

72106-2

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NO. 72106-2

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

TRINITY UNIVERSAL INSURANCE COMPANY OF KANSAS,

Appellant,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Respondent.

BRIEF OF APPELLANT

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I. SUMMARY OF THE ARGUMENT

Trinity Universal Insurance Company of Kansas and the Ohio Casualty Insurance Company had a dispute as to the relative coverage provided by liability policies each of them issued for the legal defense and indemnification of the Millennium Building Company. Ohio Casualty refused to defend or indemnify its insured, Millennium, in a lawsuit brought by an injured employee of one of Millennium's subcontractors. In Ohio's stead, Trinity funded the defense of Millennium, and was the sole contributor to the settlement paid on behalf of Millennium. Subsequently, Trinity sued Ohio Casualty, alleging status as both subrogee of Millennium, and asserting bad faith and statutory claims for unreasonable claims handling. Ohio Casualty failed to answer or otherwise respond to the suit, and Trinity took a default judgment, which included the statutory trebling, and attorney fees related to bad faith. Trinity's proposed form of Default Judgment, executed by the trial court, included post-judgment interest at the tort judgment rate of 2.23 percent.

Ohio Casualty moved to vacate the default judgment, which motion was denied by the trial court. On appeal from that Order, this Court affirmed the entry of Default Judgment with respect to the cost of defending and indemnifying Millennium, but reversed the treble damages award. In this appeal, Trinity contends that this Court's holding that

Trinity had no standing to assert common law or statutory causes of action belonging to the insured means that the judgment was no longer, by definition, “founded on tortious conduct” per RCW 4.56.110, and that post-judgment interest should have accrued at the statutory rate of 12 percent. On remand, the trial court entered final Judgment based on the “tortious conduct” 2.23 percent, despite the fact that no part of the judgment on remand was based on tortious conduct. From that Judgment, Trinity appeals.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering final judgment, on remand, based on the statutory rate for judgments founded on tortious conduct, when in fact, the judgment actually entered by the trial court was *not* founded on tortious conduct.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the judgment that was actually entered by the trial court on remand founded on tortious conduct for purposes of RCW 4.56.110?
2. Where the Court of Appeals strips a Judgment of all components that were tort-based, and remands for correction of that Judgment, should the trial court correct the statutorily applicable interest rate to conform to the Court of Appeals’ ruling?

IV. STATEMENT OF THE CASE

This Court recited the factual basis behind the dispute in this case in its Opinion in the published case of *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 312 P.3d 976 (2013) *review denied*, 179 Wn.2d 1010, 316 P.3d 494 (2014). Trinity incorporates this recitation, to avoid any dispute, and quotes it here for ease of reference.

In September 2007, Philip Riley was injured when he fell off scaffolding at a construction site in Kitsap County. Riley was employed by a subcontractor, Cascade Construction Company. Riley sued the worksite's general contractor, Millennium Building Company Inc. Trinity Universal Insurance Company of Kansas insured Cascade, while Ohio Casualty Insurance Company insured Millennium.

Millennium tendered defense of the lawsuit to Ohio. Ohio initially accepted tender and appointed an attorney to represent Millennium. But, Ohio then tendered Millennium's defense to Trinity, claiming that Millennium was an additional insured under the policy Trinity issued to Cascade. Though Riley's complaint alleged only Millennium's acts or omissions, Trinity acknowledged it was conceivable that some act or omission by Cascade could have played a role in Riley's injury. Therefore,

in January 2009, Trinity accepted tender and took over defense of the lawsuit without a reservation of rights.

In August 2009, Trinity attempted to tender Millennium's defense back to Ohio. Trinity contended that, under the circumstances of complaint, Trinity and Ohio were at least coprimary insurers. Trinity reminded Ohio that, under Washington law, an insurer's duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint.³ Trinity pointed out that the complaint alleged only Millennium's acts or omissions, triggering Ohio's duty to defend. In other words, if Millennium's acts or omissions were found to be the cause of the accident, Ohio would be entirely responsible for defense and indemnification.

But, Ohio refused to accept the retender. Ohio cited an "other insurance" provision in Millennium's policy, which stated that Ohio's insurance is primary except if "any other primary insurance [is] available to you covering liability for damages arising out of the premises or operations." Based on this provision, Ohio insisted that its coverage was excess to Trinity's.

In December 2009, Trinity notified Ohio and the Washington State Insurance Commissioner that it planned to sue unless Ohio agreed to participate in Millennium's defense. Trinity explained that it would be asserting its equitable contribution rights as Cascade's insurer, as well as the direct, subrogated rights of Millennium. Ohio again refused.

Trinity continued defense and ultimately settled Riley's claims for \$225,000 in January 2010. Millennium and Cascade received a full and complete release of all Riley's claims.

Trinity served the insurance commissioner on May 12, 2010,⁴ with a summons and complaint against Ohio for subrogation, equitable contribution, and insurer bad faith. On May 13, 2010, the commissioner forwarded the summons and complaint by certified mail to Ohio's registered agent for service, Corporation Service Company (CSC). The commissioner received a return receipt stamped and dated by CSC. CSC has no record of receiving Trinity's summons and complaint. The parties do not dispute that Trinity did not provide notice of the lawsuit to Ohio's claims representative or its outside counsel.

Trinity filed its complaint with the court on July 7, 2010. Trinity alleged that Ohio improperly relied on its "other

insurance” exclusion to deny defense, because Riley’s complaint did not specify the cause of the accident. Trinity asserted five causes of action against Ohio. First, Trinity argued that by withdrawing from and refusing to contribute to Millennium’s defense, Ohio breached its contractual duty to defend Millennium. Second, Trinity claimed that Ohio breached its duty of good faith and fair dealing by unreasonably refusing to defend Millennium, in violation of IFCA. Third, Trinity claimed that Ohio failed to respond to pertinent communications from a claimant within 10 days, as required by WAC 284–30–360(3). Fourth, Trinity argued that the same conduct constituted per se violations of the CPA. Lastly, Trinity claimed it was entitled to equitable contribution for Ohio’s share of Millennium’s defense, because both Trinity and Ohio had obligations to defend.

When Ohio failed to appear or answer, Trinity moved ex parte for a default order and judgment. Trinity requested the full cost of defending and indemnifying Millennium, attorney fees, and treble damages under IFCA and the CPA, totaling \$764,271. Trinity provided declarations and other exhibits supporting its request for damages. On July 14, 2010, a court commissioner

granted the motion and entered judgment in the full amount.

Trinity waited a year and five days before collecting on the judgment. Trinity admitted that it purposefully waited a year to collect in order to gain a procedural advantage over Ohio. On August 24, 2011, Ohio filed a motion to vacate the default order and set aside the judgment. Ohio argued the default judgment should be overturned, because (1) Ohio was not served; (2) Trinity had no standing to bring the claims; (3) the court commissioner failed to enter findings of fact and conclusions of law necessary to support the judgment; (4) Ohio's failure to appear was inadvertent, because it was unaware of the lawsuit; and (5) Ohio could assert prima facie defenses to liability and damages. The court denied Ohio's motion to vacate and this appeal followed.

Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co., 176 Wn. App. 185, 191-94, 312 P.3d 976, 980-81 (2013) *review denied*, 179 Wn.2d 1010, 316 P.3d 494 (2014).

Based on these facts, this Court ruled that the trial court *did* have subject matter jurisdiction over the dispute, but that Trinity, as Millennium's equitable subrogee and pursuant to its own right to contribution, had no standing to assert the insured's claims for common law bad faith, nor the insured's rights under the Insurance Fair Conduct

Act or the Consumer Protection Act. *Id.* Accordingly, this Court directed the trial court to correct the judgment pursuant to the Opinion. *Id.*

On remand, Trinity moved the court to enter judgment for the amount of defense and indemnity expense related to the Millennium claim, stripping the Judgment of all aspects based on common law bad faith, the Insurance Fair Conduct Act, and the Consumer Protection Act, as directed by this Court. CP 53-82. There is no dispute that the principal amount of the Judgment was correctly reduced from \$761,298.07 to \$245,432.69. CP 83-101, 110-112.

Also in its Motion to Enter Judgment, Trinity moved the trial court to re-calculate interest at the statutory rate of 12 percent, because the original statutory rate of 2.23 percent was proposed by Trinity in the Default Judgment was the appropriate rate for judgments founded on tortious conduct. The judgment was no longer founded on tortious conduct, and, Trinity argued, the interest rate should be corrected to 12 percent pursuant to RCW 4.56.110. CP 53-82. The trial court disagreed, and entered final judgment based on the tort interest rate. CP 110-112. Ohio Casualty having paid that amount, the trial court also directed that the judgment be satisfied on the judgment roles, which was appropriate in the context of its ruling on the interest rate issue. *Id.* From the decision on the appropriate rate of interest, Trinity timely appealed.

V. AUTHORITY AND ARGUMENT

A. **Standard of Review**

The correct application of statutory post-judgment interest pursuant to RCW 4.56.110 is a matter of law, reviewable *de novo*. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 165, 208 P.3d 557, 560 (2009).

B. **This Court's Opinion was silent on the issue of the appropriate post-judgment interest rate, and the trial court's obligation to "correct" the Judgment included a duty to correct the interest rate per statute.**

This Court reversed a portion of the Default Judgment, which was originally based on tortious conduct, and remanded for entry of judgment based solely on Trinity's equitably subrogated contractual rights against Ohio. The original Judgment was based primarily on tort claims, and recited the tort post-judgment interest rate.

This Court's Opinion was silent on the issue of interest. This silence is not surprising; no reason exists for the appellate Court to address the issue of interest and silence does not preclude, or relieve, the trial court from awarding interest on the judgment. This has long been the rule in Washington. For example, in the case of *Yarno v. Hedlund Box & Lumber Co.*, 135 Wash. 406, 407, 237 P. 1002, 1003 (1925), a jury awarded the plaintiff \$22,310 on a breach of contract action. In the first

appeal, the Supreme Court held that this verdict was the simple sum of a stream of future payments, and lump sum award was a present value windfall for the plaintiff. The court reversed, and remanded to the trial court with instructions to “to ascertain the worth of the recovery at the time of the return of the verdict, in accordance with the directions above given, and enter a judgment for the reduced amount.” *Id.* at 407. That Opinion did not mention the subject of post-judgment interest.

On remand, the trial court calculated the present value of the verdict rendered by the jury to be \$19,065.69. But the trial court then added post-judgment interest, beginning as of the date the original judgment. The defendant appealed, arguing: “[T]he words ‘and enter judgment for the reduced amount’ must be taken literally as an expression of this court that no interest was recoverable.” *Id.* at 407. The court swiftly rejected this contention.

An examination of the previous opinion will disclose that the question of interest was not there raised nor considered. Indeed it would hardly seem necessary that the opinion of this court should make any reference thereto, inasmuch as interest is provided for in the statute. . . . Clearly, nothing being said in the opinion with reference to interest, the most that appellant can contend for is that it is an open question.

Id.

This result was reiterated in *White Pass Co. v. St. John*, 78 Wn.2d 188, 190, 470 P.2d 548, 550 (1970). In that case, the original judgment of

the trial court was based on an unliquidated damages award against one defendant, and the other defendant had been dismissed out. The Supreme Court reversed, and mandated that judgment be entered against the dismissed defendant in the same amount. On remand, the trial court entered judgment, but did not apply interest from the date of the original judgment – the date on which the damages became liquidated. *Id.* The plaintiff appealed again, and the Supreme Court ruled that interest must be applied by the trial court based on the posture of the case *on remand*, and that the trial court should calculate interest as appropriate given the appellate ruling. In doing so, the court noted:

Respondent has argued strenuously that we should affirm the trial court on the basis that its judgment on the remittitur conformed to the remittitur from this court, and as such no appeal should lie. In particular, respondent claims that since neither our opinion nor the remittitur made any mention of interest, there should be no interest awarded.

Id. at 192.

Citing *Yarno*, the court again rejected this proposition, noting that the most that could be said from appellate silence on this issue was that nothing had been said. Applying post judgment interest in conformity with the appellate decision is a matter for the trial court on remand.

Below, Ohio Casualty distinguished *White Pass Co.* on the basis that it related only to whether pre-judgment interest was appropriate against an erroneously dismissed defendant. This criticism misses the

point. Trinity cites *White Pass Co.* and *Yarno* for the proposition that the issue of interest, where not decided or addressed on appeal, is properly before the trial court on remand, *and* that the trial court should award interest, or alter the award of interest, to conform to the appellate holding.

Such is the posture of the case at bar. This Court remanded for the trial court to correct the original judgment in conformity with the Opinion. The trial court did so, by removing the statutory multipliers based on bad faith tortious conduct and the attorney fee award. The trial court *also* reduced the *amount* of interest to conform to new principal amount, effectively *nunc pro tunc* as of the date of the original Judgment. But the trial court failed to appreciate that the very nature of the Judgment had changed, such that it was no longer “based on tortious conduct” at all. The trial court should have re-evaluated the proper interest *rate*, as well as amount, based on this Court’s Opinion and RCW 4.56.110. This Court should reverse this error.

C. The Judgment, as corrected, is not based on “tortious conduct.”

RCW 4.56.110 provides, in relevant part, two interest rates that apply to judgments: one for “judgments founded on tortious conduct”, and one for all others.

(3) (b) . . . [J]udgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities,

shall bear interest from the date of entry at . . . [in this case, 2.23%].

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at [12%].

RCW 4.56.110

In this case, the majority of judgment originally entered by the trial court was based on the statutory bad faith claims against Ohio, which were the source of the trebling, and the award of attorney fees. A judgment against an insurance company that is primarily based on the tort of bad faith rather than the insurance contract itself is “founded on tortious conduct” for purposes of RCW 4.56.110. *Woo v. Fireman’s Fund Ins. Co.*, 150 Wn. App. 158, 208 P.3d 557 (2009). There is no dispute that the original judgment against Ohio was “founded on tortious conduct,” and should have accrued interest at the tort rate.

However, this Court reversed *every* aspect of the judgment against Ohio that had anything to do with tortious conduct. In holding that Trinity’s position as equitable subrogee entitled it only to pursue Ohio for its insurance policy obligation to defend and indemnify the insured, the Court of Appeals stripped the judgment of all tortious elements, and thus the judgment to be entered on remand is *cannot* be characterized as “founded on tortious conduct.” As the court recognized in *Woo v.*

Fireman's Fund Ins. Co., 150 Wn. App. at 171, non-tortious (policy based) recovery against an insurer:

. . . may include the amount of expenses, including reasonable attorney fees the insured incurred defending the underlying action, the amount of the judgment entered against the insured, [and] the amount of a reasonable settlement by the insured. . .

Id. (citations and footnotes omitted)

These are exactly the elements on which the Court of Appeals ruled that Trinity was entitled to judgment: the cost of defending and indemnifying the insured. Because the judgment, as the trial court should have amended it on remand, was not “founded on tortious conduct,” the proper interest rate is 12%.

Ohio has taken the position that there is something about the nature of equitable subrogation that transforms these “non-tort” insurance policy claims into “tort claims.” This logic misapprehends the nature of subrogation. Subrogation is not a “cause of action”; it is a method by which causes of action originally belonging to one party are transferred to another. The cause of action itself can be *either* tort-based or contractual. “The insurer is subrogated to respondent’s *contract right of indemnity*. This sustains the cause of action against appellant for the identical reason that subrogation sustains *a tort action* where the plaintiff has been paid for his loss.” *U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn.

App. 823, 834, 16 P.3d 1278, 1284 (2001) *cf* **Consol. Freightways v. Moore**, 38 Wn.2d 427, 430-31, 229 P.2d 882, 884-85 (1951) (emphasis added). Here, Trinity was equitably subrogated to the insured's *contractual right* to be defended and indemnified by Ohio, and the judgment in favor of Trinity is not founded on any tortious conduct; it is subject to the default 12 percent interest rate.

Ohio has also suggested that equitable subrogation is akin to unjust enrichment, and that “unjust enrichment” is sufficiently like a tort to cause the judgment in this case to be qualified as such. This position has no legal support. The only Washington case that directly addressed whether an “unjust enrichment-like” cause of action resulted in a “judgment founded on tort,” is **Stevens v. Brink's Home Sec., Inc.**, 162 Wn.2d 42, 51-52, 169 P.3d 473, 478 (2007). In that case, the Washington Supreme Court noted unjust enrichment is in the nature of implied contracts, which is not a remedy for “tortious conduct.” The court affirmed the trial court's award of 12% interest. Here, the Judgment to be entered against Ohio is founded on the insurance contract rights of defense and indemnity *only*. If Ohio Casualty had not issued the insurance contract to Millennium, there would be no Judgment. Whatever rights Trinity had against Ohio Casualty, either via contribution or equitable subrogation existed because, and only because, of the contract between Millennium and Ohio Casualty.

This is not a tort judgment. The proper interest rate is 12 percent, and this Court should reverse the trial court's incorrect conclusion to the contrary.

VI. CONCLUSION

For the foregoing reasons, Trinity respectfully requests that the Court reverse the trial court's erroneous determination that the tort interest rate was applicable to the Judgment, as modified by the Court, and direct the trial court to modify the Judgment to reflect a post-judgment interest rate of 12 percent.

Respectfully submitted this 25th day of October 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that on the
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