No. 91639-0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 319920-III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

(Consolidated with 322084-III)

TJ LANDCO LLC

Respondent

v.

HARLEY C. DOUGLASS, INC., a Washington Corporation

Appellant/Petitioner

APPELLANT'S PETITION FOR REVIEW

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I. PETITIONER

Petitioner, Harley C. Douglass, Inc., Appellant and Defendant below, Petitions for review of the Decision terminating review.

II. COURT OF APPEALS DECISION TO BE REVIEWED

Douglass seeks review of the Published Opinion ("Decision") issued on March 5, 2015. A copy of the Decision is attached as Appendix A[1]. Douglass timely moved for reconsideration which was denied on March 31, 2015. A copy of the order denying reconsideration is attached as Appendix B.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

There are two issues presented for review. The first pertains to prejudgment interest and is an issue never before fully addressed by any reviewing Court in this state;[2]

> ***Are debtors required to include within their written contracts, two rather than one, agreed upon rates of interest in order to avoid imputation of the 12 percent default rate imposed by RCW 19.52.010(1)in the event of breach?***

Sole authority for imposition of the twelve percent default rate is found within RCW 19.52.010(1), a true and correct copy of which is attached as Appendix "C". This Court is asked to clarify the meaning,

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[1] All citations to the Decision are to 030515 WACA, 31992-0-III, (App "A").

[2] The cases cited as being in conflict with the Third Division's Decision strongly infer that agreement on only one, and not two, interest rates is necessary but even those cases do not definitively answer the specific question presented.

application and relationship of the terms, **"every loan *or forbearance*"** and "***where no different rate is agreed to***". The relevant portion of the statute reads as follows;

> **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:** [3]]

The second issue involves attorneys' fees on appeal.

> ***Can attorney fees on appeal be awarded absent compliance with RAP 18.1(b)?***

The Decision is in direct conflict with numerous prior decisions of this Reviewing Court and all three divisions of Court of Appeals because the Decision awarded fees on appeal despite Landco's complete failure to comply with the mandatory provisions of RAP 18.1(b).

Landco's only claim for fees in its brief was the bald statement; "**The prevailing party is entitled to attorney fees on this appeal**".

An award of fees, based upon such statement without argument as required by RAP 18.1(b) conflicts with every reported case deciding that issue.

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[3] The statute contains the following additional language not relevant to this Petition; PROVIDED, That with regard to any transaction heretofore or hereafter entered into subject to this section, if an agreement in writing between the parties evidencing such transaction provides for the payment of money at the end of an agreed period of time or in installments over an agreed period of time, then such agreement shall constitute a writing for purposes of this section and satisfy the requirements thereof. The discounting of commercial paper, where the borrower makes himself or herself liable as maker, guarantor, or endorser, shall be considered as a loan for the purposes of this chapter.

IV. STATEMENT OF THE CASE

Douglass is a residential land developer and home builder. (RT 560; 6-23). Respondent, TJ Landco, LLC, the plaintiff below, is owned and operated by Tod Lasley, himself a seasoned residential real estate developer. (RT 66; 17 & 118; 22 – 120; 6)

In late 2002 or early 2003 Landco began assembling 94 acres of land in Spokane for residential development. (RT 66; 17 & 118-22; 120; 6). In February of 2004 Landco and Douglass entered into a written contract with Douglass agreeing to buy the land once Landco obtained an acceptable preliminary plat. The purchase price was $3.6 million and required a $2 million down payment. $1.6 million was deferred, to be paid in annual installments beginning two years following close of escrow. (Ex P-1)[4](CP 49).

Prior to plat approval and before Douglass was obligated to pay any money, Landco encountered financial difficulty and needed nearly $1.5 million in advances from Douglass to enable it to honor contract obligations on its own purchase of the 94 acres. In exchange for Douglass' financial backing, Landco reduced the price to $3.1 million. (RT 148; 22; 155- 4).

Interest during the first two years following close of escrow was to equal the minimum federal rate. Since no interest was awarded for

[4] Ex P-19 is the Parties' December 22, 2006 contract modification, attached as Appendix "D".

the first two years following the December 22, 2006 close of escrow, the federal rate is not at issue. After the first two years, interest was to accrue at six percent until the balance was paid in full. (Ex P-1) (CP 49).

In June of 2004, Landco unsuccessfully attempted to amend the contract to require Douglass to pay twelve percent "default" interest on late payments. (RT 150- 9; 151; 16)[5].

By the time Landco obtained final preliminary plat approval Douglass had advanced cash or credit of around $2,485,442 of the $3.6 million original price. (Ex P-19)[6]. On December 22, 2006 the parties met and agreed that there remained owing a total of $1,114,558.19. (RT 572; 17- 19) [7]

Under the original agreement Landco was not entitled to another payment for two years. (Ex P-1). However, when the parties met in December of 2006 Landco was again in need of cash. (RT 155; 10-156; 4. At the December meeting, Landco promised to reduce the interest rate from six percent to zero if Douglass would make an immediate payment of $114,558 and advance the due date on the initial

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[5] Ex D-101 at page 2, (iii) & Ex D-102 at page 2, (iii).

[6] Ex P-19 is the parties' December 22, 2006 contract modification, attached as Appendix "D".

[7] also see CP 68 & 583 and Ex P-19.

installment a full year. (RT 331; 21- 332; 5). Douglass agreed, the parties executed a one page modification and Douglass advanced Landco another $114,558. (RT 574; 3-5). The initial $200,000 installment was paid on March 4, 2008. (CP 583)

When the December 22, 2008 installment came due Douglass had discovered what he considered to be significant problems with the plat which he believed would only allow for 304 of the 371 lots. (RT 851; 2-4) (578; 17- 579; 3). Believing entitlement to an offset exceeding the remaining $800,000 balance, Douglass made no further payments. (CP 588, 589; findings 20- 24). Douglass then sold the land without developing it. (RT 864;10- 14).

The Trial Court found that Douglass was not entitled to an offset and was found to be in breach of contract. Landco was awarded the $800,000 as damages. (RT 865; 13). That part of the Judgment was not appealed. In addition to the $800,000 in damages, and notwithstanding the contract modification that called for "zero interest", Landco was awarded $289,705 in prejudgment interest. (CP 592).

Concerning prejudgment interest, the issue presented for review is whether the Court's interpretation of RCW 19.52.010(1) conflicts with the plain language of the statute, the Washington State

Constitution and prior decisions. This Court is asked to decide if the parties to a contract need to agree upon one rate of interest or two?

Concerning fees on appeal, the issue presented for review is whether the bare bones statement, "The prevailing party is entitled to attorney fees on this appeal" satisfies RAP 18.1(b) and whether the Decision conflicts with the cases cited below.

V. ARGUMENT IN SUPPORT OF GRANTING REVIEW

1. Prejudgment Interest

Prior to this case, interpretation of RCW 19.52.010(1) had come before reviewing courts in three primary published decisions. From Division I came *McDowell v. The Austin Company*, 39 Wn.App. 443, 693 P.2d 744 (1985), from Division II came *Wright v. Dave Johnson Insurance Inc.,* 167 Wn.App. 758, 275 P.3d 339 (2012), and from this Court came *Schrom v. Board for Volunteer Fire Fighters,* 153 Wn.2d 19, 100 P.3d 814 (2004), (originally emanating from Division III). [9]

Except for the Decision on which Review is sought, there is not one published decision interpreting RCW 19.52.010(1) as requiring two---rather than one---agreed upon rate of interest in order to avoid imputation of the twelve percent default rate. To do so judicially does violence to the

[9] The following cases also touch on pre-judgment interest; *Chan v. Smider*, 31 Wn.App. 730, 644 P.2d 727 (Div I), *State v. Trask*, 98 Wn.App. 690, 990 P.2d 967 (Div 2, 2000), *Hidalgo v. Barker*, 176 Wn.App. 527, 309 P.3d 687 (Div III), *Mehlenbacher v DeMont*, 103 Wn.App. 240, 11 P.3d 871 (Div II).

statute and conflicts with Section I of Article II of the Washington State Constitution which reserves legislation to the legislature.[10]

Further, because untold numbers of commercial relationships involve application of pre-judgment interest the certainty which this Court can bring to the issue is of substantial public importance.

A. The Decision Is In Conflict With RCW 19.52.010(1), The Statute Under Which It Was Decided.

The original contract called for the deferred balance to bear interest at six percent until paid in full. The contract was modified by a writing that changed the interest rate from six percent to zero. The issue before the Court of Appeals was whether the rate stated in the contract---as modified---satisfied the statute's requirement mandating an agreed interest rate to avoid imposition of the legal rate of twelve percent.

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. . .**

The Court of Appeals determined that Parties had agreed upon an interest rate on the "loan" but had not agreed upon an *additional rate*--- a separate rate---for a "forbearance" should the loan not be paid as agreed. (Decision @ 7, 8). In effect, the Court of Appeal determined that the statute requires that the parties agree upon <u>two rates of interest</u> in order

[10] Section I of Article II Attached as Appendix "E".

to avoid imposition of the legal rate in the event of a default on the "loan" (or "forbearance"). However, that is not what the statute says.

Douglass argues that Division III's interpretation does not make sense because under that interpretation it would always be necessary for the parties to state two interest rates to avoid the legal rate upon breach. In theory, both rates might even be the same but the parties would have to designate rates on both the deferred balance on the loan as well as a rate on the new forbearance which would be created upon a loan default.

It is important to remember that where the parties have entered into a contract the issue never arises save for a default. If two parties to a contract were to agree to a deferred balance at eight percent per annum until paid and the obligor never defaulted, the balance, plus eight percent, would be paid and there would never be a need to invoke the statute. It is only where the parties have not agreed upon any rate that the statue is invoked to determine the rate at which pre-judgment interest is to be calculated.

But the Court of Appeals determined that despite the fact that the deferred balance was a "forbearance", the breach caused a "new forbearance" and that the parties had not agreed upon a separate rate for that forbearance. (Decision @ 7, 8). Clearly, the statute only calls for agreement on one rate and in this case a rate was clearly agreed upon and supported by valuable consideration, i.e., Douglass' advance payments to

Landco. In mandating two rates the Court of Appeals Decision is in direct conflict with the statute.

The Decision recognized that prejudgment interest was mandatory and "the only question was whether the statutory interest rate, or some contract rate, applied". (Decision @ 7). In support of the Decision the Court noted that the breach created a "new forbearance", citing *Kahl v. Ablan*, 160 Wash. 201, 206, 294 P. 1010 (1931) and holding;

> **the modification did not include an agreement by Landco that it would accept zero percent interest on each outstanding $200,000 installment if it went unpaid when due. Instead, each missing installment created a new forbearance of $200,000. The contract did not address a new forbearance resulting from breach of the contract. Accordingly, RCW 19.52.010(1) governs and mandates interest at 12 percent on each forbearance.** (Decision @ 8).

It should be noted that in its 84 years, *Kahl* has been cited on just three occasions---the last time being in 1953. *Kahl* has never been cited for the proposition that where the parties have agreed to an interest rate an *additional rate* must also have been agreed upon for the "new forbearance".

B. The Decision Is In Conflict With Supreme Court Case *Schrom v. Board for Volunteer Fire Fighters* And With Two Decisions of The Court of Appeals

1. *Schrom v. Board for Volunteer Fire Fighters*

In *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 100 P.3d 814, (2004), this Court provided guidance in interpreting what was meant by "no different rate having been agreed upon".

There, two volunteer fire fighters who had paid into a pension fund were determined to be ineligible to receive pension benefits and it was determined that the fees they had previously paid should be reimbursed with twelve percent interest. Since at the time the payments were paid into the fund there was no reason to believe that they would ever have to be returned, there was no agreement on a rate of interest if those payments ever had to be returned.

The Court held that since there was no written provision for interest the volunteers 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). (emphasis added). This Court made no reference to there having to be two stated rates---only one.

Since the Decision conflicts with a case decided by this Reviewing Court, RAP 13.4(b)(1) provides for review at this time.

2. *Wright v. Dave Johnson Insurance Inc.*

In April of 2012 Division II followed with a similar holding in *Wright v. Dave Johnson Insurance Inc.*, 167 Wn. App. 758, 275 P.3d 339, (Div 2, 2012). There, Johnson, Wright's son-in-law, paid some of

the premiums on Johnson's life insurance policy. As in *Schrom*, there was no expectation by the parties that those premiums would have to be repaid by Johnson so there was no agreement as to the rate of interest which would accrue on the premiums. Circumstances later required reimbursement with the Court finding;

> **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)

3. *McDowell v. The Austin Company*

McDowell v. The Austin Company, 39 Wn.App. 443, 693 P.2d 744 (Div 1, 1985) provides the most clear interpretation of the statute of any published case. There, the parties entered into a written agreement to resolve litigation over an indemnity claim. It provided that with regard to an eventual decision regarding ultimate responsibility, the prevailing party would be entitled to interest "at the rate established by RCW § 19.52.010". (at 446). Upon determination of final liability, the trial court awarded the prevailing party prejudgment interest at the six percent rate applicable under § 19.52.010 at the time the agreement was entered into. [10] However, the statutory rate had doubled between the time of the agreement and the date of the calculation. (at 451).

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[10] Now 12 percent.

On appeal the Court determined that since the parties had agreed that § 19.52.010 should control, prejudgment interest should accrue at six percent from the time of the agreement until July 26, 1981, the date on which interest under the statute was changed from six percent to 12 percent, and thereafter should be calculated at the higher rate, holding;

> **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)

McDowell provides clear authority in support of Douglass' urged statutory interpretation. The parties agreed upon a rate. It just so happened that the rate they agreed upon was the rate provided by the statute. However, as the court stated, had they agreed upon a different rate, that is the rate that would be used to calculate prejudgment interest, and the statutory increase of six percent to twelve percent between the date of the agreement and the effective date on which the interest rate had to be determined would have been ignored.

There is no published case that stands for the proposition that parties to a contract must provide for two rates of interest, one on the deferred balance and one in the event of a breach, in order to avoid imputation of the legal rate upon breach. However, the Decision Douglass asks this Court to review does just that. Since the Decision

conflicts with previous cases decided by the Court of Appeals, RAP 13.4(b)(2) provides for review at this time.

C. The Decision Is In Conflict With The Washington State Constitution

Section I of Article II of the Washington State Constitution grants and reserves legislative authority to the legislature---not to the courts. By reading language into RCW 19.52.010(1) which the legislature did not elect to include and which substantially changes the meaning of the statute, the Decision is in direct conflict with the state constitution and on that basis alone should be reviewed pursuant to RAP 13.4(b)(3).

D. The Decision Involves An Issue of Substantial Public Interest

There are an incalculable number of commercial transactions occurring daily within this state which involve written agreements providing for interest on deferred balances. By definition, there is a substantial public interest in knowing whether one must agree to two interest rates or one in order to avoid imposition of the statutory rate of twelve percent upon default. Accordingly, the Decision should be reviewed pursuant to RAP 13.4(b)(4).

2. Attorney Fees on Appeal

The trial court awarded attorney fees to Landco. The Court of Appeals found that regarding interest, Landco prevailed on appeal and was

entitled to fees pursuant to RCW 4.84.330; *Hill v. Cox*, 110 Wn.App. 394, 411-12, 41 P.3d 495 (2002) and RAP 18.1. (Decision @ 15,16).

Landco sought fees on appeal of $50,705.50 by motion. The motion was opposed by Douglass and has yet to be ruled upon. In any event, the ruling of the Court of Appeals conflicts with prior decisions of this Reviewing Court and of all three Divisions of the Court of Appeals because Landco completely failed to comply with the mandatory requirement of RAP 18.1(b) which imposes a strict requirement compelling one seeking attorneys' fees on appeal to do two things; (1) devote a separate section in the opening brief to such request, and (2) provide argument within that section. Case law interpreting the rule makes clear that the argument is mandatory and must include citation to legal and factual authority for an award of attorney fees.

While Landco provided the required separate section it failed to provide the required argument and failed to cite to any part of the record or to any legal authority---even to RAP 18.1--- which would allow an award of fees. Accordingly, because Landco failed to satisfy the mandatory argument requirement of RAP 18.1(b), the part of the Decision awarding fees to Landco on appeal conflicts with prior decisions of this Court and decisions of all three Divisions of the Court of Appeals and warrants review under RAP 13.4(b)(1) & (2).

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A. RAP 18.1

Award of attorney fees on appeal is governed by RAP 18.1.[11] The relevant portion of subsection (b) is reprinted below;

> **Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses.**

While Landco included a separate section on attorney fees in its opening brief, it failed to provide the required legal authority, citation to the record, or argument. Landco's entire separate section advised this Court that it requested fees on appeal and with the following single sentence argument;

> ***The prevailing party is entitled to attorney fees on this appeal.***

(Landco's Opening Brief, page 47).

B. The Decision is in Conflict With The Decisions of the Supreme Court and All Three Divisions of the Court of Appeals

Case after case, from this Reviewing Court, as well as Divisions I, II and III, firmly instructs that RAP 18.1(b) is not satisfied by such a bare conclusionary statement.

From the Washington State Supreme Court, Douglass cites *Wilson v. Toni Maroni's,* 134 Wn.2d 692, 952 P.2d 590 (1998) and *Wachovia SBA Lending v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (Wash. 2009).

In *Wilson*, the high Court noted; "The rule requires more than a bald request for attorney fees on appeal". (citing *Thweatt v. Hommel*, 67

[11] A copy of RAP 18.1 attached as Exhibit "F".

Wash.App. 135, 148, 834 P.2d 1058, review denied) "Argument and citation to authority are required under the rule". (citing *Austin v. U.S. Bank of Wash.*, 73 Wash.App. 293, 313, 869 P.2d 404, review denied). (*Id* at n. 4). [11]

In the more recent case from this Reviewing Court, *Wachovia v. Kraft,* it was again noted that RAP 18.1(b) requires more than a bald request for attorney fees on appeal. Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs. (*Id* at 493).

From Division III Douglass cites three cases; *Richards v. City of Pullman*, 134 Wn.App. 876, 142 P.3d 1121 (2006); *Pruitt v. Douglass County*, 116 Wn.App. 547, 66 P.3d 1111 (2003) and *Lakes v. Vondermehden*, 117 Wn.App. 212, 70 P.3d 154 (2003).

In *Richards*, the Court held that there must be more than a bald request for fees; argument and citation to authority are necessary to inform this court of the appropriate grounds for attorney fees. (*Id* at 884). In *Richards*, each requesting party provided far more than did Landco, citing the rule and statutory or code authority for an attorney fees award. However, since no argument for application of that authority was provided, attorneys' fees were not awarded. (*Id* at 883, 884).

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[11] Compliance with RAP 18.1(b) is mandatory. (citing *Phillips Bldg. Co. v. An,* 81 Wash.App. 696, 705, 915 P.2d 1146 (1996).

In *Pruitt*, the party seeking fees employed a separate section in its brief to request fees but like Landco, that section omitted argument or underlying grounds justifying a grant of fees. Noting that the procedure outlined in RAP 18.1(b) was "*mandatory*", Division III held that "the showing was not enough" and fees were not awarded. (*Id* at 560).

Lakes provides yet another example of a party seeking attorney fees through use of the required separate section in the brief with Division III holding that merely citing to RAP 18.1 without argument or citation to authority does not satisfy the requirement of the rule and fees were denied. (*Id* at 220). Landco even failed to mention RAP 18.1.

The two most recent cases, one from Division I, *Hurley v Port Blakely Tree Farms*, 182 Wn.App. 753, 332 P.3d 469 (2014) and the other from Division II, *Gunn v. Riely*, 012115 WACA, 45177-8-II (January 21, 2015), both hold that RAP "requires more than a bald request for attorney fees on appeal".

Landco's single sentence, "***The prevailing party is entitled to attorney fees on this appeal***" precludes an award to Landco of attorney fees on appeal. By finding that Landco was entitled to fees on appeal, the Decision is in direct conflict with prior rulings of this Court and the other Divisions.

///

VI. CONCLUSION

The Court should grant review to address the conflicts between the Decision and the prejudgment statute upon which the Decision was based. It should also grant review because of the conflict between the Decision and prior decisions of this Court and the Court of Appeals.

In addition, review should be granted to address the violence done to the state constitution by the Decision in which the court, by adding language to the statute, has usurped legislative authority. Finally, this Court should grant review to provide clarity for the thousands of merchants obligated under arrangements of deferred payment.

This Court is asked to decide whether RCW 19.52.010(1) requires one or two stated rates of interest.

This Court is also asked to review that part of the Decision regarding attorney fees on appeal. If the ruling awarding fees on appeal is allowed to stand, it will conflict with earlier decisions of this Reviewing Court and all three Divisions of the Court of Appeals.

RESPECTFULLY SUBMITTED this 21 day of April, 2015

LAW OFFICES OF STEVEN J. HASSING

By: _____

Steven J. Hassing, WSBA No. 6690
Attorney for Petitioner,
Harley C. Douglass, Inc.

APPENDIX "A"

FILED
MAR 5, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

TJ LANDCO, LLC, a Washington Limited Liability Company, Respondent, v. HARLEY C. DOUGLASS, INC., a Washington Corporation; SECURE SELF STORAGE, LLC, a Washington Limited Liability Company; HARLEY C. DOUGLASS and JANE DOE DOUGLASS, husband and wife, and the marital community comprised thereof; and JOHN DOE PARTNERSHIP, Appellant.	)	No. 31992-0-III Consolidated with No. 32208-4-III PUBLISHED OPINION

KORSMO, J. — This appeal arises from the modification of the provisions of a contract governing payment and interest. Concluding that the trial court adopted a reasonable construction of the contract at the bench trial, we affirm the interest rate rulings and remand for an additional hearing of the question of the attorney fee award for work performed by law students.

FACTS

The subject of the contract was land near the southwest borders of the city of Spokane. Respondent TJ Landco LLC (Landco) agreed in February 2004, to sell the 94

acre parcel of land to appellant Harley C. Douglass, Inc. (Douglass) for $3.6 million. The seller was required to obtain preliminary plat approval from the city of Spokane and obtain the city's agreement to extend water and sewer by the end of 2005.

The parties used a standard real estate purchase and sale agreement form. An addendum to that form included the following language concerning the purchase price and interest:

> 1) Purchase price of 3.6 Million Dollars ($3,600,000.00) to be paid as follows:
> A) Two Million Dollars ($2,000,000.00) as down payment due at closing
> B) The balance of One Million Six Hundred Thousand Dollars will be paid in annual installments of $250,000.00 per year plus interest until paid in full.
> C) The unpaid balance will carry and [sic] interest rate of 6% per annum.
> D) The first annual payment will begin exactly 2 years from the date of closing.
> E) Purchaser and Seller agree that the interest rate for the first two years of this transaction will carry the minimum Federal Rate allowable. At the end of the first two years the interest rate will be 6% per annum until balance is paid in full.
> F) . . . .
> G) Deed releases will be prepared on a per acre basis on the remaining balance of land and executed according to the installment payment schedule noted above.

Clerk's Papers (CP) at 49.

Three of the provisions mentioned interest, and two of them gave competing commands concerning the rate to be charged. Subsequent developments were to make the situation more complicated.

The preliminary plat approval was received October 9, 2006, and the sale closed thereafter. Tod Lasley, the owner of Landco, met on December 22, 2006, with Harley Douglass, the owner of Douglass. The two men agreed that at that point Douglass owed Landco $1,114,558.19. Douglass paid $114,558.19 at that time. On a balance sheet accounting for payments made and balance owing on the land sale, the men added two separate handwritten notes. Each was dated December 22, 2006, and signed by both men. The first stated:

> 1,000,000.00 Balance,
> Payment of 200,000.00 per year for 5 years at zero interest.

The remaining note:

> #889
> Based on 371 Lots
> If less credit will be given out of 1,000,000.00

CP at 68.

The parties treated these writings as a modification of the original contract. Douglass made a single payment of $200,000 on March 4, 2008, but did not make any additional payments thereafter. He later contended that Landco had not fulfilled all of its obligations under the contract and that only 304 of the anticipated 371 lots would be approved. Douglass sold the land to his parents for $500,000 without developing it.

Landco filed suit in February 2010, contending that Douglass had breached the contract. Douglass defended on the basis that he was entitled to an offset due to the limited number of lots approved and, thus, no further moneys were owing. The case

proceeded to a four day bench trial in the Spokane County Superior Court. In addition to the questions of breach and offset, the parties hotly contested the interest rate governing any judgment as well as appropriate attorney fees.

The trial court concluded that Douglass had breached the contract and that he had failed on his counterclaim for an offset. The court awarded Landco the remaining $800,000 on the contract, plus prejudgment interest at 12 percent and postjudgment interest at 12 percent. Detailed findings in support of the bench verdict were entered. Douglass promptly appealed to this court.

After hearing, the trial court awarded Landco its attorney fees and costs, including $24,514.16 for work done by law student "legal interns." The court denied Landco's request for fees for work performed by paralegals. Douglass appealed from the fee award. This court consolidated the two appeals and subsequently heard oral argument.

ANALYSIS

Douglass challenges the prejudgment and postjudgment interest rates, as well as the fees awarded for the work performed by the law students. Both parties seek attorney fees on appeal under the contract. We initially address the two interest rate arguments as one issue before turning to the two attorney fee contentions.

Interest Rate

Douglass contends that the zero percent interest rate in the modification provision governs both the prejudgment and postjudgment interest rates, thus making the court's

judgment in error. Landco contends that the parties did not contract for a rate to govern in the event of a breach of the contract, requiring the court to apply the statutory provisions that currently provide for 12 percent interest. No party contends that the six percent rate initially provided by the contract is still in force.[1] Because the same operative facts control the outcome, we consider the two arguments together even though different statutes govern the two situations.

Prejudgment interest is governed by RCW 19.52.010.[2] As relevant here, the statute states in part:

> (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 . . . .

The governing statute for postjudgment interest is found in RCW 4.56.110.[3] The relevant provisions relate:

> Interest on judgments shall accrue as follows:
>
> (1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.
> . . . .

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[1] Both parties agreed at oral argument that the six percent figure was inapplicable and neither side argued for it in their respective briefing.

[2] This statute had its genesis in the LAWS OF 1854, p. 380 § 1, but much of the current language was enacted by LAWS OF 1895, c. 136.

[3] This statute, too, draws much of its current language from the LAWS OF 1895, c. 136.

> (4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof.

RCW 4.56.110(1), (4). RCW 19.52.020(1) provides interest at the higher figure of either 12 percent or the average treasury bill rate plus four percent.

Appellate courts review awards of prejudgment interest for abuse of discretion. *Scoccolo Constr., Inc. v. Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). A party is entitled to prejudgment interest on liquidated claims[4] to compensate them for loss of use on money that is wrongfully withheld by another party. *Mall Tool Co. v. Far West Equip. Co.*, 45 Wn.2d 158, 169, 273 P.2d 652 (1954); *see also Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979) (discussing the purpose of prejudgment interest in applying the standard to a judgment against the State). Trial courts may exercise discretion in the amount of the award, but must give a reasonable explanation in equity for any deviance from the standard rate. *See Dave Johnson Ins. Inc. v. Wright*, 167 Wn. App. 758, 776 n.10, 275 P.3d 339 (2012).

Postjudgment interest is mandatory due to RCW 4.56.110. *Womack v. Von Rardon*, 133 Wn. App. 254, 264, 135 P.3d 542 (2006); *Rufer v. Abbott Lab.*, 154 Wn.2d 530, 551-53, 114 P.3d 1182 (2005). Consequently, awards of postjudgment interest are matters of law that are reviewed de novo. *Sintra, Inc. v. Seattle*, 96 Wn. App. 757, 980 P.2d 796 (1999).

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[4] There is no dispute here that the claims are liquidated.

When a party breaches an obligation to pay a liquidated debt, a new forbearance is created. *Kahl v. Ablan*, 160 Wash. 201, 206, 294 Pac. 1010 (1931) (citing cases). The creation of the new forbearance triggers application of the prejudgment interest statute. RCW 19.52.010(1) ("Every loan or forbearance of money . . . shall bear interest."). *Accord, Smith v. Olympic Bank*, 103 Wn.2d 418, 425, 693 P.2d 92 (1985) ("The rate of prejudgment interest is governed by RCW 19.52.010."); *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wn. App. 208, 216, 716 P.2d 911 (1986) ("RCW 19.52.010, governing prejudgment interest, provided for a rate.").[5] Thus, the trial court here correctly recognized that prejudgment interest was required when the payment obligation was breached. The only question was whether the statutory interest rate, or some contract rate, applied.

Douglass argues for the zero percent rate governing the payments expected over the five year period, while Landco contends that the statutory rate applies because the

[5] Some courts wrongly cite to the postjudgment interest statute, RCW 4.56.110, as the basis for an award of prejudgment interest due to dicta in *Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998) (*impliedly overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012)), where the court stated that prejudgment interest was allowed at the statutory judgment interest rate even while rejecting the claim for prejudgment interest. *See, e.g., Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 51, 169 P.3d 473 (2007); *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 250 P.3d 121 (2011); *Palermo at Lakeland, LLC v. Bonney Lake*, 147 Wn. App. 64, 87-89, 193 P.3d 168 (2008). Although in many instances the same interest rate will apply under either statute, we believe it is inaccurate to rely upon the postjudgment interest rate statute for calculation of prejudgment interest.

parties did not address the possibility of a new forbearance being created due to a breach of the modified payment schedule. The trial court agreed with Landco, and so do we.

Although Landco agreed to forego interest during the five year payment period set out in the modification, it also expected to receive $200,000 each December during that time frame. The modification did not include an agreement by Landco that it would accept zero percent interest on each outstanding $200,000 installment if it went unpaid when due. Instead, each missing installment created a new forbearance of $200,000. The contract did not address a new forbearance resulting from breach of the contract.[6] Accordingly, RCW 19.52.010(1) governs and mandates interest at 12 percent on each forbearance.[7]

In sum, we affirm the court's award of prejudgment interest calculated from the time each installment became due. Each missing payment created a new forbearance. In

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[6] It is not a new concept that parties can contractually account for interest in case of the possibility of breach. Chief Justice Taney long ago observed: "The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract." *Brewster v. Wakefield*, 63 U.S. 118, 127, 16 L. Ed. 301 (1859).

[7] Douglass additionally challenged the date from which prejudgment interest began. The trial court charged interest on each installment of $200,000 from the date on which the installment was due. Douglass asserts that the court should have charged interest on the entire sum from December 22, 2011, the date on which the balance was to have been paid in full. However, prejudgment interest is appropriate from the date upon which the liquidated claims were created. *See, e.g., Winkenwerder v. Knox*, 51 Wn.2d 582, 320 P.2d 304 (1958). The trial court concluded that a new debt became owing each time a payment was missed. The decision to begin interest at that time was correct.

the absence of a contract provision addressing a new forbearance, the statutory rate of 12 percent was appropriate. RCW 19.52.010(1).

Douglass also argues that the zero percent contract rate applies to postjudgment interest rather than the "default" 12 percent rate established by RCW 4.56.110(4) in conjunction with RCW 19.52.020. A contractual rate of interest was not available under the plain language of the statute.

As noted previously, the opening clause of RCW 4.56.110(1) states in part: "Judgments founded on written contracts, providing for the payment of interest *until paid* at a specified rate, shall bear interest at the rate specified in the contracts."[8] (emphasis added). The language "until paid" is a term of art. Our cases have long distinguished between agreements to pay interest at maturity and agreements to pay interest "until paid." *E.g.*, *Bank v. Doherty*, 42 Wash. 317, 329-30, 84 Pac. 872 (1906).[9] The quoted

[8] The parties have not argued, and hence we do not address, whether an agreement to pay zero interest is in fact an agreement "providing for the payment of interest" under this statute. That question will await another day. We will assume for purposes of this opinion only that zero percent interest is a contract "providing for the payment of interest" under the statute.

[9] "If the parties had intended the note in question to draw interest at the rate of two per cent per month after maturity, it would have been an easy matter to have placed such intention beyond doubt by simply adding the words 'until paid' after the words 'two per cent per month.' They did not do so, and we must, therefore, conclude that the contract contained all of the agreement, and that the parties intended to let the law fix the rate of interest after maturity, if the note should not be paid when it became due." *Bank*, 42 Wash. at 330.

statutory language was enacted by the LAWS OF 1895, ch. 136 § 4, and has not varied from that time.

While the original agreement called for six percent interest "until paid," the modification did not. It called for zero percent interest over a five year period. Hence, the language of the statute precludes applying the zero percent contract rate to the judgment in this case.

Recognizing the problem, Douglass argues that the "until paid" language originally used in the contract still applied to the modified payment obligation. In other words, Douglass contends that zero percent language of the modification merely substituted in for the six percent language of the existing contract provision. For several reasons, we are not persuaded.

First, the parties both agreed at oral argument that the six percent provision was inapplicable. If that is correct, and we believe that it is, the modification must have supplanted the original payment terms or else the six percent provision would have revived after the five year zero interest period expired. More importantly, in light of the fact that the modified payment provision totally changed the amount of the outstanding debt and its repayment terms, and the second modification allowed for credit if fewer than expected lots were permitted, it would be impossible to read the 2006 changes to the contract in harmony with the original terms. Part of the consideration for the zero percent interest provision was the fact that Douglass advanced payments before it needed to in

order to assist Landco. If these actions were intended as only a temporary change to the contract, the parties could easily have said that all other payment-related provisions continued in force or would be revived in the event payments were not made. It did not.

The only fair reading of these terms is that they supplanted the existing payment and interest schedule. The total debt was reduced to $1,000,000 and a schedule implemented to pay that sum in five annual payments with no additional interest. At the end of the period the contract would be fulfilled. The parties did not contemplate that there would be need to revive any prior contract terms or further modify the agreement.

As modified, the contract did not provide "for the payment of interest until paid." RCW 4.56.110(1). Accordingly, there was no contractual interest rate that governed the judgment award. The trial court correctly applied the "default" 12 percent interest provided by RCW 4.56.110(4) and RCW 19.52.020(1).

The trial court correctly calculated both the prejudgment and postjudgment interest awards. There was no error.

Attorney Fees for Legal Interns

Douglass also appeals from the trial court's attorney fees award for the service of law student "legal interns." The record is insufficient to decide this issue and we remand for further hearing.

Attorney fee awards are reviewed for abuse of discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). Discretion is abused when it is

exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused if it is exercised contrary to law. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). We also note that trial courts, not appellate courts, find facts. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Accordingly, this court reviews the trial court's factual determinations for sufficiency rather than make our own credibility determinations. *Cherry Lane*, 153 Wn. App. at 717.

In *Absher Construction Co. v. Kent School District No. 415*, 79 Wn. App. 841, 905 P.2d 1229 (1995), this court set forth six criteria for determining whether services performed by nonlawyers was compensable under an attorney fee award. Those criteria:

> (1) the services performed by the nonlawyer personnel must be legal in nature;
> (2) the performance of these services must be supervised by an attorney;
> (3) 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;
> (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical;
> (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and
> (6) the amount charged must reflect reasonable community standards for charges by that category of personnel.

Id. at 845.

The trial court considered these criteria in awarding the fees for the law students' work and in denying the request for fees for the paralegal's work. The trial court ruled that the fees for "research, editing and other administrative functions" performed by "legal interns" "are allowable." CP at 927. Douglass argues that the first three criteria were not satisfied by the record submitted to the trial judge.

We disagree with Douglass as to the first two criteria. Landco submitted billing records to meet its *Absher* burden with respect to fees sought for the activities of its attorneys, paralegals, and law students. The records were detailed enough to allow Douglass to present substantial detailed argument, orally and in writing, in opposition to portions of the fee request for the attorneys. Douglass successfully used the information provided to convince the trial court to trim several areas of the fee requested by the attorneys because it was duplicative of other work or related to failed motions. Douglass also was able to use the records to convince the judge that the paralegal fee request was inadequate. Accordingly, we conclude that the billing records adequately conveyed that the law students were performing legal services.

The second *Absher* criterion is whether the nonlawyers were supervised by an attorney. The billing records adequately satisfied that criterion here, although a direct statement by the supervising attorney would have been more helpful. The record does reflect that the research performed by the law students was incorporated into memoranda

and other legal decision-making by the attorneys. This showed that the students were supervised.

However, we agree in part that the third *Absher* factor was not necessarily satisfied. That criterion requires proof that the nonlawyer was "qualified by virtue of education, training or work experience to perform substantive legal work." *Absher*, 79 Wn. App. at 845. Other than identifying the students as "legal interns" who were full-time students at the Gonzaga University School of Law, there is scant evidence concerning the qualifications of these students. Douglass quite properly points out that a student beginning her law school experience does not demonstrate requisite training and education just from the fact of full-time attendance at school.

The trial court did find, and Landco did argue, that the students were "legal interns." APR 9 sets forth a process by which law students, among others, can engage in a limited law practice as "Licensed Legal Interns" under the supervision of an experienced attorney. APR 9(a). A law student must demonstrate the requisite educational success to qualify as a licensed legal intern, typically by completing at least two years of law school. APR 9(b). An experienced attorney must supervise the intern, and the Washington State Bar Association is authorized to conduct background investigations similar to those required of applicants to the bar. APR 9(c), (d). We have no hesitation in holding that a licensed legal intern satisfies the third *Absher* criterion.

Landco did not put forth evidence that its students possessed an APR 9 license. However, for decades these students colloquially have been referred to as "Rule Nines" or "legal interns." If Landco and the trial court were using that same short-hand designation for these licensed legal interns, then the evidence did support the fee award. We thus remand this portion of the case to the trial court to make that determination.

We do not suggest that only licensed legal interns possess the requisite education or training to satisfy the third *Absher* criterion. There are multiple methods of proving that a non-licensed law student is qualified by education or experience. However, Landco put on no other proof on this point and now can sustain the trial court's ruling only if its "legal interns" were licensed legal interns per APR 9.

We remand for hearing on the status of the "legal interns" whom the trial court awarded attorney fees. If Landco presents evidence that they were licensed in accord with APR 9, the trial court should make such a finding and affirm its earlier award. If not, the trial court should strike the fee award.

Attorney Fees on Appeal

Both sides seek attorney fees on appeal in accordance with the contract. *See* RCW 4.84.330; *Hill v. Cox*, 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002). Attorney fees are available on appeal where granted by applicable law. RAP 18.1. The prevailing party is awarded fees under the statute. RCW 4.84.330.

Landco prevailed in the original appeal from the judgment concerning the interest awards. It is entitled to its fees in that appeal provided that it timely complies with RAP 18.1(d). Our commissioner will consider a timely request. RAP 18.1(f).

The second appeal, concerning the attorney fee award, presents a muddled picture. Landco did not prevail in that action and is not entitled to its fees for that portion of this consolidated appeal. It is unclear at this time whether Douglass will prevail or not. If Douglass prevails on remand by obtaining any relief on the fee award related to the law students, then it is entitled to its fees on appeal related to this issue. We direct the trial judge to determine that request. RAP 18.1(i). Whichever party prevails on remand would be entitled to its fees for its efforts in the trial court.

Accordingly, the judgment is affirmed and the matter remanded for hearing on the award of attorney fees relating to the law students.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

APPENDIX "B"

FILED
MARCH 31, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

TJ LANDCO, LLC, a Washington Limited Liability Company, Respondent, v. HARLEY C. DOUGLASS, INC., a Washington Corporation; SECURE SELF STORAGE, LLC, a Washington Limited Liability Company; HARLEY C. DOUGLASS and JANE DOE DOUGLASS, husband and wife, and the marital community comprised thereof; and JOHN DOE PARTNERSHIP, Appellant.	No. 31992-0-III Consolidated with No. 32208-4-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration dated March 20, 2015 and respondent's motion for reconsideration dated March 25, 2015, and is of the opinion both motions should be denied. Therefore,

IT IS ORDERED, the motions for reconsideration of this court's decision of March 5, 2015 are hereby denied.

DATED: March 31, 2015

PANEL: Judges Korsmo, Siddoway, Fearing

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

APPENDIX "C"

RCW 19.52.010
Rate in absence of agreement — Application to consumer leases.

(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: PROVIDED, That with regard to any transaction heretofore or hereafter entered into subject to this section, if an agreement in writing between the parties evidencing such transaction provides for the payment of money at the end of an agreed period of time or in installments over an agreed period of time, then such agreement shall constitute a writing for purposes of this section and satisfy the requirements thereof. The discounting of commercial paper, where the borrower makes himself or herself liable as maker, guarantor, or indorser, shall be considered as a loan for the purposes of this chapter.

(2) A lease shall not be considered a loan or forbearance for the purposes of this chapter if:

(a) It constitutes a "consumer lease" as defined in RCW 63.10.020;

(b) It constitutes a lease-purchase agreement under chapter 63.19 RCW; or

(c) It would constitute such "consumer lease" but for the fact that:

(i) The lessee was not a natural person;

(ii) The lease was not primarily for personal, family, or household purposes; or

(iii) The total contractual obligation exceeded twenty-five thousand dollars.

[2011 c 336 § 542; 1992 c 134 § 13. Prior: 1983 c 309 § 1; 1983 c 158 § 6; 1981 c 80 § 1; 1899 c 80 § 1; RRS § 7299; prior: 1895 c 136 § 1; 1893 c 20 § 1; Code 1881 § 2368; 1863 p 433 § 1; 1854 p 380 § 1.]

Notes:

Short title -- Severability -- 1992 c 134: See RCW 63.19.900 and 63.19.901.

Severability -- 1983 c 158: See RCW 63.10.900.

APPENDIX "D"

Meadow Point Landing Project

	$ 3,600,000.00	Original Purchase Price			
less	$ 500,000.00	Discount for Stranahan & Schneider Purchase and			
	$ 3,100,000.00	Loan Payoff			
	$ 3,100,000.00				
less	$ 480,885.40	Stranahan 5/7/04			
less	$ 10,426.94	Stranahan 5/7/04			
	$ 2,608,687.66				
	$ 2,608,687.66				
less	$ 680,653.69	Schneider 6/1/04			
	$ 1,928,033.97				
	$ 1,928,033.97				
less	$ 342,739.47	Lindsey 8/3/06			
	$ 1,585,294.50				
	$ 1,585,294.50				
less	$ 31,000.00	Loan 9/13/06			
	$ 1,554,294.50				
	$ 15,000.00	Timber Tax Est			
	$ 148,125.95	Interest on Stranahan 5/7/04 to 11/09/06			
	$ 7,369.69	Loan Origination Fee Not to Exceed 1.5% 5-07-04	1.5%	491,312.34	
	$ 8,063.91	Loan renewal Fee Not to Exceed 1.5% 5-07-05	1.5%	537,594.00	
	$ 9,003.85	Loan renewal Fee Not to Exceed 1.5% 5-07-06	1.5%	600,256.92	
	$ 200,303.27	Interest on Schneider 6/1/04 to 11/09/06			
	$ 10,209.81	Loan Origination Fee Not to Exceed 1.5% 6-1-04	1.5%	680,653.69	
	$ 11,187.09	Loan renewal Fee Not to Exceed 1.5% 6-1-05	1.5%	745,806.18	
	$ 12,508.18	Loan renewal Fee Not to Exceed 1.5% 6-4-06	1.5%	833,878.35	
	$ 11,740.69	Interest on Linsey 8/3/06 to 11/09/06			
	$ 5,141.09	Loan Origination Fee Not to Exceed 1.5% 8/3/06	1.5%	342,739.47	
	$ 617.79	Interest on Loan 9/13/06 to 11/09/06			
	$ 465.00	Loan Origination Fee Not to Exceed 1.5% 9/13/06	1.5%	31,000.00	
less	$ 439,736.31				
	$ 1,114,558.19				

12-22-06
#989
Based on 37 Lots
if less credit will
be given out of
1,000,000.00
Hayden 12-22-06
Todd Lindley 12-22-06

12-22-06
1,000,000.00 ~~Less~~ Balance,
Payment of 200,000.00
per year for 5 years
at 2020 interest.
Hayden 12-22-06
Todd Lindley 12-22-06

EXHIBIT 1
DATE: 9-27-10
NAME: C. Stadtmueller

Spokane County No.: 10-2-00576-0
TJ LANDCO v. HARLEY DOUGLASS
Plaintiff's Exhibit No.: P19
Disposition:

APPENDIX "E"

WASHINGTON STATE CONSTITUTION

ARTICLE II
LEGISLATIVE DEPARTMENT

SECTION 1 LEGISLATIVE POWERS, WHERE VESTED. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.
(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date that the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.
(b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as

may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: *Provided,* That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing subsection (a). The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state.

(c) No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided,* That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

(d) The filing of a referendum petition against one or more items, sections, or parts of any act, law, or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: *Provided,* That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

(e) The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred. The secretary of state shall send one copy of the publication to each individual place of residence in the state and shall make such additional distribution as he shall determine necessary to reasonably assure that each voter will have an opportunity to study the measures prior to election. [**AMENDMENT 72,** 1981 Substitute Senate Joint Resolution No. 133, p 1796. Approved November 3, 1981.]

APPENDIX "F"

RULE 18.1
ATTORNEY FEES AND EXPENSES

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's

preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

[Amended to become effective December 29, 1998; December 5, 2002; September 1, 2003; September 1, 2006; September 1, 2010]