IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JAMES and DEBORAH SHARBONO, individually and the martial community composed thereof; CASSANDRA SHARBONO, Respondent/Cross-Appellant, 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, 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, Intervenors.	Consolidated Nos. 38425-6-II and 38596-1-II UNPUBLISHED OPINION

Hunt, J. — This appeal concerns interest owed on a settlement reduced to judgment in a lawsuit filed by the family of wife and mother Cynthia L. Tomyn, who died as a result of a 1998 vehicle collision caused by James and Deborah Sharbono's 16-year daughter, Cassandra. The Sharbonos assigned to the Tomyns benefits payable by the Sharbonos' insurance carriers. One of those carriers, Universal Underwriters Insurance Company, appeals the trial court's calculation of post judgment interest on remand from an earlier appeal in this case and other aspects of a 2005 jury's damages verdict and judgment.

Universal argues that the trial court erred by calculating interest twice; it also challenges several terms of the 2005 judgment. On cross-appeal, the Sharbonos argue that the trial court erred by awarding post-judgment interest to the Tomyn family, instead of to them. We affirm the trial court's designation of the Tomyns as recipients of post-judgment interest, but we vacate the amount of this interest award and remand to the trial court to recalculate the amount of interest that Universal owes.

FACTS

I. 2001 Judgment (Settlement), 2005 Judgment (Jury Trial), and First Appeal

We glean the following facts from our published opinion in a previous appeal in this case, *Sharbono v. Universal*, 139 Wn. App. 383, 161 P.3d 406 (2007), *review denied*, 163 Wn. 2d 1055, 187 P.3d 752 (2008):

> 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 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,[1] 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.[2]

139 Wn. App. at 388-89.

Following a jury trial in the Sharbonos' lawsuit against Universal,[3] on May 20, 2005, the trial court reduced to judgment Universal's $3.275 million share of the $4,525,000 Sharbono-Tomyn settlement.[4] This judgment included the following pertinent terms:

> 1. Judgment is hereby entered in favor of [Sharbonos] and against [Universal] in the amount of . . . $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.
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> . . . .
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> 7. Amounts awarded pursuant to paragraph 1 shall bear post-judgment interest

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[1] On March 30, 2001, the Pierce County Superior Court entered a "Judgment by Confession" in favor of the Tomyns against the Sharbonos in *Tomyn v Sharbono,* Cause No. 99-2-12800-7. *See* Clerks Papers (CP) at 236; CP at 81; 83, paragraph 1.

[2] As part of the settlement, the Sharbonos "agreed . . . to assign their insurance claims to the Tomyns." 139 Wn. App at 392; *see* "Settlement Agreement," CP at 235-39.

[3] *Sharbono v Universal,* Pierce County Superior Court Cause No. 01-2-07954-4.

[4] This $1,250,000 reduction represents policy limits previously acknowledged and paid by the Sharbonos' insurance carriers: Primary insurer State Farm had paid $250,000; and Universal had paid $1 million under an umbrella policy. This reduction is outside the scope of this appeal.

In our previous opinion, we vacated other findings of liability against Universal. 139 Wn. App. at 389. These findings, however, also remain outside the scope of this appeal, which concerns only the 2005 $3.275 million judgment and the related interest calculations.

> pursuant to RCW 4.56.110(4) and RCW 19.52.020 at the rate of 12 percent per annum.

Clerks Papers (CP) at 83.

On appeal in 2007, Universal did not assign error to this $3,275,000 verdict, together with interest, and we affirmed. We also vacated the jury's award of $4.5 million in damages to the Sharbonos against Universal and remanded for further proceedings.

II. 2008 Remand from First Appeal

On remand on October 3, 2008, the trial court granted the Sharbonos' motion to execute on Universal's appeal bond[5] and ordered Ohio Casualty Insurance Company, Universal's appeal bond surety, to pay $6,240,265.75 under paragraph 1 and $2,353,956.28 under paragraph 7 of the May 2005 judgment.[6] In reaching these figures, the trial court compounded part of the interest: Under paragraph 1 of the 2005 judgment, the trial court calculated simple 12% interest on the original $3.275 million March 30, 2001 judgment, accruing until October 15, 2008, for a total of $6,240.265.75. Under the first sentence of paragraph 7 of the 2005 judgment, the trial court applied 12% "post-judgment" interest[7] to this new paragraph 1 total, accruing from entry of the May 20, 2005 judgment until October 15, 2008, for an additional sum of $2,353,956.28.[8] CP

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[5] In August 2008, the Tomyns moved to intervene. The trial court allowed the Tomyns limited intervention "to represent [their] interests as [relating] to [the 2005 judgment], and protection of their interests in said judgment." CP at 160.

[6] The trial court received differing expert interest calculation reports from the Sharbonos' CPA, and Universal's CPA. The trial court ultimately used the Sharbonos' CPA's calculations. *See* CP at 213, 332.

[7] CP at 83, paragraph 7.

[8] *See* the Sharbonos' CPA's report ("[T]he determination of the principle [sic] judgment amount

at 333. The trial court designated the Tomyns[9] to receive the judgment amount plus interest accrued. On November 7, the trial court struck Universal's CR 60 motion to vacate and/or to amend the May 20, 2005 judgment and October 3, 2008 order.

III. Second Appeal

On October 6, Universal appealed the October 3, 2008 order: On October 17, the Sharbonos cross-appealed. On November 20, Universal filed a separate appeal from the trial court's November 7 denial of its CR 60 motion. We consolidated these two appeals under RAP 3.3(a).

In January 2009, we narrowed the scope of Universal's appeal, allowing it to "challenge [only] the trial court's calculation of post-judgment interest." In so doing, we expressly ruled that Universal could not challenge the 2005 $3.275 million judgment, which we had affirmed in the previous appeal in 2007.[10] Nevertheless, Universal attempts to appeal several aspects of the $3.275 million judgment in addition to the trial court's 2008 post-judgment interest calculation on remand.

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for purposes of paragraph 1 merely requires simple interest [ ] to be calculated on [$3.275 million] from March 30, 2001 to October 15, 2008 . . . [and then] [p]ursuant to paragraph 7, the principle [sic] amount of judgment then is subject to post-judgment simple interest at a rate of 12% per annum from May 20, 2005 to the present"). CP at 212-13.

[9] The Tomyns were "the plaintiffs in Pierce County cause no. 99-2-12800-7 . . . , whom the judgment creditors [Sharbonos] have designated to receive such payment." CP at 333.

[10] *See Spindle.* February 5, 2009 "Amended Order Granting in Part and Denying in Part Respondent's Motion to Modify" our commissioner's ruling denying motion to dismiss and request for accelerated review.

ANALYSIS

I. Scope of Appeal

In our February 5, 2009 order, we specifically limited Universal's appeal from the 2005 judgment to the method and manner used to calculate post-judgment interest:[11]

> Universal may challenge the trial court's calculation of post-judgment interest on appeal. It may not, however, challenge the $3.275 million judgment, which this court affirmed in the previous appeal [139 Wn. App. at 424].

See Spindle.

As we had previously noted in our 2007 opinion in this case, Universal failed to challenge the 2005 $3.275 million judgment or its terms in its earlier appeal. *Sharbono*, 139 Wn. App. at 424 ("Because Universal did not assign error to the directed verdict in the amount of $3,275,000, together with interest, *we affirm that judgment* . . . .") (emphasis added). Universal, therefore, may not challenge the 2005 $3.275 million judgment amount, the interest rate applied to that judgment, or the date of judgment the trial court used on remand in 2008 to calculate post-judgment interest, which terms Universal could have challenged in its previous appeal.[12] We agree with the Sharbonos that "Universal has no basis for re-visiting that part of the [2005] judgment affirmed by this court." Br. of Resp't/Cross-Appellant at 10-11. For the same reasons,

[11] *See* Feb. 5, 2009 "Amended Order Granting in Part and Denying in Part Respondent's Motion to Modify" ("Universal may challenge [only] the trial court's calculation of post-judgment interest on appeal."). *Spindle.* As intervenor Tomyn stated, "[A]ll that is left is simply how the trial court went about doing its math." Intervenor Resp. Br. at 11.

[12] The doctrine of collateral estoppel bars relitigation of issues that have already been, or could have been, determined in a prior judicial forum. *See Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987).

Universal's appeal from the trial court's denial of its CR 60 motion to reconsider its 2005 judgment also fails.[13] Accordingly, of Universal's several arguments on appeal, we reach only those relating directly to the trial court's calculation of interest on remand in 2008.

II. Calculation of Interest

Universal argues that in entering its 2008 judgment on remand from the first appeal, the trial court erred in calculating the post-judgment interest due on the 2005 $3.275 million judgment. We agree.

We review the trial court's calculation of interest for abuse of discretion. *Steele v. Lundgren*, 96 Wn. App. 773, 787, 982 P.2d 619 (1999) *review denied*, 139 Wn.2d 1026, 994 P.2d 846 (2000). As we have noted above, the trial court calculated interest twice: first, interest that had accrued on the $3.275 million judgment for purposes of paragraph 1, and again, when it applied simple interest to that new total (the 2005 judgment plus the first interest calculation) to reach a final amount that Universal owed under paragraph 7.[14] This compounding of interest was erroneous.

As we stated in *State v. Trask*, "Interest means simple interest absent agreement or statute

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[13] In addition, in light of our 2007 opinion and the doctrine of collateral estoppel, Universal's passing treatment of this issue fails to persuade us to address this argument further.

[14] *See* report of the Sharbonos' CPA:

> "[T]he determination of the principle [sic] judgment amount for purposes of paragraph 1 merely requires simple interest [ ] to be calculated on [$3.275 million] from March 30, 2001 to October 15, 2008 . . . [and then] [p]ursuant to paragraph 7, the principle [sic] amount of judgment then is subject to post-judgment simple interest at a rate of 12% per annum from May 20, 2005 to present."

CP at 212-13.

to the contrary." 98 Wn. App. 690, 696-97, 990 P.2d 976 (2000); *see also Caruso v. Local Union No. 690, Int'l Bhd. of Teamsters*, 50 Wn. App. 688, 689, 749 P.2d 1304 (1988) (Under interest statutes, RCW 4.56.110 and RCW 19.52.020, post-judgment interest is simple rather than compound interest.). Here, the trial court should have calculated simple interest on the 2005 $3.275 million judgment, at a rate of 12% annually, from the original March 30, 2001 date of entry of the judgment, $3.275 million of which is Universal's outstanding share, until Universal pays in full. Holding that the trial court erred in its calculation of interest, we remand to recalculate the interest that Universal owes on its $3.275 million share of the March 30, 2001 judgment, using an annual rate of 12% simple interest.

III. Cross-Appeal, Assignment of Interest

On cross-appeal, the Sharbonos argue that they, not the Tomyns, are entitled to the post judgment interest accruing on the $3.275 million judgment against Universal. We disagree.

In their settlement of the Tomyns' lawsuit against them, reduced to judgment in 2001, the Sharbonos assigned to the Tomyns their right to recover against Universal. The Sharbonos do not explain why this assignment did not include assignment of their rights to interest accruing on Universal's unpaid judgment. Nor is their argument on appeal persuasive. The purpose of interest is to provide compensation for the "lost value of money" to the party to whom it was "properly attributable." *Rufer v. Abbott Lab.*, 154 Wn.2d 530, 552, 114 P.3d 1182 (2005). Here, the judgment and, thus, the interest were "properly attributable" to the Tomyns, not the Sharbonos. Accordingly, we affirm the trial court's designation of the Tomyns as the recipients of the post judgment interest.

We affirm the designation of the Tomyns as recipients of the interest Universal owes on its $3.275 million share of the March 30, 2001 judgment as recited in paragraph 1 and, to the extent it does not compound interest, paragraph 7 of the May 20, 2005 judgment. We vacate the amount of this interest award and remand for recalculation of such interest at a rate of 12% per year, from March 30, 2001, until Universal pays it.[15]

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.

Hunt, J.

We concur:

Bridgewater, P.J.

Van Deren, J.

[15] Universal failed to "devote a section of its opening brief to the request for [attorney] fees or expenses," as RAP 18.1(b) requires. Therefore, we do not consider awarding them.