution of the same, and being by me duly sworn depose and saith, that he is the officer of the Companies aforesaid, and that the seals affixed to the preceding instrument are the Corporate Seals of said Companies, and the said Corporate Seals and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporations.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal at the City of Hamilton, State of Ohio, the day and year first above written.



Cheryl S. Hegarty

Notary Public in and for County of Butler, State of Ohio
My Commission expires August 6, 2002.

This power of attorney is granted under and by authority of Article VI, Section 7 of the By-Laws of The Ohio Casualty Insurance Company and Article VI, Section 1 of West American Insurance Company, extracts from which read:

Article VI, Section 7. APPOINTMENT OF ATTORNEYS-IN-FACT, ETC. "The chairman of the board, the president, any vice-president, the secretary or any assistant secretary of each of these Companies shall be and is hereby vested with full power and authority to appoint attorneys-in-fact for the purpose of signing the name of the Companies as surety to, and to execute, attach the corporate seal, acknowledge and deliver any and all bonds, recognizances, stipulations, undertakings or other instruments of suretyship and policies of insurance to be given in favor of any individual, firm, corporation, or the official representative thereof, or to any county or state, or any official board or boards of county or state, or the United States of America, or to any other political subdivision."

Article VI, Section 1. APPOINTMENT OF RESIDENT OFFICERS. "The Chairman of the Board, the President, any Vice President, a Secretary or any Assistant Secretary shall be and is hereby vested with full power and authority to appoint attorneys in fact for the purpose of signing the name of the corporation as surety or guarantor, and to execute, attach the corporate seal, acknowledge and deliver any and all bonds, recognizances, stipulations, undertakings or other instruments of surety-ship or guarantee, and policies of insurance to be given in favor of an individual, firm, corporation, or the official representative thereof, or to any county or state, or any official board or boards of any county or state, or the United States of America, or to any other political subdivision."

This instrument is signed and sealed by facsimile as authorized by the following Resolution adopted by the respective directors of the Companies (adopted May 27, 1970-The Ohio Casualty Insurance Company; adopted April 24, 1980-West American Insurance Company):

"RESOLVED that the signature of any officer of the Company authorized by the By-Laws to appoint attorneys in fact, the signature of the Secretary or any Assistant Secretary certifying to the correctness of any copy of a power of attorney and the seal of the Company may be affixed by facsimile to any power of attorney or copy thereof issued on behalf of the Company. Such signatures and seal are hereby adopted by the Company as original signatures and seal, to be valid and binding upon the Company with the same force and effect as though manually affixed."

CERTIFICATE

I, the undersigned Assistant Secretary of The Ohio Casualty Insurance Company and West American Insurance Company, do hereby certify that the foregoing power of attorney, the referenced By-Laws of the Companies and the above Resolution of their Boards of Directors are true and correct copies and are in full force and effect on this date.

IN WITNESS WHEREOF, I have hereunto set my hand and the seals of the Companies this 30th day of June, 2005



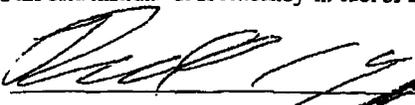
Mad E. Schmitt
Assistant Secretary

AFFIDAVIT OF ATTORNEY-IN-FACT FOR SURETY

STATE OF Illinois
COUNTY OF DuPage } SS.

On this 30th day of June, 2005, before me personally appeared M. Cathy Klink, Attorney-in-fact, of The Ohio Casualty Insurance Company, with whom I am personally acquainted, who being by me duly sworn, did depose and say, that he resides in Lombard, Illinois; that he is the Attorney-in-fact of The Ohio Casualty Insurance Company, the corporation named in and which executed the within instrument; that he knows the corporate seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed and executed the said instrument as Attorney-in-fact of said corporation by like order.

My Commission expires February 9th, 2008



S-170

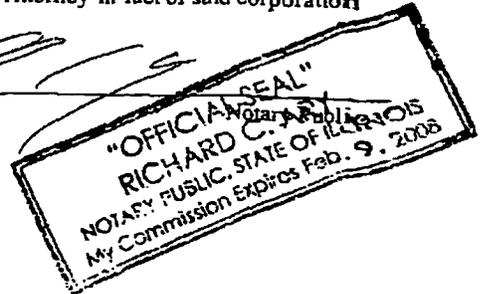


EXHIBIT 5

RECEIVED
AUG 22 2008
BY:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

Respondents/Cross-Appellants,

v.

UNDERSAL UNDER WRITERS
INSURANCE COMPANY, a foreign insurer,

Appellant/Cross-Respondent,

And

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

Appellants.

No. 33379-1-II

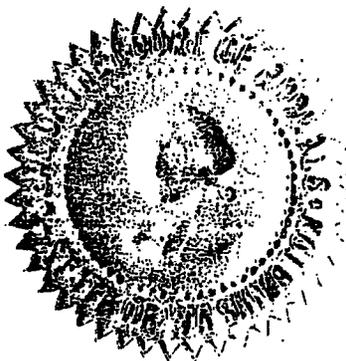
MANDATE

Pierce County Cause No.
01-2-07954-4

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

Page 2
Mandate 33379-1-II

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 26, 2007 became the decision terminating review of this court of the above entitled case on July 9, 2008. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 21st day of August, 2008.


Clerk of the Court of Appeals,
State of Washington, Div. II

Dan'L Wayne Bridges
McGaughey Bridges Dunlap PLLC
325 118th Ave SE Ste 209
Bellevue, WA, 98005-3539

Emmelyn Hart-Biberfeld
Philip Albert Talmadge
Talmadge Fitzpatrick
18010 Southcenter Pkwy
Tukwila, WA, 98188-4630

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

Hon. Rosanne Buckner
Pierce Co Superior Court Judge
930 Tacoma Ave South
Tacoma, WA, 98402

EXHIBIT 6



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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,

Plaintiffs,

vs.

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

Defendants.

NO. 99-2-12800-7

JUDGMENT BY CONFESSION

JUDGMENT SUMMARY

1. Judgment Creditors: 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, for them
and on their behalf.

1 2. Judgment Debtors: CASSANDRA SHARBONO, individually; JAMES and
2 DEBORAH SHARBONO, individually and as a marital
3 community
4 c/o Timothy R. Gosselin
5 BURGESS FITZER, P.S.
6 1501 Market, Suite 300
7 Tacoma, WA 98402-3333

6 3. Principal Judgment Amount: \$4,525,000
7 (Estate of Cynthia L. Tomyn - \$
8 (Clinton Tomyn, individually - \$
9 (Nathan Tomyn, individually - \$
10 (Aaron Tomyn, individually - \$
11 (Christian Tomyn, individually - \$

10 5. Interest to Date of Judgment -0-
11 6. Statutory Attorney's Fees (RCW 4.84.080) -0-
12 7. Costs (RCW 4.84.010) -0-
13 8. Other Recovery Amounts -0-
14 9. Principal Judgment Amount shall bear interest at 12% per annum (RCW 19.52.010)
15 10. Attorneys for Judgment Creditors: Ben F. Barcus, Attorney at Law
16 4303 Ruston Way
17 Tacoma, WA 98402
18 (253) 752-4444

JUDGMENT BY CONFESSION

19 THIS MATTER having come on regularly for hearing this date, the plaintiffs appearing by and
20 through their attorney, Ben F. Barcus, the defendants appearing through their attorneys of record,
21 Dennis J. La Porte, KRILLICH, LA PORTE, WEST & LOCHNER, P.S., and Timothy R. Gosselin,
22 BURGESS FITZER, P.S., and the Court finding based upon the declaration subjoined hereto and upon
23 the representations of counsel for the respective parties, that the requisites for confession of judgment
24 as set forth in RCW 4.60.060 have been met, and concluding that under RCW 4.60.010, this confession
25 of judgment is valid; pursuant to RCW 4.60.070, it is now, hereby

28 JUDGMENT BY CONFESSION - 2
S:\WP\CASES\218\JUDGMENTrev.WPD

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

1 ORDERED, ADJUDGED AND DECREED that the plaintiffs, CLINTON L. TOMYNN,
2 individually and as Personal Representative of The Estate of CYNTHIA L. TOMYNN, deceased; and
3 as Parent/Guardian of NATHAN TOMYNN; AARON TOMYNN; and CHRISTIAN TOMYNN be, and the
4 same hereby are granted judgment, jointly and severally, against the defendants, CASSANDRA
5 SHARBONO, individually; JAMES and DEBORAH SHARBONO, individually and as a marital
6 community, in the sum of \$4,525,000.00; it is further

7 ORDERED, ADJUDGED AND DECREED that the principal judgment amount shall bear
8 interest at the rate of 12% per annum (RCW 19.52.010); and it is further

9 ORDERED, ADJUDGED AND DECREED that each party shall bear their own costs and
10 attorney fees incurred herein; and it is further

11 ORDERED, ADJUDGED AND DECREED that his judgment fully and finally resolves all
12 claims among all the parties to this action arising out of the motor vehicle accident of December 11,
13 1998.

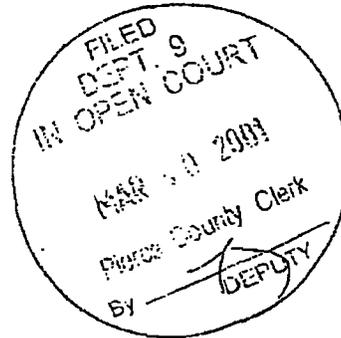
14 DONE in Open Court this 30th day of March, 2001.

15
16 
17 HONORABLE SERGIO ARMIJO

18 APPROVED AND PRESENTED BY:

19 LAW OFFICES OF BEN F. BARCUS

20 
21 By: BEN F. BARCUS, WSB # 15576
22 Attorney for Plaintiffs



1 Approved as to Form and Content, Notice
of Presentation Waived:

2 KRILLICH, LA PORTE,
3 WEST & LOCHNER, P.S.

4 By: 
5 DENNIS J. LA PORTE, WSB #2971
6 Attorney for Defendants

7 BURGESS FITZER, P.S.

8 
9 By: TIMOTHY R. GOSSELIN, WSB #13730
10 Attorneys for Defendants

11
12 We the undersigned, pursuant to RCW 4.60.060, after being fully advised of the consequences
13 hereof, and after consultation with our attorneys identified above, submit this statement and verification
14 as authorization for entry of judgment against us in the amounts set forth above, specifically
15 \$4,525,000.00.

16 This judgment and our confession thereto arise out of a two-car motor vehicle accident that
17 occurred on or about December 11, 1998. One vehicle was driven by Cassandra Sharbono, the natural
18 daughter of James and Deborah Sharbono. The other was driven by Cynthia L. Tomyn, the wife of
19 Clinton Tomyn, and the natural mother of Nathan, Aaron and Christian Tomyn. At the time of the
20 accident, Cassandra Sharbono was a minor, and was residing with her parents. The vehicle she was
21 driving was owned by James and Deborah Sharbono and maintained in part as a family car.

22 The accident resulted from the sole negligence of Cassandra Sharbono. Cassandra crossed the
23 centerline between her lane of travel and oncoming traffic to strike Ms. Tomyn head-on.

24 Cynthia Tomyn died as a result of the accident. Our counsel's investigation has revealed that Ms.
25 Tomyn was born on July 28, 1965 and was 34 years old at the time of her death. She had met her
26

1 husband Clinton during high school. They had been married for 15 years. Ms. Tomyn was a high
2 school graduate. She had been employed at Tacoma General Hospital for 5 1/2 years. She worked as
3 a heart monitor technician at the time of her death. Cynthia and Clinton had three children. At the time
4 of Cynthia's death, Nathan was 12, Aaron was 14, and Christian was 7 years old. Cynthia volunteered
5 extensively at her childrens' school.

6 Our counsel's investigation indicates Cynthia was a loving wife, devoted mother and a fine person.
7 Under the circumstances, we believe a jury could reasonably respond with a substantial award of
8 damages, possibly well in excess of the amount to which we have consented. For that reason, we
9 believe this confession of judgment is in our best interests and agree accordingly.

10
11 We declare and state under the penalty of perjury under the laws of the State of Washington that
12 the foregoing is true and correct.

13 Signed the 30th day of March, 2001, at Tacoma, Washington.

14 
CASSANDRA SHARBONO

15
16 
JAMES SHARBONO

17
18 
DEBORAH SHARBONO

19
20
21
22
23
24
25
26
27
28 BURGESS FITZER, P.S.

ATTORNEYS AT LAW

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

Appendix 9



01-2-07954-4 30654154 ORG 10-06-08

The Honorable Rosanne Buckner

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.

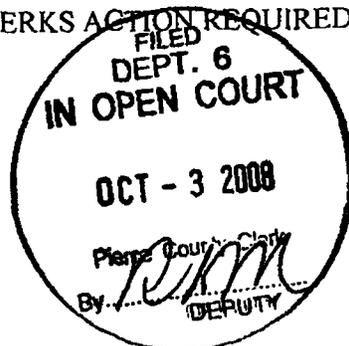
UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer; LEN VAN DE WEGE and "JANE
DOE" VAN DE WEGE, husband and wife
and the marital community composed
thereof,

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

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

ORDERED, ADJUDGED AND DECREED that, in execution of paragraph 1 of the judgment entered in this matter on May 20, 2005, Ohio Casualty Insurance Company shall, on or before October 15, 2008, pay the sum of ~~65,844,717.00~~ ^{6,240,245.75} to and pursuant to instructions of the plaintiffs in Pierce County cause no. 99-2-12800-7 or their attorneys of record on behalf of such plaintiffs, whom the judgment creditors James and Deborah Sharbono have designated to receive such payment; and it is further

TRG
AB

ORDERED, ADJUDGED AND DECREED that, in execution of the first sentence of paragraph 7 of the judgment entered in this matter on May 20, 2005, Ohio Casualty Insurance Company shall, on or before October 15, 2008, pay the sum of \$2,353,956.28 to and pursuant to ~~instructions of the judgment creditors James and Deborah Sharbono or their attorneys of record on behalf of them;~~ ^{plaintiffs in Pierce County cause no. 99-2-12800-7 or their attorneys of record on behalf of such plaintiffs (TACOMA COUNTY)} instructions of the ~~judgment creditors James and Deborah Sharbono or their attorneys of record on~~ ^{plaintiffs in Pierce County cause no. 99-2-12800-7 or their attorneys of record on} behalf of them; and it is further

TRG
AB

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

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

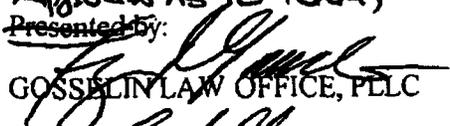
//
//
//
//

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

4 Dated this 3rd day of October, 2008

5
6 
7 HONORABLE ROSANNE BUCKNER

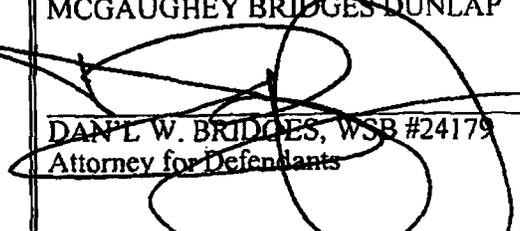
8 *Approved as to form,*
9 *Presented by:*

10 
11 GOSSELIN LAW OFFICE, PLLC

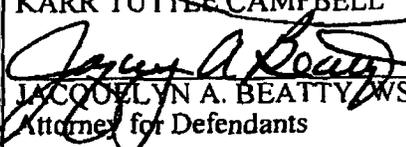
12 
13 TIMOTHY R. GOSSELIN, WSB #13730
14 Attorneys for Plaintiffs

15 Copy received; Approved as to form.

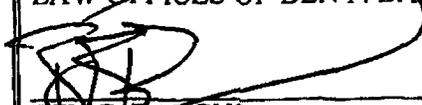
16 MCGAUGHEY BRIDGES DUNLAP

17 
18 DAN L. W. BRIDGES, WSB #24179
19 Attorney for Defendants

20 KARR TUTTLE CAMPBELL

21 
22 JACQUELYN A. BEATTY, WSB #17567
23 Attorney for Defendants

24 *Presented by:*
25 LAW OFFICES OF BEN F. BARCUS

26 
27 BEN F. BARCUS
28 Attorney for Intervenor

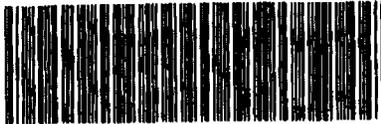
FILED
DEPT. 6
IN OPEN COURT
OCT - 3 2008
Peace Clerk
BY 
DEPUTY

Order on Plaintiffs' Motion to
Execute on Appeal Bond Page - 3

GOSSELIN LAW OFFICE, PLLC

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

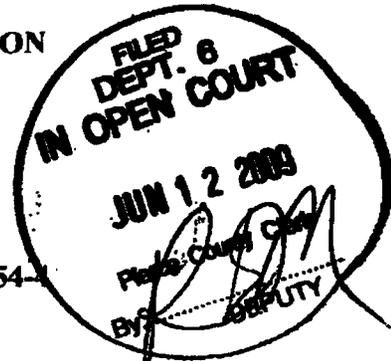
Appendix 10



01-2-07954-4 32253691 ORDF 06-15-09

THE HONORABLE ROSANNE BUCKNER
Hearing Date: 6/12/09 9:00 a.m.

**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**



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

Plaintiffs,

vs.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign insurer;
LEN VAN DE WEGE and "Jane Doe" VAN
DE WEGE, individually and the marital
community comprised thereof,

Defendants,

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 as
Intervenor.

No. 01-2-07954-1

**ORDER ON INTERVENOR
TOMYNS' MOTION FOR ORDER
DIRECTING CLERK OF THE
COURT TO DISBURSE FUNDS**

Clerk's Action Required

THIS MATTER having come on duly and regularly before the undersigned Judge of the
above-entitled Court, upon Intervenor Tomyns' Motion for Relief From Stay and for an Order
Directing Clerk of the Court to Disburse Funds currently on deposit within the Registry of the

**ORDER ON INTERVENOR TOMYNS' MOTION FOR ORDER
DIRECTING CLERK OF THE COURT TO DISBURSE FUNDS - 1**

**Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.**
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

*ORIGINAL
disc
6/12
thw*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Court, Plaintiffs represented by and through their attorney of record, Timothy R. Gosselin of The Gosselin Law Firm; Intervenor Tomyn represented by and through their attorney of record, Paul A. Lindenmuth of The Law Offices of Ben F. Barcus & Associates, P.L.L.C.; and Universal Underwriters represented through their attorney(s) of record; the Court having reviewed Intervenor Tomyns' materials, responsive materials from Plaintiffs Sharbono, and materials filed in opposition by Defendant Universal Underwriters, having reviewed the records and files herein, and having heard argument of counsel for the parties, and otherwise being fully advised in the premises, it is now, therefore, hereby

ORDERED, ADJUDGED AND DECREED that the sum of \$4,893,298.63 shall be forthwith and immediately disbursed to counsel for Intervenor Tomyns, The Law Offices of Ben F. Barcus & Associates, P.L.L.C., in trust, for Intervenor Clinton Tomyn, individually and as Personal Representative of the Estate of Cynthia Tomyn, and the children of Cynthia Tomyn, Nathan Tomyn, Erin Tomyn, and Christian Tomyn; and it is further

ORDERED, ADJUDGED AND DECREED that the Clerk of the Court is directed to disburse the above-referenced funds from the Registry of the Court no later than 4 a.m./p.m. on June 12, 2009; and it is further

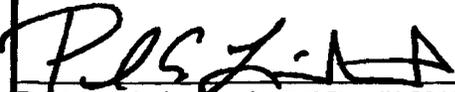
///
///
///
///

1
2 ORDERED, ADJUDGED AND DECREED that this Order directing the Clerk of the Court
3 to Disburse Funds as specified above, is an Order solely for the purpose of partial enforcement of
4 the Mandate issued by the Court of Appeals on August 21, 2008, and filed with this Court on
5 August 29, 2008.

6 DONE IN OPEN COURT this 12th day of June, 2009.

7
8 
9 The Honorable Rosanne Buckner

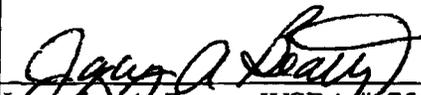
10 Presented by:

11 
12 Paul A. Lindenmuth, WSBA #15817
13 Attorney for Intervenor Tomyns

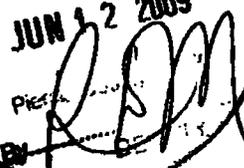
14 Approved as to form and content;
15 Notice of presentation waived:

16 
17 Timothy R. Gosselin, WSBA#13730
18 Attorney for Plaintiffs Sharbono

19 ~~Approved as to form and content;~~
20 ~~Notice of presentation waived:~~

21 
22 Jacquelyn A. Beatty, WSBA#17567
23 Attorney for Defendants

24
Provided that in the event the funds disbursed must be repaid, Plaintiff may only seek repayment from Intervenor. Should such an event allowing for repayment occur, the Intervenor may seek reimbursement of the order. PL

FILED
DEPT. 6
IN OPEN COURT
JUN 12 2009
BY 

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Approved as to form and content;
Notice of presentation waived:

Daniel W. Bridges, WSBA #24179
Attorney for Defendants

Approved as to form and content;
Notice of presentation waived:

Phillip A. Talmadge, WSBA #6793
Attorney for Defendants

**Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.**
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

Appendix 11

August 27 2009 1:16 PM

KEVIN STOCK
COUNTY CLERK

NO. 01-2-07954-4
THE HONORABLE ROSANNE BUCKNER
Hearing Date: September 4, 2009 @ 9:00 a.m.

1
2
3
4
5
6
7
8 **SUPERIOR COURT OF WASHINGTON**
9 **FOR PIERCE COUNTY**

10 JAMES and DEBORAH SHARBONO,
11 individually and the marital community
12 comprised thereof,

Plaintiffs,

13 vs.

14 UNIVERSAL UNDERWRITERS
15 INSURANCE COMPANY, a foreign
16 insurer; LEN VAN DE WEGE and "Jane
17 Doe" VAN DE WEGE, individually and the
18 marital community comprised thereof,

Defendants,

19 CLINTON L. TOMYN, individually and as
20 Personal Representative of the Estate of
21 Cynthia L. TOMYN, deceased; and as
22 Parent/Guardian of NATHAN TOMYN,
23 AARON TOMYN, and CHRISTIAN
24 TOMYN, minor children as Intervenors.

NO. 01-2-07954-4

**INTERVENOR TOMYNS' MOTION TO
COMPEL DISCLOSURE OF
SETTLEMENT NEGOTIATIONS AND
TERMS OF PROPOSED SETTLEMENT**

25 COMES NOW the Intervenor, by and through its counsel of records, The Law Office of Ben
F. Barcus & Associates, PLLC, and moves the Court for an Order Compelling the Plaintiff Sharbono
and Defendant Universal Underwriters to disclose the facts and circumstances surrounding their
settlement negotiations, and the terms of their pending settlement. This motion is based on the files

**INTERVENOR TOMYNS' MOTION TO
COMPEL DISCLOSURE OF SETTLEMENT
NEGOTIATIONS AND TERMS OF
PROPOSED SETTLEMENT - 1**

**Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.**
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

1
2 and records herein, and the annexed Declaration of Paul A. Lindenmuth, of attorneys for Intervenor.

3 DATED this 27th day of August, 2009.

4
5
6 Paul A. Lindenmuth, WSBA# 15817
7 Attorney for Intervenor

8 **DECLARATION OF PAUL A. LINDENMUTH**

9 I, Paul A. Lindenmuth, hereby declare under penalty of perjury under the laws of the State of
10 Washington that the following is true and correct:

11 That this is a matter that your declarant truly regrets having to bring to the Court's attention.
12 As the Court is well advised as to the factual background of this case, and the respective roles of the
13 parties, a detailed factual analysis shall not be presented within these moving papers.

14 As the Court is aware, this case arises out of the tragic death of Cynthia Tomy, and the
15 settlement of those claims with Plaintiff Sharbono. As part of the settlement agreement, which is
16 already on file herein, the Sharbonos were obligated to pursue claims on behalf of the Tomys against
17 Universal Underwriters, its own insurance company. To that end, the Sharbonos filed the instant
18 case, asserting not only claims that ultimately benefitted the Tomys, but also their individual claims
19 for bad faith, and the like, against their own insurance company, Universal Underwriters.

20 As the Court is well aware, the case was tried in 2005, resulting in a substantial verdict which
21 benefitted not only the Sharbonos, but also the Tomys. Unfortunately, due to among other things,
22 an alleged instructional error, that portion of the jury verdict in favor of the Sharbonos was subject to
23 reversal. As the Court is also well aware, that portion of the underlying Judgment which favored the
24
25

1
2 Intervenor Tomyns was affirmed on appeal. Following the exhaustion of the initial phase of appellate
3 proceedings in this matter, and the issuance of a Mandate, this case is again before the trial court.

4 At that time, the Tomyns sought intervention in this case, and were granted limited
5 intervention under the terms of an Order dated September 5, 2008. (Exhibit No. 1) As indicated in
6 the September 5, 2008 Order Allowing Intervention, the purpose of the intervention was to "represent
7 its interest as it relates to the Judgment previously entered herein, and the protection of their interest
8 in said Judgment."
9

10 Since the intervention and the issuance of the Mandate, the Court is well aware that this matter
11 has not followed the normal course with respect to enforcement of that aspect of the Judgment which
12 was affirmed. To that end, Defendant Universal Underwriters has even gone so far as to indicate
13 within its pleadings that "there is no Judgment" despite the clear affirming language set forth within
14 the Court of Appeals opinion. (See, Defendant's Opposition to Plaintiff's Motion to Execute on
15 Appeal Bond, p. 1, on file herein).

16 The Court also is well aware of the fact that Universal Underwriters has now started a second
17 round of appeals with respect to that portion of the Judgment which was affirmed, and which
18 benefitted the Tomyns. Over the course of time, that appeal has now been whittled down to a question
19 of whether or not the trial court appropriately calculated post-Judgment interest.
20

21 Further, as the Court is also well aware, that aspect of the case which was reversed, i.e., the
22 Judgment which favored the Sharbonos and their personal claims, was set for trial on September 21,
23 2009.
24
25

1
2 It is further relevant to note that during the course of proceedings, since the issuance of the
3 Mandate, there have been a number of instances where Universal, within the text of its pleadings, has
4 attempted to make an effort to drive a wedge between the Tomyns and Sharbonos with respect to their
5 respective interests. If it is recalled correctly, Universal has even on occasion questioned as to whether
6 or not the Tomyns, under the terms of the settlement agreement filed herein, are entitled to the
7 presumptive damages which were awarded (which the Sharbonos have never disputed are for the
8 Tomyns' benefit). Further, it is noted that recently, Universal Underwriters has even gone so far as
9 to suggest that payment of the amount due and owing to the Tomyns constitutes partial and/or full
10 resolution of any claims brought by the Sharbonos. (See, Universal Underwriters Motion for
11 Summary Judgment Re: Bad Faith Damages, filed on or about July 24, 2009).
12

13 The above provides the relevant background to the issue which Intervenors must unfortunately
14 now bring before the Court. As the Court is aware, throughout the history of this case the Sharbonos
15 and the Tomyns have been cooperative with one another, and have been pursuing what could be
16 characterized as a "common cause." To that end, on August 11, 2009, the parties in this case,
17 including Intervenors, engaged in a mediation at Judicial Dispute Resolution (JDR) with former King
18 County Superior Court Judge, George Finkle, as mediator. During the course of those discussions,
19 which will not be disclosed in any great detail, the Tomyns and Sharbonos essentially negotiated
20 together. During the course of those discussions, and at no time until very recently, was there any idea
21 that the Sharbonos were contemplating engaging in a separate settlement, which would not fully
22 resolve any and all claims, including the Tomyns' claims in this case.
23
24
25

1
2 Your declarant says "recently" because on or about August 21, 2009, apparently based on
3 negotiations to which the Tomyns nor their counsel were privy to, the Sharbonos and Universal
4 Underwriters have reached a tentative settlement. Intervenors' counsel first learned of this settlement
5 by way of an email sent by Mr. Gosselin, which is part of an email stream, which is attached hereto
6 as Exhibit "2."

7
8 After recovering from the initial shock that the Sharbonos were engaging in negotiations
9 without the Tomyns' participation, counsel for the Tomyns has made inquiry as to what the terms of
10 the settlement are. Naturally, the Tomyns have grave concerns given the various postures previously
11 taken by Universal with regard to the inter-relationship and overlap between the Tomyns' claims and
12 the Sharbonos' claims, that any settlement by the Sharbonos of their individual claims would
13 substantially impact the Tomyns' interests, as well as implicate a breach of the settlement agreement.
14 Clearly, it is the Tomyns' opinion that they should be paid in full prior to the Sharbonos collecting a
15 penny in this case, given the fact that at the root of this case is the wrongful death of Cynthia Tomyn.

16 Unfortunately, when further inquiry was made of counsel for the Sharbonos, Mr. Gosselin, he
17 refused to disclose the terms of the settlement or to discuss how the settlement was arrived at. He did
18 so based on the fact that Universal had apparently requested a confidentiality provision in any
19 settlement agreement.

20
21 While substantial efforts have been made to try to convince Mr. Gosselin to disclose the terms
22 of the settlement, and to discuss the terms of the negotiations, such efforts have been fruitless. In our
23 last telephone conversation (a telephone call involving Ben Barcus, your declarant and Mr. Gosselin),
24 it was indicated that he would contact defense counsel, Jacquelyn Beatty and Dan'L Bridges for the
25

1
2 purposes of gaining "permission" to discuss the terms of the settlement. That conversation occurred
3 on or about August 25, 2009, and since that time, no information has been conveyed in that regard.

4 As such, and given the uncertainty and clear concerns the Tomyns had that any settlement by
5 the Sharbonos could dramatically impact their interests, your declarant and Mr. Barcus felt that we
6 had absolutely no choice, but to file this motion asking the trial court to compel full disclosure with
7 respect to settlement negotiations and the terms of any settlement agreement. It is noted that if in fact
8 the Sharbonos settle with Universal Underwriters, proceedings before the trial court more likely than
9 not will for all intents and purposes terminate, and the only issues left are those pending before the
10 Court of Appeals. Thus, there is simply no vehicle for discovery from which the Tomyns could
11 otherwise gather this information. In other words, there is simply insufficient time to take Mr.
12 Gosslin's deposition, nor is there sufficient time to issue interrogatories to gather this information.

13
14 It is suggested that not only is the trial court a court of justice, but also a court of equity. It is
15 unjust and inequitable for the Tomyns' interests to be potentially impacted by a settlement agreement
16 between Universal and the Sharbonos, given the history of this case, and the obvious inter-related
17 interests of the Sharbonos and the Tomyns. As such, your declarant has no choice but to ask the Court
18 to utilize its inherent authority to manage proceedings before it, and require that the Sharbonos and
19 Universal fully disclose what is currently occurring. There is no honest reason this information must
20 be kept from the Tomyns and their counsel. It is absolutely essential for the protection of the Tomyns'
21 interests that they be privy to the terms of the settlement agreement, and have an opportunity to
22 provide reasonable input to make sure that there is no language within such a settlement agreement
23 that could impact their ability to pursue the amounts currently due and owing to them from Universal.
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

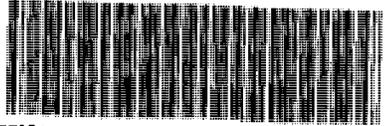
///

Dated this 27 day of August, 2009, in Tacoma, Washington.


Paul A. Lindenmuth, WSBA#18517

Appendix 12

1



01-2-07954-4 32785424 ORC 09-08-09

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF PIERCE

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

Plaintiffs,

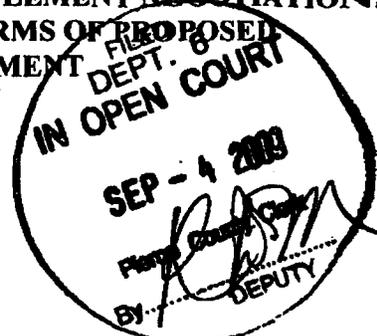
v.

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 TO COMPEL DISCLOSURE
OF SETTLEMENT NEGOTIATIONS
AND TERMS OF PROPOSED
SETTLEMENT



THIS MATTER having come on regularly upon the Motion of Ben F. Barcus, of the *Law Offices of Ben F. Barcus & Associates, PLLC*; Defendant Universal represented by and through Jacquelyn A. Beatty of *Karr Tuttle Campbell*, and Plaintiffs represented by and through Timothy R. Gosselin, the Court having considered the files and records herein, as well as argument of counsel, and being otherwise fully advised in the premises; now, therefore, it is hereby

ORDERED, ADJUDGED, and DECREED that Plaintiff Sharbono and Defendant Universal Underwriters disclose the ^{proposed} facts and circumstances surrounding their settlement negotiations ^{TERMS} is hereby

ORDER TO COMPEL DISCLOSURE OF
SETTLEMENT NEGOTIATIONS AND
TERMS OF PROPOSED SETTLEMENT -1-

ORIGINAL

Law Offices Of Ben F. Barcus
& Associates, P.L.L.C.
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444 • FAX 752-1035

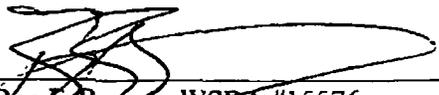
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

granted. Plaintiffs Sharbono and Defendants Universal and Van De Wege shall provide full disclosure by the close of business _____.

DONE IN OPEN COURT this 4th day of September, 2009.


The Honorable Rosanne Buckner
Pierce County Superior Court, Dept. 6

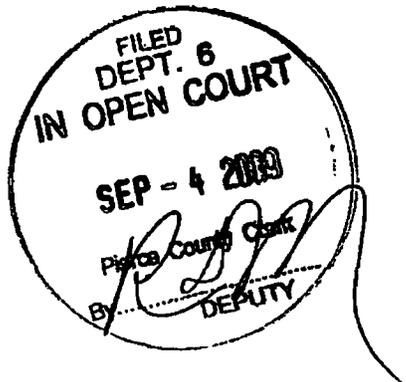
Presented by:


Ben F. Barcus, WSBA #15576
Attorney for Intervenor Tomyn

Approved as to Form and Content;
Notice of Presentation Waived;

Timothy Gosselin, WSBA #13730
of Attorneys for Plaintiffs Sharbono

Jacquelyn A. Beatty, WSBA#17567
of Attorneys for Defendant Universal Underwriters



Appendix 13

GL

October 9, 2009

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

Re: *Sharbono v. Universal Underwriters*
Our File No.: MIS-2181

Ben:

Enclosed is a copy of the settlement agreement signed by my clients yesterday.


Tim

Encl.
cc w/out encl: Jacquelyn Beatty
Clients

EMIZ

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

#725034 v3 / 10007-459

Page 2 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 8th day of October, 2009.

James Sharbono
James Sharbono

STATE OF WASHINGTON)

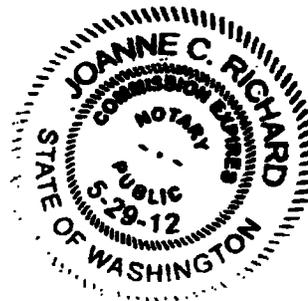
:ss.

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 9th 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)

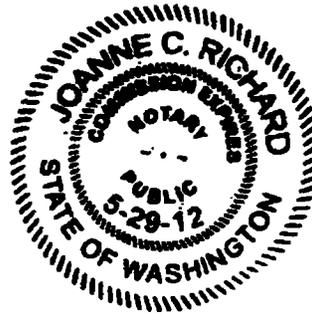
:ss.

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



[Signature]
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

///
///
///
///



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: _____

Appendix 14

The Honorable Rosanne Buckner



01-2-07954-4 33164067 ORO 11-09-09

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,

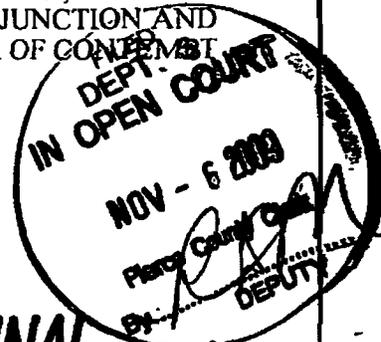
vs.

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 QUASHING TEMPORARY
RESTRAINING ORDER, DENYING
PRELIMINARY INJUNCTION AND
DENYING ORDER OF CONTEMPT



ORIGINAL

This matter having come on before the undersigned judge of the above entitled court on October 16, 2009 at 11:00 AM pursuant to the terms of a "Temporary Restraining Order and Order to Show Cause" requested by the Interveners in this action and entered on October 13, 2009, and the court having considered the files and records herein, Interveners' Ex Parte Motion for A Temporary Restraining Order and an Order to Show Cause, the Affidavit of Ben F. Barcus in support thereof, Universal Underwriters' Written Response to Affidavit of Ben F. Barcus, having heard testimony from Plaintiffs' counsel, Timothy R. Gosselin, and considered the exhibits submitted in support

ORDER QUASHING TEMPORARY RESTRAINING
ORDER, DENYING PRELIMINARY INJUNCTION
AND DENYING ORDER OF CONTEMPT Page - 1

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

thereof, and having heard argument of counsel, the court hereby finds as follows:

1. That the registry of this court presently hold sums sufficient to compensate Interveners for amounts to which they may be entitled under the settlement agreement between them and the plaintiffs. As a result, the interveners will not be immediately or irreparably harmed if the plaintiffs are not enjoined from dissipating the funds obtained by them in their settlement with defendants, or if those funds are not deposited to the registry of the court;

~~2. That the plaintiffs, their attorneys and representatives, as well as the defendants, their attorneys and representatives, have either complied with or appealed from this court's orders of October 3, 2008, June 12, 2009, and September 4, 2009.~~ *AS*

Based upon these findings of fact, the Court makes the following conclusions of law;

1. Interveners are not entitled to a preliminary injunction enjoining plaintiffs from dissipating the funds obtained by them in their settlement with defendants, or ordering plaintiffs to deposit those funds to the registry of the court;

~~2. The plaintiffs, their attorneys and representatives, and the defendants, their attorneys and representatives, have satisfactorily shown cause that they have not violated this court's orders of October 3, 2008, June 12, 2009, and September 4, 2009, and are not in contempt of court therefore.~~ *AS*

Based upon these conclusions of law, it is now, hereby

ORDERED, ADJUDGED AND DECREED, that the "Temporary Restraining Order and Order to Show Cause" requested by the Interveners in this action and entered on October 13, 2009, be and hereby is quashed; it is further

ORDERED, ADJUDGED AND DECREED, that Interveners' request for a preliminary injunction enjoining plaintiffs from dissipating the funds obtained by them in their settlement with defendants, and ordering plaintiffs to deposit those funds to the registry of the court, be, and the same hereby is, denied; and it is further

~~ORDERED, ADJUDGED AND DECREED, that Interveners' request for an order of contempt against plaintiffs, their attorneys and representatives, and the defendants, their attorneys~~ *AS*

1 and ~~representatives~~, for violating this court's orders of October 3, 2008, June 12, 2009, and
2 ~~September 4, 2009~~, be, and the same hereby is, denied; and it is further *183*

3 ORDERED, ADJUDGED AND DECREED that the court will consider whether to award
4 the amount of the bond posted for the temporary restraining order and additional or other amounts
5 to the plaintiffs, defendants, their attorneys and representatives in a separate hearing upon motion
6 brought by one or more of them.

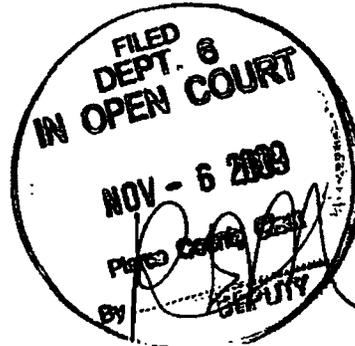
7 Dated this *6* day of *Nov* October, 2009.

8
9 
10 HONORABLE ROSANNE BUCKNER

11 Presented by:

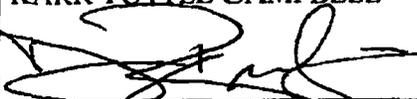
12 GOSSELIN LAW OFFICE, PLLC

13 
14 TIMOTHY R. GOSSELIN, WSB #13730
15 Attorneys for Plaintiffs

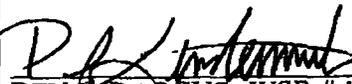


16 Copy received; ~~Approved as to form.~~

17 KARR TUTTLE CAMPBELL

18  *24779*
19 JACQUELYN L. BEATTY, WSB # 17567 *Beatty*
20 Attorney for Defendants

21 LAW OFFICES OF BEN F. BARCUS

22  *WSB # 15817*
23 BEN F. BARCUS, WSB # 15576
24 Attorney for Interveners