No. 31992-0-III

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

TJ LANDCO, LLC, a Washington Limited Liability Company
Plaintiff-Respondent

v.

HARLEY C. DOUGLASS, INC., a Washington Corporation
Defendant-Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge

APPELLANT'S REPLY BRIEF

Steven J Hassing, WSBA No. 6690
425 Calabria Court
Roseville, CA 95747
916-677-1776 Phone
916-677-1770 Fax
sjh@hassinglaw.com

Attorney for Harley C. Douglass, Inc., Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATUTES

CIVIL RULES

RULES OF APPELLATE PROCEDURE

AMERICAN BAR ASSOCIATION RULES

WASHINGTON ADMISSION & PRACTICE RULES

I. INTRODUCTION

A. Landco's opposition failed to meaningfully address the real issue on appeal, rate of interest. Instead, Landco focused on an issue which Douglass does not dispute, the prevailing party's right to interest

Instead of presenting meaningful opposition to Douglass' arguments regarding the rate of interest, Landco used 16 pages arguing that the trial court had the right to award interest. Landco thereby focused on a self created non-issue which was not disputed in order to reframe the issue to one easily supported.

Whether characterized as "interest", "damages for withholding money" or "expectation damages", Douglass has never contended that the trial court did not have the right to award interest on the liquidated debt. Douglass has shown, however, that the trial court did not have the authority to award prejudgment or post judgment interest at 12 percent.

Douglass respectfully requests that as this Court reads Landco's many pages of argument to the effect that the trial court has the authority to award interest, that it be reminded that such is not the issue on appeal. The issue is the rate of interest not---the court's right to award interest.

B. In the few instances when Landco actually made an attempt to address the rate of interest it was unable to support its argument with legal authority or to explain why this Court should accept such a strained interpretation of the pertinent statutes

In addition to attempting to change the primary issue from one which it could not defend to one easily defended, Landco champions the false argument that when the legislature stated, "where no different rate is

agreed to" it really meant to say "where no different ***default*** rate is agreed to". But Landco fails to explain how such an oversight could have occurred, why the legislative history provides no indication of any such intent or why the statue, in effect since 1895, has not been changed to correct that "mistake" to reflect the legislature's true intent.

II. ARGUMENT

LEGAL ISSUE NUMBER 1

Is conclusion number six, which states that Plaintiff is entitled to prejudgment interest at 12 percent per annum, supported by the findings?

A. The Standard of Review is De Novo

The correct standard of review in determining whether or not conclusions of law are supported by substantial evidence is de novo, not abuse of discretion as asserted by Landco. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789.

B. RCW §19.52.010 (1) restricts the trial court to awarding prejudgment interest at 12 percent to those instances where no different rate is agreed to in writing

RCW §19.52.010 (1) provides in relevant part;

> **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...**

Legislative history reveals;

> **RCW 19.52.010 and similar statutes in other states should apply only to debts where the parties have not even considered an interest rate.**

(Explanation of Substitute House Bill 822 (G-1 of Appendix AOB))[1]

Since RCW §19.52.010 (1) restricts the trial court from awarding prejudgment interest at the statutory rate of 12 percent to instances where "no different rate is agreed to in writing" the court must, before it awards 12 percent interest, find that the parties had not agreed to a different interest rate. Since the trial court made no such finding conclusion six is unsupported and constitutes error.

Landco conceded that there was no evidence supporting conclusion six by its failure to cite any. This Court is not required to comb the record for evidence that Landco has been unable to find.

Instead of pointing to evidence supporting finding number six Landco used five pages arguing that the court has no discretion to deny interest which is awarded as "expectation damages" as compensation for denying one the use of money. (14-18, ROB)[2]. As Douglass has noted, the court's authority to award interest is not disputed. It is the rate of interest that governed by §19.52.010 (1) and the parties' contract that is at issue. Labeling Landco's right to prejudgment interest "expectation damage" does not change the fact that interest is limited to the rate agreed to in the contract.

Douglass asks this Court to remand with instruction to issue a new finding stating that the parties had agreed to a rate different than the statutory 12 percent, to issue a new conclusion stating that prejudgment

[1] AOB refers to Appellant's Opening Brief
[2] ROB refers to Respondent's Opposition Brief

interest be awarded at the contract rate of zero percent and order that a new judgment be entered in accordance with the new conclusion of law.

LEGAL ISSUE NUMBER 2

Is that part of finding 18 which states, "... *without interest until paid in full on or about December 22, 2011*" and which seems to imply a date for termination of the parties' agreement that the interest rate be zero, supported by substantial evidence?

Finding 18 was not supported by the evidence. To conform to the evidence the court should have stopped with the words "*until paid in full*" and omitted, "*on or about December 22, 2011*" because the original contract provided for interest at six percent until paid in full and the modification replaced "six percent" with "zero". (Ex P-1; Ex P-19) (AOB 15). Under standard contract interpretation the parties' contract, after the December 2006 modification, called for zero percent interest "until paid in full", never zero percent "until breach". Landco conceded this point by failing to argue otherwise.

This Court is again reminded of the exchange between Douglass' trial attorney and the court stated verbatim at 18, AOB where the trial court conceded that zero interest was not to cease upon the due date. (RT 882; 15- 883; 2) (CP 546; 23-26).

A court's decision is manifestly unreasonable if the factual findings are unsupported by the record. *In re Marriage of Littlefield.* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). Douglass asks this Court to remand with instruction to issue a new finding stating the parties' contract specified that the rate of interest was to be zero percent until paid in full, a

new conclusion of law stating that prejudgment interest is to be calculated at zero percent per annum and to order that the judgment be modified accordingly.

LEGAL ISSUE NUMBER 3

Do the findings support the award of $144,000 in prejudgment interest on installments coming due prior to December 22, 2011?

In its Opening Brief, Douglass pointed out, argumendo, that even if finding 18 had been properly supported the trial court would have nonetheless erred in awarding the initial $144,000 of prejudgment interest because there would be no interest due on installments which came due prior to December 22, 2011. In awarding interest on the three unpaid installments that came prior to 2011 the court exceeded the scope authorized by its own finding 18. [3]

Landco totally ignored Douglass' argument in this section and fell back on its argument in support of the non-issue that the court had the right to award interest on a liquidated debt as "economic damage" (23, ROB).

Since the award of $144,000 of prejudgment interest was awarded contrary to finding 18 as well as to §19.52.010 (1) and the parties' contract, Douglass seeks remand with instruction to deduct $144,000 from the judgment.

---

[3] Interest on the December 22, 2008 installment; $72,000
Interest on the December 22, 2009 installment; $48,000
Interest on the December 22, 2010 installment; $24,000

Total interest; $144,000

LEGAL ISSUE NUMBER 4

When contracting parties agree in writing to interest at a certain rate must they also specify an additional "default" rate to avoid imputation of the statutory rate upon breach?

This is the issue that frames the primary question raised in this appeal. This Court's decision on this issue as framed will be one of first impression in this state. The only possible answer under § 19.52.010 (1) is "*No, the parties to a written contact do not have to agree upon a separate default rate after agreeing upon a contract rate in order to avoid imputation of the statutory rate*".

Landco points to no statute, case or other authority which would justify a different holding. Section 19.52.010 makes absolutely no mention of a "default rate". Nor does the legislative history. No Washington Court has ever determined that a separate default rate need be agreed to in order to avoid imputation of the statutory rate

Nowhere in the statute did the legislature use the word "default". Our Supreme Court instructs that courts should assume the Legislature means exactly what it says. *Western Telepage v. City of Tacoma,* 140 Wn.2d 599, 609, 998 P.2d 884 (2000). If a statute's meaning is plain on its face, effect must be given to that plain meaning. (*Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1*, 9-10, 43 P.3d 4 (2002). To find within §19.52.010 a requirement that the parties must agree upon an additional "default" in addition to a contract rate requires one to read

words into the statute not there nor included by the legislature and which would change the meaning of the statute.

In its opposition to Douglass' motion for reconsideration Landco cited *Palmer, Peoples* and *Mehlenbacher* as authority for the proposition that despite the clear and unambiguous language of §19.52.010 (1) a separate default rate was required to avoid imposing of the statutory rate. Believing that Landco would again try to use those three cases Douglass explained in AOB why none of the three provide authority for the trial court's award of prejudgment interest at 12 percent under the facts in this case.

Landco argues that §19.52.010 is just "one source" of authority providing for prejudgment interest in a breach of contract case, (25, ROB), but cites no other source. Section 19.52.010 is the only authority which allows the trial court to award prejudgment interest at 12 percent. If there was an alternative source Landco surely would have found and cited it.

Landco even claims (admits?) that §19.52.010 was not the basis for the trial court's prejudgment interest award. (24, ROB). This Court should simply reverse the trial court on prejudgment interest based on Landco's concession that the court's award was not based upon the statute.

A. The cases cited by Douglass clearly support the only interpretation of §19.52.010 (1) possible considering the language used by the legislature

In its Opening Brief, Douglass cited six cases in support of overturning the trial court's decision on prejudgment interest.

In *McDowell v. The Austin Company*, 39 Wn.App. 443, 693 P.2d 744 (1985) the parties entered into a written contract which provided that the prevailing party would be entitled to interest "at the rate established by RCW § 19.52.010". (*at* 446). At the time the agreement was entered into the interest rate authorized by § 19.52.010 was six percent. The trial court awarded prejudgment interest at six percent. However, between the date of the contract and the award the statutory rate under §19.52.010 had doubled to 12 percent. (*at* 451).

On appeal the Reviewing Court determined that since the parties had agreed that § 19.52.010, rather than six percent, should control, prejudgment interest should accrue at six percent only from the time of the agreement until July 26, 1981, the date on which interest under the statute was raised to 12 percent. Thereafter interest should be calculated at 12 percent. The Court held;

> **If the parties had agreed to a prejudgment interest rate 6 percent, that rate would control here. However, instead of setting a fixed rate, they elected in the Agreement to have the amount prescribed by RCW 19.52.010 be controlling.**

(*at* 452)

In deciding *McDowell,* the Court explained the importance of following longstanding contract law while awarding the prejudgment interest;

> **Thus, the courts are in nearly universal agreement in construing written contracts that the primary purpose of a judicial interpretation is to ascertain the parties' intentions, give effect to them and make the parties' intentions controlling. The intentions of the parties should be ascertained from the entire writings, and, if at all possible, all parts of the writings shall be constituted so as to harmonize with one another.**
>
> **The most reliable clue to the parties' intentions in a deliberately prepared and negotiated contract is the language of the contract.**

(*at* 452).

After admitting that *McDowell* "*demonstrates that courts will follow the clear terms of a contractual agreement*", Landco mischaracterizes the case and the holding by stating that "*the first analysis is to determine if the parties agreed to a default interest rate*". (31, ROB). That was simply made up since *McDowell* makes no mention of a "default rate". *McDowell* addressed an interest rate agreed upon by the parties which the court determined it must honor. (*at* 451).

Douglass also cited two very important cases which provide clear examples of when it is appropriate to impose the statutory rate where the parties had not agreed upon any rate of interest. Landco ignored both cases. The first, *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 100 P.3d 814, (2004), from the Washington State Supreme Court, is the preeminent authority on interpreting §19.52.010 (1) and cannot be ignored.

In *Schrom* our Supreme Court provided guidance in interpreting the all important phrase "no different rate having been agreed upon". The Court held that since there was no written provision for interest the plaintiffs were entitled to 12% interest on their contributions and to hold otherwise would "undercut RCW 19.52.010 which mandates 12 percent interest when no other rate was agreed upon..." (*Id* at 36). Not once did the Supreme Court mention "default rate" or "default interest". *Schrom* involved a case where there had been no discussion at all pertaining to interest. Had "default interest" been relevant to interpretation of the statute the Court surely would have addressed it.

Schrom makes clear that where the parties have agreed upon an interest rate the statutory rate provided by § 19.52.010 is not to be applied. One might wonder why Landco failed to address this all important Supreme Court case?

Landco also ignored *Wright v. Dave Johnson Insurance Inc.*, 167 Wn. App. 758, 275 P.3d 339 (2012), a recent case decided under the mandates of *Schrom*.

In *Wright* there was also no agreement as to the rate of interest. The Court, held;

> **There is no evidence of any agreed interest rate. Thus, under *Schrom*, the correct prejudgment interest rate to be applied to the reimbursement payments was 12% per annum under RCW §19.52.010(1).**

(*at* 776, 777). As with *Schrom,* the Court was wholly uninterested in "default rates".

Douglass cited *Chan v. Smider*, 31 Wn.App. 730, 644 P.2d 727, (1982), a case in equity, where the Court adopted the contract rate over the legal rate. In its Opposition Brief, Landco incorrectly argued that *Chan* stands for the proposition that a trial court has latitude to exercise discretion in the award of prejudgment interest. Landco ignored the fact that in *Chan*, a case in equity, there was no agreed upon rate that the Seller was to have paid the Buyer on Seller's breach. The Court's discretion arose from the fact that no rate had been agreed to. Had there been agreement as to rate, the Court would have had no discretion

If anything, *Chan* illustrates that while the court, sitting in equity, may award a rate other than the statutory rate even where the parties have not agreed to a different rate, there is no justification to make the leap to a court having authority---under any circumstances---to award the statutory rate when the parties have agreed upon a different rate.

State of Washington v. Trask, 98 Wn.App. 690, 990 P.2d 976 (2000) stands for the proposition that a party is entitled to prejudgment interest as provided by contract. (*at* 695). Landco attempted to distinguish *Trask* by claiming that Douglass and Landco had failed to agree upon a prejudgment interest rate. That is clearly false as established by their contract as modified.

In *Hidalgo v. Barker*, 176 Wn.App. 527, 309 P.3d 687, (Div 3, 2013), this Division followed *Schrom*, holding that under §19.52.010 prejudgment interest is correctly set at 12 percent ***when the parties have***

not agreed on some other rate. (*at* 551). As with the other cases cited there was no mention made of any necessity to agree upon an additional "default rate".

B. The cases cited by Landco have already been exposed as not standing for the proposition that when it stated "different rate" the legislature really meant "default rate".

After reading Douglass' Opening Brief, where *Palmer*, *Peoples* and *Mehlenbacher* were all exposed, Landco abandoned reliance on *Palmer.* Landco also now concedes that the holding in *Peoples* didn't even involve interest. (26, ROB). Yet, Landco still attempts to justify the trial court's award by citing *Peoples* and continues to misplace reliance on *Mehlenbacher.*

Particularly jarring is the following statement from page 27 of ROB;

> **It is a settled issue of law in Washington that unless the contracting parties expressly agree to a default interest rate, the court is free to impose the statutory rate on the wrongfully withheld balance due.**

The statement is not only false but counsel must have known it was false when the statement was written calling into question violations of CR 11, RAP 18.9, ABA Rule 3.1 and APR 5(d).

Peoples and *Mehlenbacher* are related cases. *Peoples*, decided in 1966, has been cited just once in 48 years on the issue of interest and that one time was in *Mehlenbacher. Mehlenbacher* has never been cited on the issue of interest.

In *Peoples* the Court reviewed the following five issues; (1) merger (*at* 688-689), (2) the dead man statute (*at* 690), (3) usury (*at* 690-691), (4)

statute of limitations (*at* 691), (5) misinterpretation of a contract provision not involving interest. (*at* 692). Off the cuff dicta should not be cited to this Court as authority. At the very end of the decision the Court gratuitously noted;

> ***The notes do not provide for interest. Interest is allowed at the rate of 6 percent per annum from May 21, 1963, the date the last note matured and remained due and unpaid.***

(*Id* at 694).

The Court provided no analysis regarding its comment on interest. RCW §19.52.010(1) wasn't even mentioned in the decision nor was any other authority on the rate of interest. Yet, Landco showed no reluctance in mis-citing *Peoples* for the statement;

> ***where a contract does not specify a default interest rate, the statutory default interest rate is imposed once a default has occurred.***

(25, ROB). That is not the law, it is not what *Peoples* held, it is not even an accurate quote from case dicta. It did not go without notice that Landco failed to include a page cite. The manner in which Landco has twisted, contorted and misstated *Peoples* exceeds the bounds of advocacy and is dishonest.

Next, Landco turned to Me*hlenbacher,* which, unlike *Peoples*, actually did address prejudgment interest. *Mehlenbacher* was a case in which a promissory note called for interest at the rate of 0 percent---but only to the date of maturity. Unlike Landco and Douglass, the parties in *Mehlenbacher* had expressed a clear intent that the debt would accrue

interest at a different rate upon default. The parties left a blank line in the note so that the separate default rate could be inserted.

> **This note shall bear interest at the rate of ___per cent per annum after maturity or after failure to pay any installment as above specified**

(*Mehlenbacher at* 250).

For reasons not noted in the decision the blank was never filled in. Because of the clear intent of the parties that a separate default rate was to apply, the court imposed the statutory rate when the parties failed to fill in the blank. Under those specific facts the Court of Appeals found "no abuse of discretion".

There is stark contrast between the facts of *Mehlenbacher,* where the parties intended a separate default rate and of this case now on review, where it was strikingly clear that the parties did not intend a separate default rate. Distinction is also found in the fact that in Mehlenbacher interest was zero *until due* while in this case on review interest was zero *until paid in full.*

Landco and Douglass not only agreed that the rate of interest would be zero percent *until paid* but Landco received valuable consideration for the concession. In addition, Landco's earlier unsuccessful attempt to get Douglass to agree to a 12 percent default rate evidenced knowledge of the fact that if it wanted to receive a higher rate of interest on default than the interest stated in the contract it would have to get Douglass to agree to that additional rate.

The *Mehlenbacher* Court cited *Peoples* for issuing the following holding;

> ***when parties executed multiple promissory notes, some with and some without default interest rates, the court could imply that the parties intended the statutory rate of interest to apply to those notes not specifying a rate.***

(*Mehlenbacher at* 251).

However, as already noted, *Peoples* issued no holding regarding interest. Further, *Peoples* did not involve multiple notes some with and some without default rates. All of the notes in *Peoples* provided for a default rate but the rate just wasn't filled in.

Regardless, *Mehlenbacher* cannot form the basis for a decision in this case because the facts are 180 degrees different. It is clear that *Mehlenbacher* does not hold that §19.52.010 requires agreement on a separate default rate. If anything, Mehlenbacher stands for the proposition that where the parties clearly indicate that a default rate, different from the contract rate, is intended, but they fail to identify that separate default rate, the statutory rate must be imposed. That did not happen in this case on review. Interestingly, on the issue of the proper rate of prejudgment interest, *Mehlenbacher* has never once been cited in any reported case.

LEGAL ISSUE NUMBER 5

Was the Landco-Douglass contract sufficient to avoid imputation of the legal rate of 12 percent?

In AOB Douglass explained that the original contract called for six percent interest *until paid in full* and that when the rate was negotiated to

zero percent the *until paid in full* language was left unchanged. Under normal contract interpretation the contract then provided that the rate was *zero percent until paid in full.* Landco did not dispute Douglass' interpretation of the contract as modified.

Accordingly, the contract provides for zero percent until paid rather than zero percent until due, (as it did in *Mehlenbacher*), so the parties contract reflected an agreement as to interest applicable to amounts owed but not paid, satisfying the conditions of §19.52.010 (1).

Landco's Brief avoids any explanation of why Landco attempted to get Douglass to agree to a contract modification which would insert a 12 percent default rate, if upon default, Landco would be entitled to prejudgment interest at 12 percent anyway. Nor has Landco explained why, if it thought it was entitled to interest in excess of zero percent upon default did it fail to seek interest for the period between December 22, 2007 and March 4, 2008 when Douglass was in default.

This Court is reminded that Tod Lasley, Landco's sole member, freely admitted on direct that he had bargained away Landco's right to receive interest at a rate higher than zero in exchange for (or as a tradeoff) for early payment.

> **Lasley;**
>
> **Well, I think that might have been part of the - - since the payment was being made, I think that was part of the - - the tradeoff with the interest, if I'm not mistaken. I could be mistaken, but I - - I don't think so. So ...**

(RT 328; 6-16).

Landco really seems to be arguing that this Court should ignore the parties' agreement despite Landco having negotiated the reduction in interest (or limitation of damages) in order to receive advance payment of $314,000 which Landco desperately needed at the time. (RT 155; 10- 156; 4).

Landco and Douglass were two experienced developers. As the trial court noted, the modification was an arm's length transaction and the parties knew full well what they were doing. (RT 862; 20- 25)

LEGAL ISSUE NUMBER 6

Where the parties to a written contract agree upon the rate of interest does the trial court abuse its discretion if it awards prejudgment interest at a different rate ?

Section 19.52.010 (1) mandates that the rate agreed to by the parties is the rate that court is to use. The Landco-Douglass contract specified a rate of interest. The trial court therefore had no authority to calculate prejudgment interest at a rate different than the one they agreed to. When the court, acting under an erroneous interpretation of a statute, awards relief in direct violation to that authorized by the statute, it has abused its discretion. (*Endicott at* 886).

A trial court also abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds. *Noble v. Safe Harbor Family Pres. Trust,* 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. *Id.; Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 339, 858 P.2d 1054

(1993). Awarding interest contrary to the statute was an error of law and therefore an abuse of discretion requiring reversal.

Landco argues that the court properly exercises its discretion when it awards prejudgment interest as "expectation damages". Landco fails to explain why it would "expect" interest at a rate in excess of that for which it bargained and for which Douglass paid valuable consideration. Landco has also failed to explain how a negotiated reduction in interest is not the same as a negotiated limitation on damages. Most importantly, Landco never explains how this complies with §19.52.010 (1).

LEGAL ISSUE NUMBER 7

Is conclusion number seven, which states that Plaintiff is entitled to interest on the judgment at the rate of 12 percent, supported by the findings?

RCW 4.56.110 (1) provides that interest on judgments mirror the interest rate stated in the contract. Only if the contract rate is not set forth in the judgment shall interest accrue at 12 percent. (4.56.110 (4)). [4]

In conclusion number 7, the trial court stated that interest on Landco's judgment should bear interest at 12 percent without first finding that the parties' contract had failed to provide for an interest rate. Without that all important finding, the conclusion is unsupported and remand is required.

Landco argues entitlement to post judgment interest as a matter of law rather than as a matter of contract. Here again, Landco fails to

[4] Ex H, Appendix to AOB

correctly frame the argument or respond to Douglass'. While the court had the right to award post judgment interest it had no right to award interest at a rate other than agreed to in the contract and certainly had no authority to award a different rate without the finding noted above. As to the argument that Landco is entitled to interest as a matter of law, Landco fails to apprise this Court of the law to which it is referring.

As noted in *Jackson v. Fenix Underground, Inc.*, 142 Wn.App. 141, 146, 173 P.3d 977 (Div 1, 2007), RCW 4.56.110(1) manifests a legislative intent to allow contracting parties the freedom to specify an interest rate different from the imposed by §4.56.110 (4). As with *Schrom* and *Wright* in the section on prejudgment interest, Landco failed to address *Jackson* on post judgment interest.

Jackson provides that the contracting parties are by statute, provided with the freedom to choose varying interest rates depending on their individual circumstances, (*id* at 147) and judgments founded on a written contract are required to bear interest at the rate specified in the agreement. (*Id* at 142).

It is in this section that Landco attempts to drag *Palmer v. Laberee, 23 Wash. 409, 63 P. 216 (1900)*, cited in *Marriage of McLaughlin,* 46 Wn.App. 271, 274, 729 P.2d 659 back into the mix. *Palmer* is a case from 1900 involving an 1894 judgment emanating from a note entered into in 1892. Landco reprinted the following analysis of *Palmer* to which Douglass does not disagree;

> **A closer reading of *Palmer* reveals, however, that the case principally stands for the proposition that where the balance due on a promissory note, which contains no provision for interest after maturity, is reduced to judgment, and the judgment contains no recital of interest, it draws interest at the legal rate specified by statute for judgments.**

(*McLaughlin* at 274; 41, ROB).

The quoted passage is itself unobjectionable because it is very similar to present day §4.56.110 (4). However, by 2014 the statute as applicable to written contracts had been changed to include §4.56.110 (1) which requires the court to calculate interest on judgments founded on written contracts which provide for the payment of interest until paid (as the Douglass-Landco contract does) **at the rate specified in the contract**. As with prejudgment interest, there is no reference in the statute to "default interest" and no case has interpreted the statute as requiring a default interest. Because the trial court did not include language in the judgment that interest was to accrue at the contract rate---zero percent---Douglass has been denied the benefit of the bargain for which it paid $314,000.

It should also be noted that *Marriage of McLaughlin* did not even apply the same subpart of RCW §4.56.110 that this Court must now apply. In *McLaughlin* the Court applied §4.56.110 (2) pertaining to a judgment for child support where as in this case on review §4.56.110 (1) & (4) apply because this case involves a written contract.

LEGAL ISSUE NUMBER 8

Does the court abuse its discretion when it awards attorney fees for work performed by unlicensed legal interns without finding that they were qualified to perform substantive legal work, that the work performed was of a legal nature and was supervised by an attorney?

Prior to 1995 no Washington Court had addressed whether the time of non-lawyer personnel may be included in an attorney fee award. *Absher Construction Company v. Kent School District* 79 Wn.App. 841, 844 917 P.2d 1086 (1995). *Absher* established very specific criteria which must be satisfied before fees may be recovered for the work of non-attorneys; Two of the six criteria are spelled out below;

(a). The performance of these services must be supervised by an attorney.

(b). The qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work.

(Id, 845).[5]

The trial court noted the importance of the qualification criteria in disallowing fees based upon work of paralegals because their qualifications to perform substantive legal work had not been established. (CP 926, 927).

The trial court failed to find that the legal interns were qualified to perform substantive legal work. In fact, the trial court had been provided no facts from which such finding could have been made. Findings of fact and conclusions of law are required in order to establish a record for

[5] Douglass lists all six in its Opening Brief

proper review of a fee award. The absence of such a record requires remand so that the trial court may develop such record. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Smith v. Dalton,* 58 Wn.App. 876, 795 P.2d 706 (1990).

The sole finding of the trial court regarding the interns is that "they are described as full-time students of Gonzaga University..." [6] (CP 927). Obviously, simply being a full time student, of itself, does not satisfy the requirement that the qualifications be

> ***specified in sufficient detail to demonstrate that the person is qualified by virtue of education, training or work experience to perform substantive legal work.***

(*Absher* at 845).

There was no evidence from which the court could discern how long the interns had been students. One week of law school could not satisfy the *Absher* test and Landco failed to provide any information to the court by which it could determine if the interns had been enrolled for one week or three years.

Landco argued that the trial court determined that the interns were "presumably" qualified to perform substantive legal work based on their status as current law students in good standing at an ABA accredited law school. Such "presumption" is speculation on the part of Landco and in any event does not substitute for evidence of qualification and a proper finding.

---

[6] the trial court didn't even find that they were "law students", only that they were students of Gonzaga University (however, Douglass does not wish to quibble over that point)

Landco also failed to properly establish that the interns were supervised by an attorney, a simple task that would have taken only part of a line in the supporting declaration. That the interns' work may have been incorporated into an attorney's work, as Landco argues, does not satisfy the supervision requirement.

The *Absher* Court, in setting the criteria, also found that determination of the fee award should not become unduly burdensome. (*Id* at 848). Obviously then, the *Absher* Court did not consider the requirement of establishing qualification and supervision of the non-attorneys burdensome.

Landco's complaint that Douglass seeks to make the fee request unduly burdensome rings hollow in light of the above. Moreover, Landco failed to show how inserting a line or two into a declaration constitutes undue burden.

Landco sought $444,525 in fees and costs. The trial court awarded $237,007.47. Douglass asks the court to reverse the trial court as to the $24,514.16 attributable to the legal interns whose qualifications to perform substantive legal work and supervision was left unknown.

III. LANDCO'S REQUEST FOR FEES ON APPEAL FAILS AS INSUFFICIENT

The Court sitting in Division II declined to award attorney fees on appeal because the prevailing party failed to meaningfully discuss legal authority or cite to the record in support of its request. *Cosmopolitan*

Engineering Group, Inc v. Ondeo Degremont, Inc., 128 Wn.App. 885, 895 117 P.3d 1147, (2005).

On this issue, Landco states in cursory fashion;

> **The prevailing party is entitled to attorney fees on this appeal. TJ Landco requests that this court award TJ Landco its fees on appeal**

Should Landco prevail it should not be awarded fees.

IV. CONCLUSION

RCW Section 19.52.010 refers to a "rate agreed to in writing between the parties". Section 4.56.110 refers to "the rate specified in the contract". The legislative history of §19.52.010 shows that the legislature did not have a separate default rate in mind. Had a mistake been made, the legislature has had 119 years to correct it. Landco has failed to cite any case that supports its position on interest and failed to distinguish any of the cases cited by Douglass.

Landco has attempted to paint Douglass as an intentional wrongdoer who simply decided to breach the contract. For that, Landco infers that the statutes on interest should be ignored so that Douglass can be penalized. However it was Douglass that financed Landco's entire endeavor. It was Douglass that agreed to Landco's plea for advance payment in exchange for dropping the interest rate (or limiting damages).

Douglass only stopped making payments under the good faith belief that there were be less lots than promised. (RT 851;2-4)(RT 578; 17- 579; 3). The court agreed that Douglass had a right to set off if it could be

established that less lots were achievable than were promised but then found that Douglass' proof was lacking. (RT 865; 4-10). Accordingly, Landco's attempt to paint Douglass in a bad light fails and in any event would not bear on a correct interpretation of the statutes.

There is no dispute that the contract provides for interest at zero percent until paid. The statutes, the cases cited by Douglass, the legislative history, the parties' contract and Landco's inability to counter any of Douglass' arguments compel reversal on the amount of interest as well as the attorney's fees which were challenged.

RESPECTFULLY SUBMITTED this 30th day of June, 2014

Law Office of Steven J. Hassing

Steven J. Hassing, WSBA No. 6690
Attorney for Harley C. Douglass, Inc.,
Appellant/Defendant