1 3 2012

No. 310914

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

COLLEEN KELLY, an individual,

Appellant,

v.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,
a corporation organized pursuant to the laws of Minnesota,

Respondent.

OPENING BRIEF OF APPELLANT

David J. Lenci, WSBA #7688
Whitney J. Baran, WSBA #41303
Ash Miller, WSBA #45125
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580
Attorneys for Appellant

1 3 2012

No. 310914

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

COLLEEN KELLY, an individual,

Appellant,

v.

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,
a corporation organized pursuant to the laws of Minnesota,

Respondent.

OPENING BRIEF OF APPELLANT

David J. Lenci, WSBA #7688
Whitney J. Baran, WSBA #41303
Ash Miller, WSBA #45125
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

WASHINGTON STATE CASES

OTHER STATE CASES

WASHINGTON STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION

Less than two months before her case was to go to MAR arbitration, Plaintiff-Appellant, Ms. Colleen Kelly, had her claims summarily dismissed in the Superior Court. Her claims arose out of the cancellation of three annuity contracts issued by Defendant-Respondent Allianz Life Insurance Company of North America ("Allianz") that were never approved by the State and were sold to Ms. Kelly by an unscrupulous insurance broker. Once confronted that its annuities were not authorized for sale in Washington, Allianz returned her premium payments. In doing so, however, Allianz failed to include interest on her premiums in the percentage provided by law in the Washington general interest statute, RCW 19.52.010, which was twelve percent, instead only paying Ms. Kelly three percent.

Once negotiations between the parties failed, Ms. Kelly filed a lawsuit against Allianz on August 11, 2011, seeking the full amount of interest to which she is entitled. After the matter was set for MAR arbitration, Allianz moved for summary judgment in Superior Court arguing that the applicable statute of limitations is three years, and that it had run before the suit was commenced. The Court below agreed and dismissed the case without any findings, conclusions, or comment.

Pursuant to RCW 4.16.040, the applicable statute of limitations is six years and did not begin to run until the point in time, September 13, 2005, when Allianz refunded Ms. Kelly her premiums and shorted her on the applicable interest. Under a proper interpretation of the applicable law, the decision below should be reversed and Ms. Kelly be allowed her "day in court" so that her claims may be decided on the merits.

Rescission of the annuities was never completed or fully consummated because Ms. Kelly never received reimbursement for the full statutory rate of interest on her initial payments under the annuity contracts. Instead, Allianz chose an arbitrary rate of three percent and paid that amount to Ms. Kelly. Allianz has never explained how it chose three percent. However, by its conduct Allianz concedes that it owed Ms. Kelly interest. The dispute now before this Court concerns what is the appropriate rate of interest to be applied while Ms. Kelly's monies were held by Allianz pursuant to the illegal contracts, and the applicable limitations period to that claim for interest.

Ms. Kelly seeks to recover the full interest to which she is entitled, namely, the difference between the three percent paid by Allianz and the twelve percent owed to her under RCW 19.52.010. She is entitled to this interest to compensate her for the lost time-value of money held by Allianz while the parties were unaware of the illegality of the annuities.

This would restore her to the *status quo ante*, which is the appropriate remedy in the context of rescission.

I. Assignments of Error

1. The Superior Court erred in granting summary judgment because Ms. Kelly is entitled to twelve percent interest on principal invested in the illegal annuity contracts pursuant to Washington's general interest statute, RCW 19.52.010.

2. Ms. Kelly's claims are subject to a six-year statute of limitations pursuant to RCW 4.16.040 because they involve Allianz's liability arising out of written agreements, and these claims accrued when Allianz failed to repay the full amount of interest Ms. Kelly was owed. Prior to that time, there was no dispute or justiciable controversy between the parties. The Superior Court erred in granting summary judgment to the extent it found Ms. Kelly's claims untimely.

3. To the extent it granted summary judgment based on accord and satisfaction of Ms. Kelly's claims as a matter of law, the Superior Court erred since accord and satisfaction involves a factual determination of the parties' intent, and these material facts are in dispute on that question. Evidence in the record demonstrates Ms. Kelly never intended to agree to settle this dispute.

Issues Pertaining to Assignments of Error

1. Under Washington law, does the general interest statute, RCW 19.52.010, apply to the return of premiums held as payment for illegal investment annuities when the annuities were not approved for sale in Washington and were later rescinded?

2. Does a six-year statute of limitations from RCW 4.16.040 apply when a claim is brought for statutory interest upon rescission of a written contract? Does a claim for interest accrue and become ripe at the point in time when the rescinding party provides the wrong amount of interest when, prior to that time, the rescinding party gave no indication that it would violate the general interest statute?

3. Did the parties agree, as a matter of law, to settle this dispute, where the matter was not in dispute at the time of the alleged "accord and satisfaction," where there was and is no agreement manifesting the parties' intent to settle, no other evidence offered to indicate the parties intended to settle, and where one party disputes that it ever intended to settle and has evidence to support its position?

II. Statement of Facts

In April of 2004, Ms. Kelly was introduced to Curtis Horton, an insurance broker, who represented himself as a financial and retirement planning consultant. (CP 95) When she told Mr. Horton she had investments of roughly $100,000.00, he urged her to acquire certain annuity policies he was selling: the annuity policies at issue in this case issued by Allianz (the "Annuities"). (CP 95)

Based on Horton's statements, Ms. Kelly purchased three Allianz Annuities. To do so, however, she had to liquidate all of her existing independent investment assets in order to pay Allianz the premiums. (CP 96)

After discovering that the Allianz Annuities were never approved for sale in Washington, Ms. Kelly inquired of the Washington Office of the Insurance Commissioner ("OIC") whether the contracts might be terminated. The Washington OIC informed Allianz that the Annuities sold to Ms. Kelly by Mr. Horton, agent for Allianz, were never approved for sale in Washington, and requested that the contracts be terminated.

(CP 104) Mr. Horton subsequently had his insurance broker's license revoked. (CP 12-14)

Allianz, through its Compliance Analyst, Mary Lou Fleischhacker, canceled the policies via a letter dated September 13, 2005. (CP 21) Enclosed with the letter were checks for the premium amounts as well as three percent interest. *Id.* The premiums and the interest for each annuity were combined into one check per policy. Ms. Kelly had little choice but to cash these checks, given that she had earlier liquidated her other investments to pay Allianz for the Annuities in the first place. Allianz has characterized this return of monies as having "rescinded" the Annuities, however, Ms. Kelly received only three percent interest on her premiums. (CP 26) There were no representations in the September 13, 2005, letter from Allianz, nor were there any recitals or restrictive endorsements on these checks, stating or implying that Ms. Kelly was agreeing to accept three percent interest as the final resolution of her claims against Allianz by depositing the checks. (CP 21)

In fact, Ms. Kelly never agreed explicitly or implicitly that three percent was the proper amount of interest to which she was entitled in conjunction with restitution of the Annuity premiums. The contrary is true. (CP 96) In the time following her receipt of the checks from Allianz, Ms. Kelly contacted Allianz by phone and spoke with Ms.

Fleischhacker. (CP 108) Ms. Kelly told Ms. Fleischhacker that she was dissatisfied with the amount of the checks and that she felt she was entitled to more, especially in interest. *Id.* Ms. Fleischhacker of Allianz made notes of this conversation from March 20, 2006, and recorded that "Ms. Kelly has consulted an attorney and was told Allianz should have paid her twelve percent interest in accordance with the Washington statute regarding statutory pre judgment law. Calling to get additional 9% interest sent to her." (CP 94)

During November 2008, Ms. Kelly retained counsel and notified Allianz of this development. (CP 110) Counsel for Ms. Kelly contacted Allianz by phone to discuss the interest rate matter. (CP 90) Over time, Allianz and counsel for Ms. Kelly engaged in a series of written communications regarding the dispute over the amount of interest owed to Ms. Kelly. This process came to a head during the spring and summer of 2011, when counsel for Ms. Kelly and Allianz attempted to negotiate a resolution of the dispute over the interest paid to Ms. Kelly. (CP 116-145) The parties were unable to resolve the dispute and the original complaint was filed on August 19, 2011. (CP 36) The complaint was later amended on December 19, 2011. (CP 1-26)

In the communications between Ms. Kelly, her attorney, and Allianz prior to filing this lawsuit, Allianz never once contended that by

depositing the premium refund check, Ms. Kelly was agreeing or accepting that three percent was the proper measure of interest to which she was entitled, or that her depositing of the checks was a settlement of her claims. Nor were any assertions made by Allianz prior to the filing of this suit that her claims were time barred.

Because of the amount in controversy, this matter was subject to Mandatory Arbitration MAR. An arbitration hearing was scheduled for September 21, 2012. However, before the arbitration went forward, Allianz succeeded on its motion for summary judgment and the matter was dismissed on July 27, 2012. (CP 169-170)

ARGUMENT

III. Standard of Review

This Court is reviewing a grant of summary judgment by the Superior Court on Ms. Kelly's two claims for relief: (1) for rescission of the annuity contracts and (2) for declaratory judgment regarding the rights of the parties. Accordingly, the standard of review of the record and matters of law here is *de novo*. *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100, 1105 (2012); *Pelton v. Tri-State Memorial Hospital, Inc.*, 66 Wn. App. 350, 354, 831 P.2d 1147, 1150 (1992) ("In reviewing a summary judgment, the appellate court engages in the same inquiry as the trial court.").

In addition, because this case calls for construction of statutes, including RCW 19.52.010 (general interest), RCW 4.16.040 (statute of limitations), and RCW 4.16.270 (effect of partial payment of liability on statute of limitations), review of these statutory construction issues is also *de novo* as a matter of law. *Jackowski*, 174 Wn.2d at 729.

A motion for summary judgment may only succeed if there is no genuine issue of material fact when viewing the evidence in the light most favorable to the nonmoving party. *Id.* ("We review *de novo* an order granting summary judgment, taking all facts and inferences in the light most favorable to the nonmoving party.")(quotation omitted); *Wm. Dickson Co. v. Pierce Cnty.*, 128 Wn. App. 488, 492, 116 P.3d 409, 412 (2005) (reversing grant of summary judgment below in contract context, setting forth standard of review as *de novo*). An appellate court may only affirm summary judgment if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825, 142 P.3d 209, 212 (2006).

Here, the applicable law and relevant facts demonstrate that Ms. Kelly has a cognizable right to recover twelve percent interest on premium amounts paid to Allianz on the Annuities, that her claims for

relief were timely filed within the applicable statute of limitations, and the parties did not agree to settle this dispute.

IV. Ms. Kelly is Entitled to Twelve Percent Interest per RCW 19.52.010 on Payments to Allianz.

RCW 19.52.010 ("Rate In Absence Of Agreement") states:

> (1) Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties ....

Courts have given this statute broad effect by holding that RCW 19.52.010 applies a twelve percent rate of interest to any "liquidated" claim, meaning an amount capable of determination as a sum certain without recourse to opinion or discretion. *See, e.g., Wright v. Dave Johnson Ins., Inc.*, 167 Wn. App. 758, 776, 275 P.3d 339, 350 (2012) (applying RCW 19.52.010 rate to reimbursement of insurance premium payments).

Neither party disputes that Ms. Kelly's claims are "liquidated" as they are for a fixed and easily ascertainable sum. A sum certain, $136,437.13, was the amount Ms. Kelly paid in premiums to Allianz for the Annuities, and $141,221.69 was the amount Allianz returned to her—representing her premiums, plus three percent interest. (CP at 2, 18-19, 21-24, 34-35.) By applying simple math to Ms. Kelly's claim for interest, the amount of Ms. Kelly's claim is easily computed, without recourse to

opinion or discretion. Thus, Ms. Kelly's claim is liquidated and within the purview of RCW 19.52.010.

Aside from the fact that Ms. Kelly's claim is within the purview of RCW 19.52.010 because it is a liquidated claim, it also falls within the plain language of the statute as a forbearance. Using the definition of forbearance relied upon by Allianz, a forbearance is "[t]he act of refraining from enforcing a right, obligation, or debt." Bryan A. Garner, *Black's Law Dictionary* (West 2006). (CP 39) Neither party disputes that Allianz held Ms. Kelly's premium payments in exchange for purported annuity insurance contracts. Upon Ms. Kelly's discovery that the contracts were illegal, the Washington State OIC contacted Allianz to request the contracts be terminated, which Allianz did. Acknowledging her right to the premiums paid, Allianz returned the amount Ms. Kelly had paid with a three percent rate of interest. Because she had a right to the money from the moment she paid for the illegal investment Annuities, Ms. Kelly's act of not enforcing that right during the period that Allianz wrongfully held her money fits squarely within the definition of forbearance. From the plain language of RCW 19.52.010, Ms. Kelly is entitled to a rate of twelve percent interest for the period of forbearance.

a. Twelve Percent Interest Accrues to Insurance Premiums And Amounts Held Pursuant to Rescinded Contracts

RCW 19.52.010 applies to reimbursement of insurance premiums. *Wright*, 167 Wn. App. at 776. The *Wright* Court reversed and remanded a lower court's rejection of the statutory rate and adoption of a lower rate—a rate the court below deemed a "fair" rate. *Id.* The *Wright* Court reversed and held that RCW 19.52.010 statute "mandates" twelve percent interest when the parties have not agreed on some other rate. *Id.* (*citing Schrom v. Bd. for Volunteer Fire Fighters*, 153 Wn.2d 19, 36, 100 P.3d 814 (2004).). Thus, regardless of whether the three percent Allianz provided to Ms. Kelly is deemed "fair"—which it is not—that would not be the proper amount here. The *Wright* case mandates that statutory twelve percent interest applies to Allianz's return of Ms. Kelly's premium amounts, which were held wrongly throughout the duration of the illegal annuity contracts.

This result makes sense in the rescission context and is supported by case law. During the period Allianz held Ms. Kelly's investment premiums as payment for the investment contracts which turned out to be valueless, Ms. Kelly was deprived of the use of those funds. For this reason, when illegal contracts (such as Ms. Kelly's investment Annuities) are rescinded, RCW 19.52.010 sets the interest rate at twelve percent in

order to restore the innocent party to its pre-contract position, absent a contrary term in the contract itself. *See Morango v. Phillips*, 33 Wn.2d 351, 357-58, 205 P.2d 892, 895 (1949) ("if a rescission is had, ... each party to the contract must place the other in status quo in so far as it is practicable or possible so to do."); *Hornback v. Wentworth*, 132 Wn. App. 504, 505, 132 P.3d 778, 782 (2006) (applying twelve percent interest rate from RCW 19.52.010 to rescinded contract for funds paid pursuant thereto, reasoning "[r]escission is an equitable remedy and requires the court to fashion an equitable solution.").

The *Hornback* Court's reasoning should inform the reasoning here since it confronted facts remarkably similar to those in this case. In *Hornback*, the plaintiff asserted a common law claim of rescission arising out of a written land sale agreement where a zoning change made performance illegal. *Id.* at 508-509. The plaintiff had paid the defendant sums pursuant to the written agreement, which were held by the defendant until the contract was rescinded. *Id.* The seller argued that the rate of interest on funds paid as set forth in the contract—eleven percent—should apply to the return of monies after rescission. *Id.* at 514. However, the Court awarded the full twelve percent interest on those funds pursuant to RCW 19.52.010.

Twelve percent is the relevant interest rate applicable to funds paid pursuant to a rescinded contract where no rate is specified in the terms of the contract. *Id.* at 514. Here, twelve percent is appropriate because the Annuities at issue contained no express interest rate in the event of rescission. That other returns on monies may be contained in the contracts is irrelevant. As the *Hornback* Court reasoned:

> While the parties' contract sets an 11 percent interest rate, this rate related to (1) the rate the Hornbacks would pay if payments were deferred, and (2) the rate the Hornbacks would pay on property expenses, such as taxes and insurance, paid by the Wentworths if the Hornbacks failed to pay the expenses. *The contract interest rate was not set to provide for equitable restitution upon rescission.* Considering all, we cannot say the court erred in equitably setting the prejudgment interest rate at twelve percent.

Id. at 514 (emphasis added).

As in *Hornback*, the written agreement in this case did not provide for an interest rate in the event of rescission. (CP at 2 (Complaint, ¶ 7), 28 (Answer, ¶ 7)) Since Allianz refused to pay the full statutory twelve percent interest, Ms. Kelly is entitled to the balance owing under the statutory twelve percent interest.

Here, Allianz rescinded the contract, but the rescission was never complete or consummated because Allianz did not pay Ms. Kelly the full amount of interest it owed. Ms. Kelly has yet to be restored to where she would have been had the contracts never existed. *Morango v. Phillips,* 33

Wn.2d at 357-58. Under these circumstances, the legal rate of interest is supplied by RCW 19.52.010. *Id.*; *see also Hornback*, 132 Wn. App. at 514.

b. Twelve Percent Interest Accrues in Cases of Voluntary Rescission.

The fact that the rescission here was initiated through mutual and voluntary action—as opposed to a court order—does not change the analysis. Nor is the fact that the obligor admits it owes the principal amount germane.

In *Schrom*, the Washington Supreme Court held that twelve percent interest was mandatory on sums returned to payors who erroneously paid premiums into a pension system over several years. 153 Wn.2d at 36. The *Schrom* defendant conceded liability on the underlying amount, "stipulating it would be liable to respondents for all coverage fees erroneously paid." *Id.* at 35. However in *Schrom,* as here, only the rate of interest was disputed. *Id.* The Supreme Court held that twelve percent applied pursuant to RCW 19.52.010 because "no other rate was agreed between the parties." *Id.* at 36. To hold otherwise would have given the defendant a "windfall for inadvertently accepting coverage fees [the amounts erroneously paid]" under wrongful circumstances. *Id.* The same logic applies here—to allow Allianz to retain Ms. Kelly's monies under

illegal contracts, have the benefit of those funds, and not return them with adequate interest, would provide a similar windfall benefit. Absent RCW 19.52.010, Allianz would be free to pick any interest rate out of the air—here it inexplicably chose three percent.

In *Morango v. Phillips*, the Washington Supreme Court further explained that restoring the parties to their respective positions as if the contract had never existed is the relevant inquiry in the case of *voluntary* rescission: "if a rescission is had, *either as the result of a decree of court or by mutual agreement*, each party to the contract must place the other in status quo in so far as it is practicable or possible so to do," 33 Wn.2d at 357-58 (emphasis added). This is because "[t]he contract is at an end as though it never existed." *Id.*

c. Allianz Concedes Interest is Owed.

On September 13, 2005, Allianz returned Ms. Kelly's premium funds with three percent interest. (CP at 21.) By returning Ms. Kelly's capital with interest (albeit at an incorrect rate), Allianz has admitted that interest accrued on her funds during the period it held them. *See Spencer v. Alki Point Transp. Co.*, 53 Wn. 77, 90, 101 P. 509, 514 (1909) ("Part payment of the bill or note after its maturity by the drawer or indorser, is an acknowledgment of liability, and therefore, alone and unexplained, is presumptive evidence that the liability was duly fixed according to law.").

Accordingly, the only dispute is the correct rate of interest on Ms. Kelly's funds.

Investment vehicles, such as the Annuities sold by insurance companies like Allianz, provide Allianz with the benefit of possessing an investor's capital for a certain period of time, allowing them to gain a return on that capital. Allianz has retained that benefit, having held Ms. Kelly's capital pursuant to illegal contracts for a period of time, and has only repaid Ms. Kelly an arbitrarily low interest rate of three percent—contrary to the statutory mandate of twelve percent. It is inequitable in the context of rescission for a party to retain the benefit of a contract while seeking to rescind the remainder of the deal. *See Gentry v. Smith*, 487 F.2d 571, 578-579 (5th Cir. 1973) ("... it is inequitable to allow one party to a ... contract to retain both the subject matter of the transaction and the benefit conferred upon him by the other party").

V. The Six-Year Limitations Period Provided For in RCW 4.16.040 Applies Because Allianz's Liability Arises Out of a Written Agreement.

Allianz's liability for interest arises out of three written investment annuity contracts. The applicable limitations period on Ms. Kelly's claims is clearly provided by RCW 4.16.040. That section states:

> The following actions shall be commenced *within six years: (1) An action upon a contract in writing, or liability express or implied arising out of a written agreement*

RCW 4.16.040 (emphasis added).

The law is clear in Washington that actions for rescission or declaratory judgment regarding the rights of the parties derived from written agreements are covered by a six year statute of limitations because they are actions upon contracts in writing and involve liability—express or implied—"arising" out of written contractual agreements. *See, e.g., Hornback,* 132 Wn. App. at 514.

In *Hornback*, this Court analyzed the appropriate statute of limitations for rescission of a contract based on illegality—a remarkably similar circumstance to that presented here. 132 Wn. App. at 514. The Court found that "rescission based upon mutual mistake is still an action upon a written contract subject to the six-year limitation period of RCW 4.16.040." *Id.*

In claims for declaratory judgment, courts look to the underlying nature of the claim at issue to supply the appropriate statute of limitations. Thus, for Ms. Kelly's claims of rescission and declaratory judgment, the appropriate statutory limitation period is six years.

VI. The Six-Year Limitations Period Began to Run no Earlier Than September 13, 2005, When Allianz Paid Ms. Kelly The Wrong Amount of Interest.

The statute of limitations began to run no earlier than September 13, 2005—the date of Allianz's underpayment of interest. This is the first time Ms. Kelly could have been aware of her current claims for relief because it is the date Allianz arbitrarily underpaid her by adding only three percent interest to her principal repayment. Until then, no dispute existed between the parties and no claim could have accrued. The statute of limitations could not, by definition, have begun to run earlier, because Ms. Kelly did not yet have a justiciable claim for relief. Ms. Kelly had no notice prior to that day that Allianz would act wrongfully and had no reason to believe it would not comply with the law in refunding her premiums with the proper interest factor.

a. No Case or Controversy Existed Prior to September 13, 2005.

A limitations period cannot run before a party has a right to relief. *Thompson v. Wilson,* 142 Wn. App. 803, 818, 175 P.3d 1149, 1156 (2008); *Erickson v. Chase*, 156 Wn. App. 151, 157, 231 P.3d 1261 (2010) ("[t]he statute of limitations does not necessarily begin running from the date of the written agreement. It begins running when the cause of action accrues, meaning when a party has the right to apply to the court for relief.") (citing RCW 4.16.005; *Haslund v. Seattle*, 86 Wn. 2d 607, 619,

547 P.2d 1221 (1976); *Campbell v. Loftus*, 36 Wn. App. 678, 679, 676 P.2d 1025 (1984)) (emphasis added). For a party to ask a court to grant relief, there must first exist a justiciable controversy between the parties. *Thompson*, 142 Wn. App. at 818. The essence of a justiciable controversy is the existing of actual, present, opposing interests that are direct and substantial, between the parties:

> (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Id.

Prior to September 13, 2005, Ms. Kelly could have had no actual dispute with Allianz regarding the amount of interest to be paid on her principal amounts. No factual material in the record hints that Allianz may have picked a three percent rate prior to September 13, 2005. Accordingly, this case and controversy could not have arisen prior to Ms. Kelly having notice that Allianz would underpay the interest to which she was entitled. As a matter of law, the statute of limitations could therefore not have begun to run until September 13, 2005, at the earliest. *See, e.g, Alabama v. U.S.*, 630 F.Supp.2d 1320, 1327 (S.D. Ala. 2008) ("a

cause of action does not accrue, so as to trigger the limitations period, until the claim is ripe for judicial resolution."). The case was filed on August 19, 2011. Thus, this Court should not hold that the statute of limitations in the case at bar began to run before Ms. Kelly had the right to bring a cause of action against Allianz for wrongful payment of interest.

b. RCW 4.16.040 Claims Accrue Upon Breach.

This result is consistent with well-established principles for accrual of contractual claims under the applicable limitations period of RCW 4.16.040. It is black letter law that accrual of contractual claims occurs when the wrongful act of a party results in a violation of the other party's rights—i.e., the act contrary to the other party's rights. The operative date to commence the contractual statute of limitations RCW 4.16.040 is not the date the duty *arises*, but rather that date a party *violates* that duty. Put another way, in any action based upon a written contract, or "where liability is express or implied arising out of a written agreement," the action must be commenced within six years after breach of that party's obligations. *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 353, 997 P.2d 353, 356 (2000) ("the contract statute of limitations begins to run against an insured on the date the insurer breaches the contract of insurance"); 25 Wash. Prac. § 16:20 ("In any action based upon a written contract, or where liability is express or implied arising out of a written

agreement, the action itself must be commenced within six years *after breach.*") (emphasis added).

Courts and parties should not infer or anticipate a wrongful act or breach before it occurs, absent clear and positive statements to the contrary. *Versuslas, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 321-22, 111 P.3d 866, 872 (2005). It logically follows that no justiciable controversy exists prior to the breaching party's wrongful act as discussed above. *Schwindt,* 140 Wn.2d at 353.

Applying these basic principles here leads to only one conclusion: the act giving rise to Ms. Kelly's claims for twelve percent interest was Allianz's underpayment of interest, which occurred on September 13, 2005. This is the key operative fact upon which Ms. Kelly's claims are founded and the accrual of her claims could not (and did not) occur before then.

Moreover, discovery of fraud does not trigger a limitations period. Where a party seeks rescission because that party was defrauded by an illegal investment contract, the date of potential discovery of the fraud does not trigger a limitations period, but the date of rescission should be considered when determining the start date of the statute of limitations triggers. *See Taback v. Greenberg*, 108 Cal. App. 759, 760, 292 P. 279 (2d District 1930) ("instead of the statute of limitations for the bringing of

this action running from ... when the alleged fraud was discovered, it would not begin to run until the cause of action accrued—on... when the notice of rescission was served."). Here, the date of rescission was September 13, 2005.

Therefore, Ms. Kelly's claim is timely because it was first filed August 19, 2011—less than six years after the limitations period began to run on September 13, 2005 (the date of Allianz's unlawful underpayment of interest).

c. Allianz's Partial Payment Would Toll Any Limitations Period Per RCW 4.16.270.

Any doubt about the proper accrual date is resolved by another statute that addresses partial payments on liabilities arising from contracts and written instruments. RCW 4.16.270 tolls the running of any limitations period until the date of the last partial payment made on any interest and principal sums owed.

RCW 4.16.270 ("Effect of partial payment") provides:

> When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

This section should be read in conjunction with the applicable contractual limitations period from RCW 4.16.040, found in the same

chapter of the revised code as RCW 4.16.270. There can be no doubt that Allianz owed a debt to Ms. Kelly at the time it remitted partial payment of principal and interest on September 13, 2005.

The "partial payment" toll in RCW 4.16.270 codifies a common law rule–partial payment of a sum owed operates as implicit acknowledgement of the full amount owed, and therefore renews the limitations period on a claim arising therefrom. *Perkins v. Jennings*, 27 Wn. 145, 151-52, 67 P. 590, 592-93 (1902); *Hamilton v. Pearce*, 15 Wn. App. 133, 137-38, 547 P.2d 866, 870 (1976).

The *Hamilton* Court applied the partial payment toll as follows:

> It should first be noted what the partial payment statute is. It is substantially a codification of the common-law rule. Most, if not all states, have a similar rule of law, if not by statute then as a part of their common law. The underlying principle upon which partial payment will start the limitation period running anew is that part payment amounts to a voluntary acknowledgment of the existence of the debt and from this the law implies a new promise to pay the balance. The courts of this State have consistently referred to the partial payment statute as being a 'tolling' statute. In discussing the effect of partial payments on statutes of limitation, they have also consistently referred to such payments as 'tolling' the statutes of limitation.

Hamilton, 15 Wn. App. at 137-38.

However, this question cannot be easily resolved on summary judgment because it involves factual inquiry into the intent of the paying party. While it appears Washington courts have yet to address this

specific issue, courts elsewhere have found that whether partial payment can toll the limitations period is a question for the trier of fact:

> Whether partial payment constitutes unequivocal acknowledgment of the whole debt from which an unconditional promise to pay can be implied thereby tolling the statute of limitations is a question for the trier of fact.

See, e.g., Birarelli v. Wright, 2002 WL 1492179 at *5 (Conn. Super. 2002).

Ms. Kelly's claims were timely, whichever rule discussed above applies. Claims for liability "arising from" written contracts or agreements are subject to a six-year statute of limitations that commences upon the wrongful act by a defendant. Here, that act occurred no earlier than September 13, 2005, when Ms. Kelly first learned Allianz would apply an arbitrary three percent interest rate in returning her premiums instead of the rate mandated by RCW 19.52.010. Before September 13, 2005, Ms. Kelly had no way of knowing of whether Allianz would use an improper interest rate in returning her premium payments, or of the underpayment that would violate Kelly's right to statutory interest. Prior to that date, there was no reason to sue Allianz because no dispute about the interest rate existed and the claim before this court would not have been justiciable. Ms. Kelly's claims are timely because this action was filed August 19, 2011, less than six years later.

VII. Accord And Satisfaction.

Allianz argued below that there was a "binding" accord and satisfaction in this case.[1] (CP at 40-41) However, the facts in this case fail to meet any of the three elements required for the accord and satisfaction defense. Accord and satisfaction requires that the parties have: (1) a bona fide dispute; (2) an agreement to settle that dispute; and (3) performance of that agreement. *Silverhawk, LLC v. KeyBank Nat. Ass'n*, 165 Wn. App. 258, 264-65, 268 P.3d 958 (2011) (*citing Paopao v. State, Dept. of Social and Health Services*, 145 Wn. App. 40, 46, 185 P.3d 640 (2008)). "In order to establish this defense, the *proponent must show that a bona fide dispute existed at the time payment was made*." *Id.* (*citing Housing Authority of County of King v. Northeast Lake Washington Sewer and Water Dist.*, 56 Wn. App. 589, 598, 784 P.2d 1284 [789 P.2d 103, review denied, 115 Wash.2d 1004, 795 P.2d 1156] (1990)).

In its arguments, Allianz attempted to miscast the parties' dispute in an effort to shoehorn its defenses into the law. With regard to the first prong of the accord and satisfaction defense, the "bona fide dispute" here is whether Ms. Kelly was owed three percent or twelve percent interest when the contracts between the parties were rescinded. In an effort to

---

[1] This issue was briefed below but not reached at oral argument or by the Superior Court's order, which did not set forth any reasoning for the ruling.

sidestep this issue, Allianz's asserts that the dispute concerns whether the Annuities themselves should have been rescinded. Yet, there was never any dispute about returning the premium amounts to Ms. Kelly. Allianz rests its case on its unilateral return of the premiums. However, Allianz "must show that a bona fide dispute existed at the time payment was made." *Silverhawk*, 165 Wn. App. at 264-65. It cannot. The dispute in this case did not exist until after the payment was made, when Ms. Kelly discovered she was shorted on the proper amount of interest on the money she entrusted to Allianz.

With regard to the second prong (an agreement to settle the parties' dispute), there is no evidence in the record that the parties agreed to settle the dispute over the interest payments. All the evidence is to the contrary. When Ms. Kelly received the checks from Allianz, Ms. Kelly contacted Alliance by phone and spoke with Ms. Fleischhacker. (CP at 96, ¶ 8.) Ms. Kelly told Ms. Fleischhacker that she was dissatisfied with the amount in the checks and that she felt she was entitled to more, especially in the amount of interest. *Id.* Ms. Fleischhacker's notes from March 20, 2006, as produced by Allianz, state that Ms. Kelly was "[c]alling to get additional 9% interest sent to her." (CP at 94). This document establishes that there was a dispute regarding the amount of interest owed to Ms. Kelly, not an agreement on three percent.

Additionally, counsel for Ms. Kelly engaged in a series of telephone and written communications with Allianz discussing the dispute over the interest payments. (CP at 92, 111-171). The dispute is now before this Court. Allianz cannot point to any evidence that the parties agreed to settle the dispute over the interest amount.[2] All the evidence is to the contrary.

Regarding the third accord and satisfaction prong (performance of the agreement to settle the dispute), Allianz likewise cannot point to any performance of a settlement because there has been no agreement between the parties to settle this dispute. Allianz has not, and cannot, establish an accord and satisfaction defense, as a matter of law.

To the extent that Allianz and Ms. Kelly may have somehow "agreed" that her premium payments would be returned, it was Allianz

---

[2] Allianz also argued that the parties mutually agreed upon three percent interest "in writing" when Allianz sent Ms. Kelly checks including three percent interest and Ms. Kelly cashed those checks. (CP at 42). This claim falls woefully short of an agreement "in writing" between the parties for three percent interest. Even Allianz's transmittal letter itself does not state that the checks are provided in "full settlement" of any claims. (CP at 21.) Nor do the checks make any such statement. (CP 18-19.) As a sophisticated contracting party that regularly deals in insurance products and limitation of risk, it stands to reason that Allianz's failure to include even a boilerplate statement that Ms. Kelly was settling her claims against Allianz was intentional. Allianz does not point to any writing that shows a mutual agreement regarding final settlement between the parties that they settled on three percent as the appropriate interest on the debt because there is none.

that ultimately unilaterally chose the three percent interest rate: a decision that has been disputed continuously from that time up to the present. Indeed, Allianz has never explained why it chose the three percent rate or proffered any writing or other communication wherein Ms. Kelly "agreed" that this was the proper rate.

Allianz's arguments attempt to construe Ms. Kelly's claims in an anachronistic and absurd manner. Allianz's interpretation of RCW 19.52.010 would allow a rescinding party to always be able to unilaterally and arbitrarily choose a favorable rate of interest upon rescission of an illegal contract. By including this arbitrary amount, the rescinding party can pick any interest figure it wishes and assert that percentage is legal, regardless of the twelve percent general interest statute. This gamesmanship should not be allowed. *See City of Auburn v. Gauntt*, 174 Wn.2d 321, 330, 274 P.3d 1033, 1037 (2012) (courts do not interpret statutes so as to achieve absurd results).

Even if this Court believes Ms. Kelly may possibly have settled this matter, genuine issues of material fact are disputed in the record regarding the parties' intent, precluding summary judgment. Ms. Kelly's statements to Allianz in 2006, and her sworn statement to the Superior Court on the motion for summary judgment below, both strongly dispute (and even negate) Allianz's contentions that the parties settled this matter.

(CP 86-97.) The intent of the parties is a fact-specific inquiry and all factual inferences on summary judgment should be drawn in favor of Ms. Kelly as the non-moving party. *Jackowski*, 174 Wn.2nd at 729.

At a minimum, the accord and satisfaction defense has not been established as a matter of law on this record. Sufficient factual issues exist so as to require a trial on this defense.

CONCLUSION

For all of the above reasons, Ms. Kelly respectfully requests that this Court reverse the decision of the Superior Court granting Allianz summary judgment and dismissing Ms. Kelly's claims, and remand for further proceedings.

DATED this 13th day of December, 2012.

Respectfully submitted,

K&L GATES LLP

By /Whitney J. Baran/

David J. Lenci, WSBA # 7688
Whitney J. Baran, WSBA # 41303
Ash Miller, WSBA # 45125
Attorneys for Appellant Colleen Kelly

DECLARATION OF SERVICE

I, Nancy Hunt, do hereby declare under penalty of perjury under the laws of the State of Washington, that on the date below, I served a copy of the foregoing document, OPENING BRIEF OF APPELLANT, to the following persons in the manner indicated:

DAVID R. EBEL, WSBA #28853 CLAIRE R. BEEN, WSBA #42178 AVERIL ROTHROCK, WSBA #24248 SCHWABE, WILLIAMSON & WYATT, P.C. U.S. BANK CENTRE1420 5TH AVENUE, SUITE 3400 SEATTLE, WA 98101-4010 [Attorneys for Respondent]	VIA HAND DELIVERY ☒ VIA EMAIL ☒

EXECUTED this 13th day of December, 2012, Spokane, Washington.

Nancy K. Hunt

Nancy Hunt, Legal Assistant

Appendix

Authority Provided Pursuant to Washington State Court General Rules, Rule 14.1

Note: The following case may be cited pursuant to GR 14.1(b) insofar as Connecticut Superior Court Rule 5-9, "Citation of Opinion Not Officially Published," permits such citation as follows: "An opinion which is not officially published may be cited before a judicial authority only if the person making reference to it provides the judicial authority and opposing parties with copies of the opinion. (P.B. 1978-1997, Sec. 294.)"

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.
Madeline BIRARELLI,
v.
Gerald WRIGHT et al.

No. CV020389534S.
June 7, 2002.

MELVILLE, J.

***1** This case arises from a series of financial transactions among former friends. Before the court is a petition requesting a prejudgment remedy. Madeline Birarelli, the plaintiff, has filed this application for a prejudgment remedy against three defendants, Gerald Wright, Linda Wright and David Nyden.

The facts of the case are intertwined with the life and death of two fruit and produce companies with which Mrs. Wright was associated. The testimony reveals that Mrs. Wright had once been a partner at a fruit and produce company named L. Bernstein & Sons (Bernstein). At some point in 1991, the Bernstein partners had a falling out and litigation ensued. Mrs. Wright still desired to own and operate a produce company though she testified that she was negotiating a settlement that could possibly have required her to agree to a non-compete clause within the settlement.

In order to obtain capital for a new produce company, she approached the plaintiff who had, at that point, just recently gained funds from her deceased husband's life insurance policy. Although there is conflicting testimony on who approached the plaintiff about a loan, the court finds that Mrs. Wright approached the plaintiff for the loan.[FN1] Mrs. Wright needed $55,000 in order to start her own fruit and produce business and told the plaintiff why she needed the money. The court finds that the plaintiff agreed to loan the funds to Mrs. Wright in exchange for two promissory notes. Each note, prepared by Mrs. Wright and dated January 30, 1992, is for the amount of $55,000 and provides for 8% or 1.5% over prime, whichever is higher, per annum interest. Both notes provided that the money would be due two years from the date thereof. One note was signed by Mrs. Wright. The second note was signed by Andrew Skarupa.[FN2] Skarupa, besides signing the note, was to contribute to the operation of the new produce business.

> FN1. "It is within the province of the trial court, as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence ... Where testimony is conflicting the trier may choose to believe one version over the other ... as the probative force of the evidence is for the trier to determine ... Credibility must be assessed ... not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude ..." (Citations omitted; internal quotation marks omitted.) *Briggs v. McWeeny*, 260 Conn. 296, 327 (2002). These standards apply to prejudgment remedy hearings. See *Micci v. Thomas*, 55 Conn.App. 14, 16, 738 A .2d 219 (1999). The

court concludes that Mrs. Wright approached the plaintiff because, on the stand, both the plaintiff and Mrs. Wright remembered that Mrs. Wright was present when the loans were requested. Although the passage of time has dulled the memories of the parties as to whether any other person was present, the court, in its discretion, finds the motivations of the plaintiff more believable and, hence, credits plaintiff's testimony that Mrs. Wright asked for the money.

FN2. The plaintiff does not claim that she is owed more than $55,000 on this transaction. The plaintiff, however, could not articulate why Mrs. Wright and Skarupa each signed a note. The court's best guess is that such a maneuver would hold Mrs. Wright and Skarupa jointly and severally liable in the case of default.

The plaintiff surrendered a check in the amount of $55,000. She made the check payable to Skarupa. Her testimony indicates that she did this because Mrs. Wright told her that she could not own anything in her own name because of her impending bankruptcy.[FN3] The day he received the check, Skarupa filed a trade name certificate in the town of Bridgeport indicating that he would be doing business as County Produce.

FN3. Gerald and Linda Wright did indeed file for bankruptcy on or around March 24, 1992, almost two months after plaintiff's check was issued.

Three events then happened over the next four months. First, the settlement of the Bernstein litigation was never concluded because the other participant filed for his own bankruptcy. Second, the United States Department of Agriculture, under the authority granted it by the Perishable Agricultural Commodities Act (PACA), sanctioned Mrs. Wright for defaulting on payments to suppliers and, consequently, forbade her from affiliating with any produce business. Third, over the course of the next few months, Mrs. Wright, the plaintiff and Nyden engaged in a series of "discussions" about what to do with County Produce. From these discussion sprang the idea to incorporate County Produce.

***2** During this time, the plaintiff gave more cash to Mrs. Wright totaling $25,000. In March and April 1992, the plaintiff drafted five checks, each made out to Linda Wright: (1) for $7000 dated March 1, 1992; (2) for $5000 dated April 2, 1992; (3) for $5000 dated April 9, 1992; (4) for $3000 dated April 9, 1992; (5) for $5000 dated April 23, 1992. All the checks were cashed and not deposited. Coinciding with these checks, the plaintiff took out a $25,000 home equity loan so that she would not deplete her bank account.

On June 1, 1992, Nyden and the plaintiff signed County Produce's certificate of incorporation as incorporators. The certificate was filed on June 18, 1992. The organization and first biennial report, also filed with the certificate, indicates that Nyden was the president and treasurer of County Produce and that the plaintiff was the vice president and secretary of County Produce. The report also indicates that Nyden and the plaintiff were directors of County. While testifying, the plaintiff did not recall signing these documents, although she remembered signing documents that were placed before her, and did not recall being either a director or officer of County Produce.

Based on the paucity of evidence showing that plaintiff understood the legal significance of her signing these papers and by her total lack of business experience, the court concludes that plaintiff did not fully comprehend the legal consequences of signing these papers.

In November of 1992, Mrs. Wright requested more money from the plaintiff in the amount of $15,000. The court finds that the plaintiff made a check out to County Produce because Mrs. Wright again claimed that she could not have anything in her own name.

At some point before November 2, 1993, Skarupa decided that he no longer wanted to be affiliated with County Produce and that he did not wish to be responsible for the $55,000 promissory note. Mrs. Wright told the plaintiff that Skarupa wanted to get back the note he had signed. The plaintiff was not comfortable letting Skarupa out of his obligation. To settle the matter, Nyden volunteered to sign a different promissory note if the plaintiff would give the promissory note back to Skarupa or destroy it. The plaintiff agreed and Mrs. Wright prepared a new promissory note. This note, dated November 2, 1993, was due on demand and provided for 10% per annum interest. Someone wrote "void" over the face of the Skarupa note, evidencing that he had been released from his obligation.

The plaintiff did not give any money to Mrs. Wright again until around February 1994. At this time, Mrs. Wright asked for significantly more money. Nervous about the amounts of cash she had already given, the plaintiff hesitated. The court finds, however, that Mrs. Wright suggested that the plaintiff should take out a mortgage on her home and that County Produce would make the mortgage payments.[FN4] The plaintiff testified that both Mr. and Mrs. Wright assured her that they would prepare a promissory note that she could enforce should Mrs. Wright default on the loan.

> FN4. The financing vehicle was exclusively Mrs. Wright's idea in order to allay plaintiff's concerns about repayment.

***3** Mrs. Wright accompanied the plaintiff to the meetings with the mortgagee bank and to the closing where the plaintiff was able to obtain a loan in the amount of $125,000. The check advanced was for $99,389.04. The proceeds of this loan were to go towards paying off the home equity loan that the plaintiff took out in 1992 as well as a $75,000 business loan procured by County on which plaintiff gave her own personal guaranty.

After the rescission period, the check arrived at the office of the bank's lawyers. The plaintiff, however, could not immediately obtain the check because it was a snowy day and she did not wish to drive. Mr. Wright offered to retrieve the check, which he did. He then drove to the plaintiff's residence where he had her endorse the check. He did not furnish her with any promissory notes as were agreed. The plaintiff testified that she had repeatedly asked Mr. and Mrs. Wright for notes to back these debts but was later rebuffed.

Various payments were made on the four transactions, which the court shall discuss in turn. The last recorded payment, however, occurred on June 2, 2001.

On January 17, 2002, the plaintiff filed the present application for a prejudgment remedy. Attached to the application is an affidavit averred by the plaintiff and a proposed complaint.[FN5] The complaint is fairly characterized as a proceeding on a series of debts.[FN6]

FN5. The proposed complaint provides in full:

1. Between January 30, 1992 and February 3, 1994, [the plaintiff] lent approximately $195,000.00 to or for the benefit of the defendants, Linda A. Wright, Gerald B. Wright and David I. Nyden.

2. In consideration thereof, the defendants agreed to repay [the plaintiff] with interest.

3. Payments were made upon the indebtedness through and including May 2001 but the defendants have failed and neglected to make any payments since.

4. Despite demand, the defendants refuse and neglect to pay.

FN6. On the record the day of the hearing, the plaintiff attempted to amend her proposed complaint. The court, in its discretion disallowed this procedure based upon due process considerations because the plaintiff attempted to add new causes of action for the first time.

I

The court begins by reviewing the standards for a prejudgment remedy. A "prejudgment remedy" means any remedy that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of his property prior to final judgment. *Fermont Division v. Smith,* 178 Conn. 393, 398, 423 A.2d 80 (1979), quoting General Statutes § 52-278a(d). The purpose of a prejudgment remedy is to preserve the assets while a matter is being litigated. *Rosenberg v. Rosenberg,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 356640 (January 5, 1999, Frankel, J.).

General Statutes § 52-278d authorizes a trial court to issue a prejudgment attachment upon a determination of probable cause to sustain the validity of the plaintiff's claim. *Calfee v. Usman,* 224 Conn. 29, 36, 616 A.2d 250 (1992). The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. *New England Land Co., Ltd. v. DeMarkey,* 213 Conn. 612, 620, 569 A.2d 1098 (1990).

The hearing in probable cause for the issuance of a prejudgment remedy is not contemplated to be a full scale trial on the merits of the plaintiff's claim. This weighing process applies to both legal and factual issues. *Bank of Boston Connecticut v. Schlesinger,* 220 Conn. 152, 156, 595 A.2d 872 (1991). In ruling on an application for a

prejudgment remedy, the court is limited to the evidence produced at the hearing. *South Mill V. Assn. v. Still Hill Development Corp.,* Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 563009 (April 27, 1998, Lavine, J.), citing *McCahill v. Town & Country Associates, Ltd.*, 185 Conn. 37, 39, 440 A.2d 801 (1981).

II

***4** Although the proposed complaint's details are sparse, the plaintiff argues that she seeks an attachment for the $55,000 promissory notes solely against Mrs. Wright and Nyden. The defendants have raised several defenses in regard to these notes which the court shall consider.

A

The court finds that the plaintiff has met her probable cause standard and shown that she is the holder of the note signed by Mrs. Wright. "[T]he holder of the instrument" may enforce the instrument. General Statutes § 42a-3-301. "A person is not liable on an instrument unless ... the person signed the instrument ..." General Statutes § 42a-3-401.

Mrs. Wright attacks the validity of the debt upon three grounds and she also asserts one special defense. She contends that the debt is not due and owing because: (1) when the parties made their agreement, Mrs. Wright informed the plaintiff that she might not be able to pay the note, and thus as a condition precedent to her personal obligation to pay the note, she would have to be able to affiliate with County Produce; (2) that the money forwarded was a capital contribution and not a debt; and (3) that when the plaintiff later replaced the Skarupa note with the Nyden note, she also had agreed to release Mrs. Wright from any personal obligation.

These three theories are contradictory, however, in Connecticut a defendant may bring inconsistent theories upon which to defend. *Hoard v. Sears Roebuck & Co.*, 122 Conn. 185, 192, 188 A. 269 (1936). All of the first three theories also call upon the court to weigh the testimony and decide the credibility of the various witnesses.

At the hearing, the plaintiff testified that Mrs. Wright came to her requesting a loan. The plaintiff acknowledged that she was aware that the $55,000 loan was going to be used as capital to start County Produce. She generally testified that no conditions were placed upon the lending of the money except that the check was to be made out to Skarupa because Mrs. Wright was not able to have any money in her own name.

Mrs. Wright's testimony differed. Mrs. Wright testified that, while she had prepared the note, she had told the plaintiff that she may not be liable for the underlying debt because she might possibly have to sign a non-compete clause due to the settlement of the Bernstein litigation. Although this settlement never materialized, she was precluded from affiliating with a produce company due to her violation of PACA. On the stand, Mrs. Wright also testified that the $55,000 that had started as a loan was later made into a contribution at the organizational meeting. She testified to this even though she admitted on the stand that the participants of the meeting did not discuss canceling the notes that the plaintiff held.

The court finds the plaintiff's testimony to be more credible and makes the finding

that her testimony was accurate. Several reasons lead the court to its conclusion. First, Mrs. Wright admitted that she never discussed canceling the note when the debt supposedly was converted into an investment. Second, in a document titled "Interest Calculation," Mrs. Wright wrote out what the interest calculation would be for $55,000 per annum from January 30, 1992 to December 31, 1996.[FN7] Most significant to the court about this document is that it is evidence that Mrs. Wright knew that she owed interest on a debt and her payments to the plaintiff were not returns on an investment. Third, the plaintiff demonstrated in her case that Mrs. Wright continued to pay on her debt even after County Produce ceased operations. Mrs. Wright herself testified that after County Produce lost its license and ceased to do business, she formed another produce company, American Fruit & Banana (American) for the sole purpose of trying to re-pay some of County Produce's creditors and "investors." American did make some payments to the plaintiff. For these reasons, the court finds that the plaintiff has shown by a probable cause standard that the debt belonged to Mrs. Wright and not to County Produce. Moreover, the payment record shows that the debt was not canceled. Accordingly, the plaintiff has demonstrated a factual predicate that she is likely to prevail upon this claim against Mrs. Wright.

> FN7. There is some discrepancy between the interest calculation document and the actual promissory note. The note itself requires at least 8% interest. The interest calculation, however, shows interest at 5%. No reasonable explanation was given for this discrepancy by any party. The court notes, however, that the document was prepared by Mrs. Wright and the change in the interest rate benefits her. This discrepancy does not undercut the plaintiff's claim.

***5** Mrs. Wright contends, however, that the plaintiff has not met her burden because her claim is barred by the statute of limitations. General Statues § 42a-3-118 provides in relevant part that "an action to enforce the obligation of a party to pay a note payable at a certain time must be commenced within six years after the due date or dates stated in the note ..." The note was due on January 30, 1994, meaning that the plaintiff would have had to commence suit by January 30, 2000.

Although the plaintiff filed her action after January 30, 2000, certain events may toll the statute of limitations. Partial payment of a debt which is barred by the statute of limitations removes a case from the statute provided that, under the circumstances, it constitutes an acknowledgment of the indebtedness sued upon as a then existing debt. *Zapolsky v. Sacks*, 191 Conn. 194, 198, 464 A.2d 30 (1983). The Statute of Limitations creates a defense to an action. It does not, however, erase the debt. Hence, the defense can be lost by an unequivocal acknowledgment of the debt, such as a new promise, an unqualified recognition of the debt, or a payment on account. *Id.* Whether partial payment constitutes unequivocal acknowledgment of the whole debt from which an unconditional promise to pay can be implied thereby tolling the statute of limitations is a question for the trier of fact. *Id.*

At the hearing the plaintiff introduced a record of payments. The record was introduced with no objection by the defendants and no testimony by Mrs. Wright contradicts this record. The evidence shows that Mrs. Wright made payments on the $55,000 debt until September 11, 1997.[FN8] The court finds that the plaintiff has met her burden to demonstrate that Mrs. Wright made payments until 1997. Moreover, the court

finds that Mrs. Wright's payments constitute an unequivocal acknowledgment of the debt. No evidence revealed that the amount of the debt was disputed before litigation began. It is of no moment that Mrs. Wright now contests the debt. Mrs. Wright's self-serving characterization that the $55,000 represented an investment is undercut by the fact that she continued to make interest payments, never disputing that they were due, even though County Produce had gone out of business.

> FN8. The record is for the combined $55,000 debt and the $15,000 monies advanced. The payments are not segregated towards either debt. This detail, however, is immaterial as to the tolling of the statute of limitations for such a document showing both debts evidences an acknowledgment of both debts.

Accordingly, the court finds that the plaintiff has shown by the recognized probable cause that she could prevail against Mrs. Wright for the $55,000 note. Mrs. Wright's defense of statute of limitations is unavailing as her payments tolled the statute of limitations until 1997 and the claim was filed in 2002.

B

The court finds that the plaintiff is the holder of the Nyden note as well. At the hearing, Nyden admitted the validity of the debt and that, by signing the instrument, he made himself liable for the debt.

Post-hearing, however, Nyden has raised one legal issue. Nyden argues that the note lacks consideration and, therefore, it is unenforceable.

Before determining what consideration is due, the court must first determine what type of agreement the plaintiff has proven was between her and Nyden. The court finds that the evidence shows that it was a novation of Skarupa's obligation.

***6** Novation may be broadly defined as a substitution of a new contract or obligation for an old one which is thereby extinguished. *Bushnell Plaza Development Corp. v. Fazzano,* 38 Conn.Sup. 683, 688, 460 A.2d 1311 (App.Sess.1983). A recognized test for whether a later agreement between the same parties to an earlier contract constitutes a substitute contract looks to the terms of the second contract. If the second contract contains terms inconsistent with the former so that the two cannot stand together, it exhibits characteristics indicating a substitute contract. *Id.* "[A]n essential element of any novation is the extinguishing of the original contract by substitution of a new one." *Flagg Energy Development Corp. v. General Motors Corp.*, 244 Conn. 126, 145, 709 A.2d 1075 (1998). The plaintiff has shown by probable cause that she had an obligation from Skarupa. Skarupa, however, wished to no longer be held to that obligation. As a result, the plaintiff agreed to release Skarupa from his obligation in exchange for an obligation from Nyden. The terms of the obligation between Nyden and Skarupa differed. First, Nyden's note was due on demand whereas the first note was due at a time certain. Second, the Nyden note provided for a higher interest rate than the Skarupa note. These facts evidence a new obligation from Nyden.

As this note evidences a novation, the court must determine whether the plaintiff has shown, by probable cause, that there was consideration for the Nyden debt. "A simple

novation involving a substitution of obligors results when an obligee promises the obligor that he will discharge the obligor's duty in consideration for a third person's promise to pay the obligee ... A substitution of obligors may also result when an obligee promises a third person that he will discharge the obligor's duty *in consideration* for the third person's promise to render either the performance that was due from the obligor or some other performance." (Emphasis added.) 2 Restatement (Second), Contracts § 280, comment (d) (1981).[FN9]

> FN9. While the Connecticut appellate courts have yet to formally adopt § 280 of the Restatement (Second) of Contracts, the Connecticut Supreme Court has cited the tentative draft of § 280 as authority for its decision. *Soneco Service, Inc. v. Bella Construction Co.*, 175 Conn. 299, 301, 397 A.2d 1364 (1978) (per curiam).

As the plaintiff demonstrated, the consideration in the novation is that the plaintiff agreed to release Skarupa from his obligation in exchange for Nyden being obligated to pay the $55,000 debt at 10% interest per annum.[FN10] Accordingly, because Nyden has no defense to the debt which he acknowledged in his testimony, the plaintiff has demonstrated the probability that he could be found liable at trial.

> FN10. Nyden argues that the consideration cannot be the discharge of the Skarupa note because the $55,000 debt was used by County Produce and not by Skarupa. Nyden asserts that because Skarupa was not a shareholder of County Produce and that he turned over the funds that were advanced to him once County became a corporation, he could not be held liable on the debt. The court finds this evidence to be irrelevant as to who is liable for the $55,000 debt. The plaintiff has proven by probable cause that Skarupa initially agreed to be held liable for the $55,000 debt if the plaintiff advanced the funds. It is of no moment that Skarupa was not a stockholder in County Produce.

III

The plaintiff attempts to hold Linda and Gerald Wright liable for the $25,000 loan advanced by a series of checks. The Wrights argue that the plaintiff has failed to demonstrate that they borrowed the money with the intention of paying it back. Failing that argument, the defendants raise the statute of limitations defense.

A

As for Mrs. Wright, the court finds that the plaintiff has demonstrated by probable cause that she gave a loan to Mrs. Wright.

At the hearing, the plaintiff testified that Mrs. Wright approached her for the $25,000 loan. She testified that Mrs. Wright proclaimed an urgency, but that she had forgotten why the funds were so urgently needed. As a result of Wright's proclamation, plaintiff made out a series of checks over time payable to Mrs. Wright. Mrs. Wright promptly cashed each of the checks.

*7 Mrs. Wright denied this testimony on the basis that this money was an investment from the plaintiff into County Produce. The court, however, does not credit Mrs. Wright's

testimony on this point. First, Mrs. Wright's family had extraordinary expenses during the period of time that plaintiff lent her the proceeds. Mrs. Wright and her husband were required to pay their attorney in order to file a petition for bankruptcy. They additionally decided to purchase a condominium during this time and began to refurbish the condominium. All of this was done while Mrs. Wright earned no income. This testimony raises the inference that Mrs. Wright needed money during this period of time. Second, the checks were made out to Mrs. Wright personally. If her testimony that this was an investment were to be given credit, then one must wonder why the checks were not made out to County Produce or why the plaintiff did not receive any shares evidencing her investment. Given the weight that the court accords the plaintiff's testimony, it concludes that the plaintiff has shown that she lent the money to Mrs. Wright personally.

Mrs. Wright raises the defense of statute of limitations. For an action on a debt contract, General Statutes § 52-576 is the applicable statute of limitations. *Cupina v. Bernklau*, 17 Conn.App. 159, 162-63, 551 A.2d 37 (1988). Section 52-576(a) provides in relevant part that "[n]o action for an account, or on any simple or implied contract ... shall be brought but within six years after the right of action accrues ..." The last loan was made when the plaintiff issued the last check on April 23, 1992. The court must first determine when the cause of action accrued.

While the statute of limitations normally begins to run immediately upon the accrual of the cause of action, some difficulty may arise in determining when the cause or right of action is considered as having accrued. The true test is to establish the time when the plaintiff first could have successfully maintained an action. *Wynn v. Metropolitan Property & Casualty Ins.*, 30 Conn.App. 803, 807-08, 623 A.2d 66 (1993), aff'd., 228 Conn. 436, 635 A.2d 814 (1994). The testimony did not reveal any terms attached to the lending of the $25,000. The plaintiff did testify that the loan was supposed to be a short-term loan that would be paid once Mrs. Wright obtained a loan from a bank. The plaintiff estimated that this would be a "few months" at the most.

In an action for breach of contract, the cause of action is complete at the time the breach of contract occurs, that is, when the injury has been inflicted. *Tolbert v. Connecticut General Life Ins. Co.*, 257 Conn. 118, 124, 778 A.2d 1 (2001). Giving the plaintiff's testimony weight, six months could be the most time equaling a "few months." That would place the injury on October 23, 1992. The cause of action, therefore, would expire on October 23, 1998.

The tolling principles discussed in Part II A operate for this debt. The plaintiff, in her post-hearing brief, argues that payments were made until 2001. The court, however, has found no proof that Mrs. Wright has made any payments on the debt. The plaintiff put forth evidence of payments on several other debts, but has not shown the court that Mrs. Wright has acknowledged this debt through payment.

***8** Accordingly, the plaintiff has not demonstrated that she is likely to prevail on her claim of the $25,000 loan because it is barred by the statute of limitations. Therefore, a prejudgment remedy cannot issue on the $25,000 debt.

The court must next determine whether the plaintiff has proven that *Mr.* Wright can be held liable for the debt. The court finds that she has not.

The plaintiff offered no evidence that Mr. Wright is liable on the debt. The only evidence suggests that Mr. Wright benefited from the debts. Near the time the plaintiff issued the checks to Mrs. Wright, Mr. Wright needed to pay his attorney in order to file his bankruptcy. Also, he deposited money on a new condominium and refurbished the condominium. Mr. Wright denied any direct benefit.

Whether the court credits Mr. Wright's testimony is immaterial. Mrs. Wright could have gratuitously given the funds to Mr. Wright after the plaintiff advanced the funds to Mrs. Wright.

In her post-trial brief, the plaintiff has argued that the court should hold Mr. Wright liable on the basis of unjust enrichment. The court, however, does not read the allegations of the proposed complaint to allege a cause of action sounding in unjust enrichment. The proposed complaint clearly alleges a debt action by using the terms "consideration," "indebtedness" and "demand." None of these allegations indicate an unjust enrichment action.

It is black letter law that one may not recover on a cause of action not alleged. Our Appellate Court has reaffirmed this principle as recently as last year stating:

Pleadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them ... The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise ... The principle that a plaintiff may rely only upon what he has alleged is basic ... It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations of his complaint ... A plaintiff may not allege one cause of action and recover on another. Facts found but not averred cannot be made the basis for a recovery.

(Citations omitted; internal quotation marks omitted.) *Bartomeli v. Bartomeli,* 65 Conn.App. 408, 412, 783 A.2d 1050 (2001).

Furthermore, the court may not premise a prejudgment remedy on a claim which was not part of the operative complaint at the time of the hearing. See *Dornfield v. Granquist,* Superior Court, judicial district of New Britain at New Britain, Docket No. CV 00 0502628 (March 13, 2001, Shapiro, J.).

It has been held that where a party has not pleaded unjust enrichment that a court should not grant relief based upon the unpleaded theory. See *Gould v. Hall,* 64 Conn.App. 45, 53-54, 779 A.2d 208 (2001) (finding that it was proper for a court to accept an attorney trial referee's report finding no liability on a counterclaim when that counterclaim merely pleaded a contract action and not unjust enrichment). Accordingly, the court cannot give effect to the plaintiff's unjust enrichment argument.

IV

*9 The plaintiff seeks to hold both Mr. and Mrs. Wright liable for the debt secured by the mortgage. The court credits the testimony of the plaintiff where she said that Mrs. Wright agreed to repay the $125,000. The evidence reveals that, contrary to the defendants' assertions that the amount represented a loan to County Produce, Mrs. Wright continued to pay on the mortgage well after County Produce ceased operations. A record prepared by the plaintiff reveals that mortgage payments were made at the direction of Mrs. Wright from April 1, 1994 to June 12, 2001. This evidence indicates that Mrs. Wright understood that the debt was her personal obligation.

As for Mr. Wright, the court finds that he did not owe an obligation to repay the debt. The plaintiff argues that she had a direct contract with Mr. Wright. She has not, however, produced any evidence of such a contract. At most, she had assurances from Mr. Wright that he would prepare promissory notes to her in order to allow her to have some security. Such evidence might constitute an inference that he induced the plaintiff to take out the mortgage. The evidence, however, does not contain an inference that the two parties reached a meeting of the minds. Accordingly, Mr. Wright cannot be shown to be liable on the $125,000 debt.

Mrs. Wright also seems to argue that she is only responsible for $99,389.04 because that is the amount of check that the plaintiff received and gave over to Mrs. Wright. The court finds, however, that the agreement was for Mrs. Wright to pay the full $125,000 mortgage. Moreover, the plaintiff eventually repaid the full amount to the mortagee bank on her own. Accordingly, the court shall use that amount, less payments, when figuring the amount of the attachment.

V

The plaintiff also seeks an attachment based upon the $15,000. She seeks this attachment as to Mrs. Wright only.

Mrs. Wright argues that the plaintiff has not shown that she is liable for the $15,000 debt. Mrs. Wright contends that it was their understanding that this was a debt to County Produce and not a personal obligation.

While the plaintiff did make out the $15,000 check to County Produce, the plaintiff testified that Mrs. Wright instructed her to do so. Moreover, Mrs. Wright treated the $15,000 loan the same as the original $55,000 loan. She prepared loan repayment schedules for the $15,000. She also made interest payments after County Produce ceased operations. Accordingly, the court finds that the plaintiff has proven by probable cause that Mrs. Wright owes on the $15,000 loan.

Mrs. Wright has raised the defense of statute of limitations under § 52-576. As discussed in Part III A, the cause of action accrues at a breach. The breach on the $15,000 did not occur until non-payment of the debt. Mrs. Wright made her last payment on September 11, 1997. Accordingly, the plaintiff is not barred by the statute of limitations until September 11, 2003. For this reason, the defense of statute of limitations is inapplicable.

VI

***10** The plaintiff has requested that the court grant the application for a prejudgment remedy against the defendants in the amount of the principal debt plus agreed-upon interest and statutory interest pursuant to General Statutes 37-3a.[FN11] The allowance of prejudgment interest as an element of damages is an equitable determination and a matter lying within the discretion of the trial court. *Killion v. Davis,* 69 Conn.App. 366, 375, 791 A.2d 552 (2002). Before awarding interest, the trial court must ascertain whether the defendant has wrongfully detained money damages due the plaintiff. Interest on such damages ordinarily begins to run from the time it is due and payable to the plaintiff. *Id.* The determination of whether or not interest is to be recognized as a proper element of damage, is one to be made in view of the demands of justice rather than through the application of an arbitrary rule. *Id.*

> FN11. General Statutes § 37-3a provides in relevant part: "[I]nterest at the rate of ten per cent a year; and no more, may be recovered and allowed in civil actions ... including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable."

The court finds that the demands of justice require allowing the plaintiff to have a prejudgment remedy in the amount of the principal and by the amount of interest. Based upon the findings detailed in this memorandum of decision, the court grants the prejudgment remedy as to Mrs. Wright and Nyden.

The court has found that the plaintiff has sustained her burden as to Mrs. Wright on three debts: the $55,000 note, the $15,000 loan and the $125,000 mortgage loan. As for the $55,000 note, the evidence has shown that the parties agreed to 8% interest per annum on the debt. On 8% interest, the debt produces $4,400 of interest a year. The note, being unpaid for ten years, has accumulated interest in the amount of $44,000. Adding to the unpaid principal of $55,000, the total due would be $99,000 before crediting any payment.

The evidence also showed that Mrs. Wright owed on the unpaid balance of $15,000. The court finds that it is appropriate to charge 5% interest against that debt. The only evidence adduced at the hearing regarding interest on the $15,000 debt was that Mrs. Wright calculated interest in the amount of 5% from the time the debt was forwarded to her. Accordingly, the court finds that the interest on the debt was at 5%, which is $750 a year. The $15,000 was unpaid for ten years. Accordingly, without payment, the defendant owed the plaintiff $22,500 ($15,000 plus $7,500).

The evidence adduced at the hearing was that Mrs. Wright has paid on both these debts. The court is uncertain as to how to allocate the payments to which debt. In its discretion, therefore, the court shall subtract the payments from the combined total owed on both debts. The court finds that Mrs. Wright paid a total of $7797.25 on the debts ($55,000 and $15,000). The two debts (principal and interest) total $121,500. Subtracting the payments made, the court finds that the plaintiff is entitled to a prejudgment attachment in the amount of $113,702.75 ($121,500 less $7,797.24).

As for the $125,000 note, the court declines to award interest based upon this

amount. The plaintiff has demonstrated that Mrs. Wright paid some interest on the debt, but has failed to show how much interest Mrs. Wright has paid. Moreover, the debt was a variable interest mortgage, making a determination of the interest impossible to determine. Accordingly, the court finds that the plaintiff may have a prejudgment remedy in the amount of $125,000 for the mortgage debt.

***11** As for the Nyden note, it provides for 10% interest per annum on its face. The court has found that the plaintiff has demonstrated by probable cause that Nyden is liable for the debt in the amount of $55,000. That note has been unpaid for nine years. The amount of interest, at the stated 10% per annum rate, would be $5,500 per year. After nine years, the interest totals $49,500. Added to the $55,000 principal, the total amount of the attachment would be $104,500. The plaintiff, however, has only asked the court for a prejudgment remedy in the amount of $100,000 against Nyden. Accordingly, the court shall order a prejudgment remedy in the amount of $100,000.[FN12]

> FN12. This amount does not reflect the payments on the debt made by Mrs. Wright. As stated previously, it is impossible to determine the allocation of the payments she made to the $55,000 debt. The court notes, however, that if it subtracted the full payments of $7797.25 from Nyden's debt, Nyden is still liable for 103,702.75. Accordingly, because this amount exceeds the amount the plaintiffs have asked for, the court shall still order a prejudgment remedy in the amount requested.

CONCLUSION

For the reasons herein stated, the court grants the application for a prejudgment remedy against Mrs. Wright in the amount of $138,702.75 which it rounded out to $139,000. It also grants the application for a prejudgment remedy as to Nyden in the amount of $100,000. As for Mr. Wright, the court finds that the plaintiff has not met her burden as to him.

Conn.Super.,2002.
Birarelli v. Wright
Not Reported in A.2d, 2002 WL 1492179 (Conn.Super.)

END OF DOCUMENT