94388-5



NO. 72114-3-I

**SUPREME COURT OF THE STATE OF WASHINGTON**

ALGO, INC., a Washington corporation and ALLEN R. GRANT, individually and his marital community, and JANE DOE GRANT, her marital community,

*Defendants/Appellants and Cross-Respondents,*

v.

WASHINGTON FEDERAL SAVINGS, a United States Corporation,

*Plaintiff/Respondent and Cross-Appellant.*

# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Appellants Algo, Inc. and Allen Grant (collectively referred to as "Mr. Grant" or "Appellants") ask this Court to accept review of the Court of Appeals' decision terminating review designated in Part II.

## II. COURT OF APPEALS DECISIONS FOR REVIEW

Mr. Grant seeks review of the unpublished decision filed on February 21, 2017, by Division I of the Court of Appeals ("Opinion"). (App. A.) Mr. Grant's motion for reconsideration was denied on March 16, 2017. (App. B.)

## III. ISSUES PRESENTED FOR REVIEW

The decision of the Court of Appeals presents two primary issues.

A. The first issue concerns the proper measure of damages for an anticipatory breach of a contract to pay money in the future. The contract required payment in five years, with no interest. The contract also included a schedule of the lower amounts that would be due if payment were made in certain periods before the due date. Mr. Grant's position is that either (1) the judgment should have been for the amount due under the contract at the time of judgment or, alternatively, (2) if damages were deemed to be the full contract amount due in the future, the judgment should have been reduced to present value at the time of judgment.

The Court of Appeals instead affirmed judgment for the full amount that would have been due at the end of the contract term, with no discount to present value. This was an error.

B. The second issue concerns whether prejudgment interest is recoverable in the situation described above—i.e., where no payment obligation had been breached as of the date of the judgment and thus Washington Federal Bank, the Plaintiff below, had not been deprived of the use of any money. The Court of Appeals affirmed a judgment that included prejudgment interest. This was an error.

This Court's review is warranted because the decision below conflicts with decisions of this and other courts, RAP 13.4(b)(1). Indeed, on the first issue above, the trial court reversed itself on cross motions for reconsideration, and the Court of Appeals was divided. This Court's guidance is needed.

## IV. STATEMENT OF THE CASE

### A. The Underlying Litigation[1]

Mr. Grant, a long-time and successful real-estate developer, borrowed money from Washington Federal in 2006 to finance the purchase and development of property in Sequim, Washington. The

[1] The facts concerning the underlying litigation are not at issue on appeal. They are set forth in more detail at CP 59–85.

borrower was ARG Development, LLC, and Mr. Grant and his company, Algo, Inc., signed personal guarantees securing the debt.

The financial crisis of 2007–2008 caused the project to fail, and in 2009, the bank issues a notice of default. In the discussions between Mr. Grant and Washington Federal that followed, the bank initially agreed to accept a deed in lieu of foreclosure but subsequently proceeded with a trustee sale in 2010.

A year later, Washington Federal commenced this action seeking a deficiency judgment against Mr. Grant and Algo as co-guarantors. (CP 1–4.) Under RCW 61.24.100(7), a deed in lieu of foreclosure would have eliminated Washington Federal's right to seek a deficiency judgment against the guarantors. Accordingly, Mr. Grant counterclaimed for breach of the deed-in-lieu agreement between him and the bank.

## B. The Settlement

### 1. Terms

The parties reached an agreement settling their respective claims and defenses at a mediation on August 1, 2012. (CP 211, at ¶ 9.) The terms of the agreement were set forth in a Settlement Term Sheet ("Settlement Agreement") executed the same day. (CP 228–29.) The material portions of the Settlement Agreement are set forth verbatim here, with emphasis added:

Washington Federal Savings ("Washington Federal") and Allen Grant and Algo, Inc. ("Defendants") agree to settle the claims asserted in the pending litigation between them (King County Superior Court Case No. 11-2-07772-1) on the following terms. While the parties contemplate that these terms will be incorporated into a more detailed settlement agreement and release, promissory note, deed of trust, and related documents, it is understood and agreed that this document is itself a binding and enforceable agreement.

1. Defendants agree to pay Washington Federal $1 million in the form of a promissory note under the following terms:

   a. ***Payment shall be due in 60 months*** from the date of this agreement;

   b. ***Interest shall be 0%*** for the five-year term;

   ...

   e. The following discounts shall apply if the discounted amount is paid in full within the time periods set forth below:

      ***If paid within 24 months: 15%***
      If paid within 36 months: 10%
      If paid within 48 months: 5%

2. The note shall be secured by a first position deed of trust encumbering one or more properties owned by GO Merced GP (either the 145-acre parcel or the 56-acre parcel), to be determined and effectuated as follows....

### 2. Mr. Grant's attempt to perform his obligations regarding security

Over the several months following the settlement, Mr. Grant took steps to arrange to provide the first-position deed of trust encumbering one of the properties identified in the Settlement Agreement. (CP 211–12, at ¶¶ 10–14.) But as Washington Federal knew even at the time of settlement, providing this security required the participation of Mr. Grant's partner in these properties, Don Olmsted. (CP 213, at ¶ 15.) Mr. Olmsted ultimately refused to go through with the transaction. (CP 307, at ¶ 6.) Thus, Mr. Grant was not able to make the arrangements necessary to provide the security contemplated under the settlement term sheet. (CP 213, at ¶ 15.)

Mr. Grant remained willing to honor the rest of the terms of the settlement term sheet, including preparing and executing a note and finding other suitable security. (CP 213, at ¶ 17.) Washington Federal rejected Mr. Grant's offer to discuss an alternative agreement regarding security for the settlement terms and instead resumed the litigation on its underlying claim for a deficiency judgment. (CP 20–24.)

## C. Subsequent Litigation and Judgment

Washington Federal gave notice that it was withdrawing the settlement agreement in February 2013. (CP 20–24.) Four months later, the bank filed a motion for summary judgment on its claim for a

deficiency judgment based on the personal guaranties of the original loan. (CP 32–58.) On July 17, 2013, Judge John Erlick denied the motion. (CP 86–88.)[2]

The next day, Washington Federal filed a motion for leave to amend its complaint in order to state claims for breach of the Settlement Agreement. (CP 89–97.) Mr. Grant did not oppose the motion. Six months after that, in January 2014, Washington Federal filed the amended complaint. (CP 98–104.)

In March 2014, Washington Federal filed a motion for summary judgment for breach of the Settlement Agreement. (CP 175–189.) The motion asked for judgment awarding Washington Federal $1 million plus "default interest" from February 2013 (when the bank withdrew the certificate of settlement) and attorneys' fees. (CP 176.)

At oral argument on April 18, 2014, Judge Regina Cahan granted Washington Federal's motion. (*See* CP 541.) Initially, she ruled that damages were $1 million and that the bank was not entitled to attorneys' fees. (*Id.*) Because Washington Federal had not asked for prejudgment interest in its motion (but raised it only at oral argument), the Court asked the parties to brief that issue. (*Id.*)

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[2] The trial court denied the bank's request for summary judgment but granted summary judgment dismissing some of Mr. Grant's counterclaims (but not his claim for breach of contract against the bank). (CP 86–88.)

As instructed by the Court at oral argument, the parties submitted further briefing addressing the issue of prejudgment interest. (CP 144–151, 142–44.) In addition, both parties moved for reconsideration of the Court's oral ruling. (CP 144–151, 140–150.) Mr. Grant asked the Court to reconsider the award of $1 million, arguing that Washington Federal was only entitled $850,000 under the terms under the Settlement Agreement. Washington Federal asked the court to reconsider its order denying attorneys' fees.

The trial court ended up reversing itself on both counts. The court reduced the amount of the damage award to $850,000 but ordered that Washington Federal was entitled to attorneys' fees. (CP 540–42.) In addition, the court ordered that Washington Federal was entitled to prejudgment interest. (CP 542.)

**D. The Appeal**

Mr. Grant appealed the award of attorneys' fees and prejudgment interest. Washington Federal filed a cross-appeal regarding the principal amount of the judgment.

The Court of Appeals ruled that the principal amount of the judgment should have been $1 million, rather than $850,000. (App. A, at 4–8.) Judge Leach dissented from this part of the opinion, on the grounds that the judgment amount should have been reduced to present value. (*Id.*,

Dissent at 1–7.) The Court of Appeals also affirmed the trial court's award of prejudgment interest from the date of the breach (i.e., the failure to provide security). Those two rulings are the subject of this Petition.

The Court of Appeals also reversed the award of attorneys' fees, finding that there was no contractual basis for it. (*Id.* at 10–14.) Washington Federal did not move for reconsideration of this decision and has not petitioned for its review by this Court.

## V. ARGUMENT

### A. The Court of Appeals Erred in Directing Entry of Judgment in the Principal Amount of $1 Million.

It is black-letter law that damages must be limited to the amount the prevailing party would have received had the contract been fully performed. (App. A at 5–6) (citing *Rathke v. Roberts*, 33 Wn.2d 858, 879–80, 207 P.2d 716 (1949)). Here Mr. Grant's inability to provide the agreed security effectively resulted in an award of specific performance, requiring Mr. Grant to "pay now," rather than at the end of the five-year period. (*See* CP 541; App. A. at 4.) The issue on appeal has been and is: how much did Mr. Grant owe "now"?

#### 1. The parties' agreement expressly provided that $850,000 was due as of the date of the judgment

Under the Settlement Agreement Mr. Grant agreed to pay $1 million on specific terms—the first and foremost being that payment was

due in 60 months, and with no interest. The Settlement Agreement then set forth discounted sums that would be due in certain time periods. On the date of the breach and on the date of the judgment, the amount due was $850,000. Accordingly, the trial court entered judgment for this principal amount.

In reversing, the Court of Appeals seems to have reasoned that because Mr. Grant did not affirmatively ***make*** any payment, he should not get a "discount" for early payment, and thus Washington Federal is entitled to the $1 million principal sum that would have been due on August 1, 2017. (App. A, at 7.) But although Mr. Grant did not make an early ***payment***, his inability to provide security is what gave Washington Federal an early ***judgment***. That judgment extinguished and substituted for the payment obligation. *See Caine & Weiner v. Barker*, 42 Wn. App. 835, 838, 713 P.2d 1133 (1986) (applying the merger doctrine to hold that a judgment on a note extinguished the underlying obligation); *McFerran v. Heroux*, 44 Wn.2d 631, 642, 269 P.2d 815 (1954) (noting that "[a]n award of damages is compensation in money as a ***substitute*** for the promised performance"; emphasis added). Thus, the principal judgment amount cannot have been for more than the amount that would have been due at the time had Mr. Grant made payment.

Indeed, the fact that a judgment cannot be entered for more than is due at the time of judgment explains why many installment contracts contain acceleration clauses—to make the whole amount due upon default. But the Settlement Agreement contained no such clause. (CP 228–29; App. A, at 6 n.4.) Nor did the unexecuted draft note prepared by Washington Federal's counsel. (CP 303–05.) There is simply no evidence that the parties agreed to accelerate the future obligation to pay $1 million under any circumstances. And without a right of acceleration, there was no basis in the Settlement Agreement to make the judgment exceed the amount due at the time of judgment.

Instead of requiring Mr. Grant to pay the amount due as of the date of the judgment, the Opinion requires him to pay the $1 million that was not due until August 1, 2017. In doing so, the Court of Appeals necessarily either (1) reads ***out of*** the Settlement Agreement the payment due date—a material provision—or (2) reads ***into*** the Settlement Agreement a right of acceleration. Either way, the Opinion awards Washington Federal more than it ever bargained for. As Judge Leach noted in his dissent, '[t]he majority fails to cite any supporting authority or evidence [for this] for good reason. None exists." (App. A, Dissent at 5.)

### 2. As a future obligation, the $1 million settlement amount had to be discounted to present value

Consistent with the rule that a party may not recover in damages more than it bargained for, it is the equally well settled that, where "damages represent losses that are expected to occur in the future, those damages are traditionally reduced to present value." DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 12.6(1), at125–26 (2d ed. 1993). The rule applies in contract cases just as any other. *Id.*

> The idea is that if the plaintiff recovers money today that is not needed to replace a loss until sometime in the future, the plaintiff can invest the money and reap the interest. Full compensation does not require an award of the money when due plus the interest it can presently earn. The reduction to present value attempts to provide an award that gives the plaintiff an amount of present capital which, with the interest it can safely earn, will provide a total sufficient to compensate for the loss when the loss occurs.

*Id.* In other words, to enter an award of money not yet due without a discount to present value is to grant a windfall.

This principle has long been recognized in Washington. One of this state's earliest cases on point is *Yarno v. Hedlund Box & Lumber Co.*, 129 Wash. 457, 225 P. 659, *modified*, 227 P. 518 (1924). In *Yarno*, a logger who had been hired by the defendant to cut its trees sued for breach of a roughly four-year contract for timber-harvesting services. *Id.*

at 459. Under the contract, the plaintiff was required to cut and deliver a certain amount of logs per year and was to be paid semi-annually based on the amount of logs he delivered. *Id.* at 474. The defendant breached by prematurely terminating the contract, and the plaintiff sued for lost profits, including future profits that would have been earned had the contract been performed. At the time of trial, more than three years still remained under the agreement. *Id.* at 476-77. The trial court entered judgment for the plaintiff for the full amount of payments due under the contract. *Id.* at 459.

The Supreme Court reversed. To the extent the judgment was for future payments not yet due, without a discount to adjust for the value of receiving those payments early in the form of a judgment, it was in error. As the Supreme Court stated, "[t]he rule is... that in computing damages recoverable for the deprivation of future payments" recovery must be limited to the "present value." *Id.* at 477. The reason is clear: "a judgment for the whole amount at the time of trial would be more valuable than the right to receive the money at a later period." *Yarno v. Hedlund Box & Lumber Co.*, 135 Wash. 406, 407, 237 P. 102 (1925) (following remand).

The Washington Supreme Court applied the same rule in *McFerran v. Heroux*, 44 Wn.2d 631, 269 P.2d 815 (1954). *McFerran*

also involved an action seeking future damages for a present breach. In *McFerran*, the plaintiff had an option allowing him to take possession of an improvement at a future date in exchange for $5,000. *Id.* at 636–37. To calculate damages, the court determined the cost to rebuild the property at the time of the breach, reduced that amount to reflect five years of depreciation (to the time when the plaintiff would have had the right to exercise the option), and subtracted the option price. *Id.* at 643–44. The result was the amount of the damages—in five years. The court then discounted this amount to find its present-day value at the time it entered judgment. *Id.* at 644.

As in *Yarno*, the discount to present day in *McFerran* was necessary to reflect the fact that awarding the plaintiff a judgment for the full amount of damages not yet incurred would give the plaintiff more than he would have been entitled to under the contract. "An award of damages is compensation in money as a ***substitute*** for the promised performance" and not to give plaintiff something more than it would have received under the contract. *Id.* at 642 (citing 5 CORBIN ON CONTRACTS 3, § 990; emphasis in original).[3]

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[3] Nor does Washington Federal cite any support for the suggestion that the amount of the award should have compensated it for the future consequences of being an unsecured judgment creditor in Appellants' subsequent bankruptcy proceedings. (Op. Br. of Cross-Appellants at 11–12, 15.) Whatever unspecified "real damage" (*id.* at 15) the bank may

Even if $1 million were in some sense the "amount due," the fact is that it was not due until August 1, 2017. A judgment entered more than three years before the payment obligation would have come due must be discounted to present day value. Washington Federal offered no evidence of the proper discount rate, but the present-day value of $1 million in three years is significant by any measure. And indeed, here the parties agreed as to the discount rate: under the Settlement Agreement, it was effectively 5% per year, capped at 15%.[4]

The Opinion rejected the argument that the $1 million sum should be discounted to present value. This "conclusion necessarily assumes that the right to receive a liquidated sum in 60 months has the same value as the right to receive it now. This conclusion defies common sense and reality." (App. A, Dissent at 6.)

The majority's conclusion is based on reasoning that Washington courts generally have not done so for material breach of contracts with liquidated sums. In support, the majority cited three cases involving unliquidated damages on ***other*** types of claims, in which future damages

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have later incurred in hindsight had not been incurred, and was not contemplated, as of the date of the judgment. It is therefore irrelevant.

[4] In the absence of evidence to the contrary, the trial court could have used the legal rate of interest to discount the judgment to its present value. *See, e.g., McFerran*, 44 Wn.2d at 646 (applying the legal rate of interest to discount the judgment to its present-day value); *Aetna Life Ins. Co. v. Geher*, 50 F.2d 657, 659–60 (9th Cir. 1931) (applying legal rate of interest to determine present worth of money owed at future date).

or payouts *were* discounted to present value. (Opinion at 8) (citing *Cornejo v. State*, 57 Wn. App. 314, 788 P.2d 554 (1990); *In re Marriage of Pilant*, 42 Wn. App. 173, 709 P.2d 1241 (1985); *Warner v. McCaughan*, 77 Wn.2d 178, 460 P.2d 272 (1969)).

In *Cornejo*, future damages for future economic losses were discounted to present value; the issue was whether expert testimony based on the cost of an annuity should have been admitted as evidence of the discounted present value. 57 Wn. App. at 324–330. Similarly, *In re Marriage of Pilant* involved the discount of the future value of a pension to present value; the issue was whether the future value was properly determined. 42 Wn. App. at 179. And in *Warner*, the court noted that damages for prospective lost earnings should be discounted to present worth. 77 Wn.2d at 183.

But these cases merely illustrate ***other*** situations in which future damages also should be discounted to present value; none of them says—or even implies—that discounting to present value is ***not*** warranted in the present case. To the contrary, the black letter law is that damages for losses expected to occur in the future are to be reduced to present value—in contract cases just as any other. *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 12.6(1), at 135–26 (2d ed. 1993). The

decisions of this Court in *Yarno* and *McFerran* (supra pp. 11–13) reflect and apply that rule in circumstances analogous to these.[5]

As Judge Leach summarized, "no logical reason appears to exist for the majority's distinction." (App A, Dissent at 7.)

Here in particular, the Opinion, both in its analysis and in its conclusion, conflicts with decisions of this and other courts. RAP 13.4(b)(1). At the very least, this Court should accept review of this issue and remand to the trial court for a determination of present value at the time of judgment.

### B. The Court of Appeals Erred in Affirming the Award of Prejudgment Interest

Prejudgment interest is appropriate only where the defendant wrongfully "retains funds rightfully belonging to another." *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 87, 193 P.3d 168 (2008) (internal quotations and citations omitted). "The touchstone for an award of prejudgment interest is that" the defendant has improperly retained "the 'use value' of the money" to which the plaintiff was entitled.

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[5] Nor is it fair to distinguish this case from the non-contract cases cited by the Court on the ground that they involve "profits, losses, and earnings that would have necessarily been received at a future date." (App. A., at 8.) If the Court deems $1 million to be the amount that Washington Federal was to receive, then Washington Federal necessarily would have received that amount at a future date. Had Mr. Grant made payment earlier, he would not have paid—and Washington Federal would not have been entitled to receive—$1 million.

*Id.* (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 429–30, 957 P.2d 632 (1998)).

Because the purpose of prejudgment interest is to compensate the plaintiff for the lost use of money wrongfully withheld, interest is properly computed from the time the money ***should have been paid*** to the plaintiff. *See Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 34–35, 442 P.2d 621 (1968); *Olsen Media v. Energy Sciences, Inc.*, 32 Wn. App. 579, 585–86, 648 P.2d 493 (1982). This rule is well illustrated in *Olsen*, in which the parties executed a service contract under which the plaintiff was entitled to monthly payments of $400 for six months and which automatically renewed for one year. *Id.* at 581–82. When the defendant cancelled the contract, the plaintiff sued for the monthly payments due and unpaid as well as for payments that would have been due in the future under the contract. *Id.*

The trial court found in favor of the plaintiff and awarded prejudgment interest on the sum total of all of the unpaid monthly payments from the date of the cancellation/breach forward. *Id.* at 583. In effect, this meant that interest was applied on some payments from a date (date of cancellation) before they were actually due. The court of appeals reversed, finding that the trial court erred in its calculation of prejudgment

interest because "interest is due on each payment only from the time it is due." *Id.* at 586.

*Olsen* makes clear that prejudgment interest cannot accrue ***before*** a payment is actually due. Thus, where a breach occurs before payment is due, prejudgment interest can accrue only from the date on which the plaintiff would have been entitled to payment had the contract been performed.

Here, the breach was of an obligation to provide security (*see* CP 183–85), not "an obligation to pay a sum of money," *Prier*, 74 Wn.2d at 32. Accordingly, Mr. Grant's breach was not a "detention of such a liquidated sum" from Washington Federal. *Id.* In other words, there was no wrongful retention of funds "rightfully belonging to [Washington Federal]," thus depriving the bank of the '"use value' of the money." *Palermo at Lakeland, LLC*, 147 Wn. App. at 87.

Rather than depriving Washington Federal of money, Mr. Grant's breach formed the basis of a claim by the bank for payment under the Settlement Agreement. Because no payment was then due under the Settlement Agreement, the obligation to make payment arose at the time of—and by virtue of—the judgment. Before then, no payment was due, and Washington Federal was not deprived of any funds. Thus,

prejudgment interest is not warranted, and the trial court's judgment awarding it should be reversed.

## VI. CONCLUSION

For the reasons stated above, this Court should grant Mr. Grant's petition for review and reverse the Court of Appeals on the issues addressed above.

DATED: April 14, 2017.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 14, 2017 a true and correct copy of the foregoing document was served via **Email/PDF** on the following party:

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DATED this 14th day of April, 2017 at Seattle, Washington.

Gabriella Sanders
Gabriella Sanders

# APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| WASHINGTON FEDERAL SAVINGS, a United States corporation, | ) | No. 72114-3-I |
| Respondent/Cross-Appellant, | ) | DIVISION ONE |
| v. | ) | UNPUBLISHED OPINION |
| ALGO, INC., a Washington corporation; and ALLEN R. GRANT, individually and his marital community; JANE DOE GRANT, her marital community, | ) | |
| Appellants/Cross-Respondents. | ) | FILED: February 21, 2017 |



TRICKEY, A.C.J. — Washington Federal Savings (Washington Federal) and Algo, Inc., Allen R. Grant, and Jane Doe Grant (collectively, Grant) both appeal the trial court's order granting summary judgment based on Grant's breach of a settlement agreement term sheet (Settlement Agreement) between the parties.

Washington Federal argues that the trial court erred in awarding less than the Settlement Agreement's value. We agree because Grant's material breach rendered the entire value of the Settlement Agreement due immediately and reverse and remand for entry of judgment of $1 million.

Grant argues that the trial court erred in awarding Washington Federal prejudgment interest. We disagree and affirm the trial court. Grant argues that the trial court erred in awarding Washington Federal attorney fees in general and awarding excessive attorney fees. We agree and reverse the trial court's award of attorney fees to Washington Federal.

## FACTS

In 2011, Grant defaulted on his loan obligations to Washington Federal. Washington Federal nonjudicially foreclosed on the real property securing the loan and sued Grant for a deficiency of $2,414,633.60. Following mediation, the parties executed the Settlement Agreement on August 1, 2012.

The Settlement Agreement provided that Grant would agree, via promissory note, to pay a principal sum of $1 million.[1] The note would have made payment due in 60 months from the date of the Settlement Agreement, with interest set at 0 percent for the term and 12 percent per annum in the event of default. It would have allowed for recovery of attorney fees in an action to enforce the terms of the note and for discounts if the discounted amount was paid in full within specified time periods. The Settlement Agreement required that Grant secure the note with real property. By its terms, the Settlement Agreement was binding and enforceable, despite contemplating the parties executing future documents.

Grant never signed a promissory note and never secured his payment obligation with real property. On February 11, 2013, Grant repudiated the Settlement Agreement, and Washington Federal soon moved to withdraw the notice of settlement.

Soon after, the parties resumed the deficiency judgment litigation. Washington Federal moved for summary judgment on its underlying claims. The trial court granted the motion in part and set the remaining claims and defenses for trial.

[1] Washington Federal sent Grant a draft promissory note, which Grant never signed.

Washington Federal amended its complaint on January 13, 2014, to add a claim for breach of the Settlement Agreement. Washington Federal moved for summary judgment on its new claim, requesting $1 million as a principal award, interest from the date of default, and attorney fees and costs. Washington Federal's motion noted that the "parties' remaining claims and counterclaims should be dismissed with prejudice" if the motion was granted.[2] The trial court granted the motion in part and dismissed the deficiency judgment claim. It awarded Washington Federal $1 million, denied its request for attorney fees and costs, and requested supplemental briefing on the issue of prejudgment interest.

Both parties moved for reconsideration. Washington Federal challenged the denial of attorney fees and costs, and Grant challenged the principal award amount and prejudgment interest. The trial court granted both motions. It reduced the judgment against Grant to $850,000, awarded Washington Federal prejudgment interest at a rate of 12 percent per annum from February 11, 2013, and awarded costs and reasonable attorney fees to Washington Federal.

Washington Federal requested a total of $151,330.04 in costs and fees incurred since August 1, 2012, the date of the mediation between the parties. The trial court adopted Washington Federal's findings and conclusions, and awarded the full amount requested. Both parties appeal.

While the appeal was pending, Grant filed for chapter 11 bankruptcy protection. The bankruptcy court treated Washington Federal as a general

[2] Clerk's Papers (CP) at 176.

unsecured creditor because of Grant's failure to secure his obligation under the Settlement Agreement.

ANALYSIS

Damages for Breach of Contract

Washington Federal argues that the remedy for Grant's material breach of the Settlement Agreement is $1 million because a nonbreaching party may demand the entire value of a contract due immediately. Grant argues that $850,000 is the proper amount because that amount would have been due had a promissory note been executed and paid at the time of breach. We conclude that Washington Federal was entitled to $1 million as a principal amount because Grant's material breach of the Settlement Agreement allowed Washington Federal to demand the entire $1 million due immediately.

Review of a trial court's decision on summary judgment is de novo. Troxell v. Rainier Pub. Sch. Dist. No. 307, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). Summary judgment is appropriate if there is "'no genuine issue as to any material fact' and 'the moving party is entitled to judgment as a matter of law.'" Dean v. Fishing Co. of Alaska, Inc., 177 Wn.2d 399, 405, 300 P.3d 815 (2013) (citing CR 56(c)).

The trial court granted Washington Federal's motion for summary judgment on Grant's breach of the Settlement Agreement. "'Any unjustified failure to perform when performance is due is a breach of contract which entitles the injured party to damages.'" Colorado Structures, Inc. v. Ins. Co. of the West, 161 Wn.2d 577, 589,

167 P.3d 1125 (2007) (quoting LAWRENCE P. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS §187, at 377 (2d ed. 1965)).

A material breach is one that is not slight or insubstantial. Colorado Structures, 161 Wn.2d at 588-89. If a party materially breaches a contract, the nonbreaching party may elect either the remedial right to damages for total failure of full performance, or treat the contract as continuing and claim damages limited to compensation for the defective performance. Colorado Structures, 161 Wn.2d at 589. When one party repudiates a contract, the other party may treat that as a breach which excuses its own performance. CPK, Inc. v. GRS Const. Co., 63 Wn. App. 601, 620, 821 P.2d 63 (1991).

Grant does not dispute that he materially breached the Settlement Agreement by failing to secure Washington Federal's interest and repudiating the contract. Grant's failure to secure his obligation was not a slight or insubstantial breach.[3] Also, Grant unequivocally informed Washington Federal that he would not be able to perform under the Settlement Agreement. Each action is a sufficient basis to find that Grant materially breached the Settlement Agreement. Grant's material breach gave Washington Federal the option to treat the breach as a total failure of performance, and gave Washington Federal an immediate cause of action.

Washington Federal argues that Grant's breach entitles it to $1 million in damages because that is the full value of the Settlement Agreement. A party's recovery of damages is limited to the amount they would have received had the

[3] As noted previously, because Washington Federal was treated as an unsecured creditor in Grant's bankruptcy proceeding, it suffered a delay in payment and a loss of priority.

contract been fully performed. Rathke v. Roberts, 33 Wn.2d 858, 879-80, 207 P.2d 716 (1949). The interpretation of an unambiguous contract is a question of law and is reviewed de novo. Dice v. City of Montesano, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006). "A contract is ambiguous if its terms are uncertain or they are subject to more than one meaning." Dice, 131 Wn. App. at 684.

The Settlement Agreement states that the "[d]efendants agree to pay Washington Federal $1 million in the form of a promissory note."[4] The note would have included terms allowing discounts if the discounted amount was paid in full within set time periods. For example, if a promissory note had been executed, Grant could have received a 15 percent discount if he paid $850,000 in full to Washington within 24 months of the execution of the Settlement Agreement.

Based on the unambiguous language of the Settlement Agreement, the principal amount due under the Settlement Agreement was $1 million.[5] If Grant had not breached the Settlement Agreement, Washington Federal would have received a secured promissory note for $1 million and the liquidated sum of $1

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[4] CP at 160-161. Washington Federal argues in the alternative that an acceleration clause contained in the draft promissory note controls and entitles it to the full $1 million following Grant's breach. A contract requires an offer, acceptance, and consideration. Bulman v. Safeway, Inc., 144 Wn.2d 335, 351-52, 27 P.3d 1172 (2001). The parties agree that the draft promissory note was never executed because Grant never signed it. Accordingly, the draft promissory note's acceleration clause is not relevant.

[5] Washington Federal also argues that Grant's failure to challenge the Settlement Agreement's principal value of $1 million during the settlement negotiations shows that he understood that $1 million was the principal sum. Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish the meaning of the writing, whether or not integrated. Berg v. Hudesman, 115 Wn.2d 657, 668, 801 P.2d 222 (1990) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 214(c)). When the parties were reviewing the Settlement Agreement, Grant sought clarification only of when interest would begin to accrue. Grant's failure to dispute the principal sum due may be evidence that the intended principal sum was $1 million.

million from Grant in five years. Because of Grant's breach, Washington Federal will receive nothing.

Further, the discounted sums claimed by Grant were only available if the promissory note had been executed and the required amount was paid within the specified time periods. Because these steps were never performed, the value of the bargain for Washington Federal remained $1 million. Accordingly, the trial court erred in awarding only $850,000.

Based on the discounts in the Settlement Agreement, Grant argues he should have to pay only $850,000. The discounted values were available only if Grant paid the full discounted value within the stated time periods after properly executing a promissory note. Grant acknowledges that he did not pay the discounted amount in full within the stated time periods. Indeed, Grant never made a single payment. We conclude that Grant's failure to satisfy these conditions precludes him from receiving a discount on his debt.

Grant argues in the alternative that the trial court's award of $850,000 represents the $1 million principal sum discounted to present value. Grant relies on cases applying discounts to future profits that would have been earned under an employment contract and to the value of disputed real property that a party had an option to buy in five years. Yarno v. Hedlund Box & Lumber Co., 129 Wash. 457, 225 P. 659, modified, 227 P. 518 (1924); McFerran v. Heroux, 44 Wn.2d 631, 643-44, 269 P.2d 815 (1954).

Discounts to present value do not apply here. Washington courts have discounted damage awards to present value in several contexts, but generally not

for material breach of contracts with liquidated sums, as is at issue here. See, e.g., Cornejo v. State, 57 Wn. App. 314, 325-26, 788 P.2d 554 (1990) (calculation of future losses by considering the cost of an annuity); In re Marriage of Pilant, 42 Wn. App. 173, 179, 709 P.2d 1241 (1985) (applying discount factors to pension to calculate present cash value); Warner v. McCaughan, 77 Wn.2d 178, 183, 460 P.2d 272 (1969), disagreed with on other grounds by Wooldridge v. Woolett, 96 Wn.2d 659, 663, 638 P.2d 566 (1981) (discounting prospective loss of earnings during normal life expectancy). Discounts to present value have been generally applied to profits, losses, and earnings that would have necessarily been received at a future date.

In contrast, the Settlement Agreement contains a liquidated sum that became due on Grant's material breach, rather than remaining due at the end of the term of the Settlement Agreement. This is distinguishable from the context of future profits, losses, and earnings. Therefore, we conclude that the principal sum awarded to Washington Federal under the Settlement Agreement was not subject to a discount to present value.

Award of Prejudgment Interest

The trial court awarded prejudgment interest to Washington Federal. Grant argues that he did not wrongfully deprive Washington Federal of funds because the Settlement Agreement did not require payment until August 1, 2017. We disagree and affirm the trial court's award of prejudgment interest.

"The award of prejudgment interest is reviewed for abuse of discretion." Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton, 158 Wn.2d 506, 519,

145 P.3d 371 (2006). In Washington, interest prior to judgment is allowable when an amount claimed is "liquidated," or when an "unliquidated" claim is for an amount due upon a contract for the payment of money and the amount due is computable with reference to a fixed contractual standard, without reliance on opinion or discretion. Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968). A "liquidated" damages claim is one where evidence furnishes data which, if believed, makes it possible to precisely compute the amount, without reliance on opinion or discretion. Prier, 74 Wn.2d at 32. "[A] sum of money named in and covenanted to be paid by an express contract, where the liability to pay the principal sum is undisputed, is a 'liquidated' sum." Prier, 74 Wn.2d at 32-33 (quoting CHARLES T. MCCORMICK, DAMAGES § 54 (Hornbook Series 1935)).

Prejudgment interest is appropriate when a party retains funds rightfully belonging to another, and thereby deprives the other of the "use value" of the funds. Mahler v. Szucs, 135 Wn.2d 398, 429, 957 P.2d 632 (1998); Rufer v. Abbott Labs., 154 Wn.2d 530, 552, 114 P.2d 1182 (2005). Prejudgment interest accrues from the date of the default or breach at issue. Prier, 74 Wn.2d at 34.

Grant materially breached the Settlement Agreement on February 11, 2013. The total contract price under the Settlement Agreement was $1 million. This sum is "liquidated" because it can be calculated with exactness without reliance on opinion or discretion. Accordingly, a liquidated sum of $1 million became due to Washington Federal from Grant on February 11, 2013. Grant failed to pay the sum and deprived Washington Federal of the "use value" of the money. The trial court

properly determined that prejudgment interest began to accrue from the date of Grant's breach.

Grant argues that the Settlement Agreement requires payment by August 1, 2017, and, therefore, he has not wrongfully retained the disputed funds. An injured party has a right to demand full performance of a contract at the time of material breach. Colorado Structures, 161 Wn.2d at 589. As discussed above, Grant's breach of the Settlement Agreement rendered the $1 million due immediately, rather than on the original contract date of August 1, 2017.

Award of Attorney Fees to Washington Federal

The trial court granted Washington Federal's claim for attorney fees and costs. Grant argues that the trial court erred because the Settlement Agreement does not provide for attorney fees in an action to enforce its terms. We agree with Grant and reverse the trial court's award of attorney fees to Washington Federal.

A trial court's initial determination of the legal basis for an award of attorney fees is reviewed de novo. Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). Each litigant is responsible for paying its own fees unless specifically authorized by contract, statute, or a recognized ground of equity. Dayton v. Farmers Ins. Group, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). The court should award fees if a contract specifically provides for the recovery of attorney fees incurred to enforce its provisions. RCW 4.84.330; C-C Bottlers, Ltd. v. J.M. Leasing, Inc., 78 Wn. App. 384, 386-87, 896 P.2d 1309 (1995).

Here, the Settlement Agreement states that "[i]n any action to enforce the note, the prevailing party shall be entitled to recover its reasonable costs, including

attorneys' fees."[6] The Settlement Agreement itself does not authorize recovery of attorney fees in an action to enforce the terms of the Settlement Agreement. Washington Federal prevailed on an action to enforce the Settlement Agreement, not an action to enforce the draft promissory note. Therefore, the trial court erred in awarding Washington Federal attorney fees.

Washington Federal argues that the attorney fees provision contained in the draft promissory note should apply to the present case. The draft promissory note was never executed because Grant never signed it, and its terms never became binding on the parties. Accordingly, Washington Federal cannot rely on it to recover attorney fees.

Washington Federal argues that the prevention of performance doctrine should apply and bar Grant from claiming that the draft promissory note should not be given effect. A party cannot claim impossibility or excuse of nonperformance where his wrongful acts are the cause of the impossibility or nonperformance. Wolk v. Bonthius, 13 Wn.2d 217, 219, 124 P.2d 553 (1942). For example, a defendant cannot argue that new road construction and sewage treatment statutes render performance financially impossible if the defendant is only subject to new legislation due to its breach of the contractual timelines. Pacific County v. Sherwood Pac., Inc., 17 Wn. App. 790, 799, 567 P.2d 642 (1977); McDonald v. Wyant, 167 Wn. 49, 55, 8 P.2d 428 (1932) (party's failure to collect the amount due to him on logs marketed, and failure to market other cut logs, prevented the party from depriving the other of the benefit of the contract); Blair v. Wilkerson Coal

[6] CP at 160.

& Coke Co., 54 Wash. 334, 338-39, 103 P. 18 (1909) (defendant's refusal to allow plaintiffs to continue with construction pursuant to contract precluded defendant from arguing that plaintiffs had not completely performed under the contract).

Washington Federal contends that Grant should be bound by the terms of the draft promissory note because his refusal to sign the draft promissory note was improper. The prevention of performance doctrine is inapplicable because the draft promissory note was not a contract whose performance could be prevented. The prevention of performance doctrine focuses on a party's wrongful acts interfering with the performance of an existing contract. Grant's refusal to sign the draft promissory note prevented the note from becoming a valid and binding contract. The provisions of the draft promissory note did not become binding on either party. Washington Federal's reliance on the prevention of performance doctrine is misplaced. Therefore, the draft promissory note's attorney fees provision is not binding on Grant.

Finally, Washington Federal argues that it should be able to recover its fees under the attorney fees provision contained in the original loan documents between Grant and Washington Federal. This provision applies to actions to enforce the terms of the original loan documents. These documents are not at issue in the current appeal and were not the basis for summary judgment below. Washington Federal's second motion for summary judgment acknowledged that the underlying deficiency judgment claim would be dismissed with prejudice if the motion was granted. The court granted Washington Federal's motion for summary

judgment and dismissed its other claims. Therefore, the attorney fees provision contained in the original loan documents is inapplicable to the current dispute.

Washington Federal argues that it is entitled to attorney fees because Grant would have been awarded attorney fees if he had prevailed below. Washington Federal bases its argument on a letter Grant wrote to Washington Federal, in which he claims that he will be entitled to attorney fees if he prevails. Washington construes unilateral attorney fee provisions as bilateral. First-Citizens Bank & Trust Co. v. Cornerstone Homes & Dev., LLC, 178 Wn. App. 207, 218-19, 314 P.3d 420 (2013). Thus, if the Settlement Agreement were a proper basis for attorney fees for Grant, it would be a proper basis for an award to Washington Federal. But, despite Grant's claim, he would not have been entitled to attorney fees if he had prevailed below.

Washington Federal's argument that Grant could recover fees, relying on First-Citizens, is unpersuasive. In First-Citizens, the court held that RCW 61.24.100(10) prohibited First-Citizens from obtaining a deficiency judgment against the guarantors of foreclosed property. 178 Wn. App. at 209. The guaranty at issue in First-Citizens was properly executed and bound the parties. 178 Wn. App. at 209-10. The court held that RCW 61.24.100 precluded First-Citizens from obtaining a deficiency judgment.[7] First-Citizens, 178 Wn. App. at 211, 218.

Unlike the guaranty in First-Citizens, the draft promissory note was never executed and summary judgment was granted for breach of the Settlement

[7] Washington Federal cites First-Citizens as holding that the attorney fees provision was held valid despite the underlying documents being inapplicable to the dispute. This misconstrues the holding of First-Citizens, as the court did not hold that the underlying documents were inapplicable.

Agreement. Neither party could have used the draft promissory note as a basis to recover attorney fees.

Attorney Fees on Appeal

Washington Federal requests attorney fees and costs on appeal. Where a statute authorizes the award of fees to the prevailing party, they are available on appeal as well as in the trial court. Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 715-16, 9 P.3d 898 (2000); see also Richter v. Trimberger, 50 Wn. App. 780, 783-86, 750 P.2d 1279 (1988) (applying the same principle to action seeking fees under RCW 4.84.330).

There is no contractual basis below for the award of attorney fees to Washington Federal and, therefore, it has no basis to request them on appeal.

We reverse and remand for entry of judgment of $1 million and reverse the award of attorney fees. We affirm the trial court's award of prejudgment interest. We deny Washington Federal's request for attorney fees and costs on appeal.

Trickey, ACJ

WE CONCUR:

Mann, J.

Washington Federal Savings v. Algo, Inc., No. 72114-3-I

LEACH, J. (dissenting) — The majority's approach to Washington Federal Savings' damages reflects a dramatic departure from Washington case law and assumes facts not in the record. The majority awards the bank a judgment for the full amount of a debt not due. Over 100 years ago, our Supreme Court stated, "We know of no case, and certainly none is cited, to the effect that a judgment may be had for a debt not due."[1] I know of no case changing this well-established rule. The record provides no basis for determining, on summary judgment, the amount of the bank's actual damages. For these reasons, I dissent.

This lawsuit arises out of a secured loan Washington Federal made to ARG Development LLC. In addition to a deed of trust, the bank received as security for the loan the guarantees of Algo Inc. and Allen R. Grant. After ARG defaulted, the bank foreclosed the deed of trust. But after crediting the sale price, ARG still owed a deficiency of $2,414,633.60. So the bank sued Algo and Grant on their guarantees. The parties mediated and agreed to the settlement involved in this decision.

At the end of the mediation the parties signed a settlement term sheet. This document contemplated preparation of more detailed settlement documents, including a promissory note and a deed of trust. But it also stated that it was a "binding and enforceable agreement." The term sheet included three paragraphs and one omission significant to my analysis. The three paragraphs:

> 1. Defendants agree to pay Washington Federal $1 million in the form of a promissory note under the following terms:

[1] Mondioli & Stewart v. Am. Bldg. Co., 83 Wash. 584, 589, 145 P. 577 (1915).

a. Payment shall be due in 60 months from the date of this agreement.
b. Interest shall be 0% for the five-year term;
c. Interest shall accrue at 12% per annum in the event of default;
d. In any action to enforce the note, the prevailing party shall be entitled to recover its reasonable costs, including attorneys fees;
e. The following discounts shall apply if the discounted amount is paid in full within the time periods set forth below:

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| if paid within 24 months: | 15% |
| if paid within 36 months: | 10% |
| if paid within 48 months: | 5% |

2. The note shall be secured by a first position deed of trust encumbering one or more properties owned by GO Merced GP (either the 145-acre parcel or the 56-acre parcel), to be determined and effectuated as follows:
   a. By August 10, 2012, Mr. Grant shall identify the parcel to be encumbered and provide for that parcel a copy of the preliminary title insurance and the most recent tax-assessor's appraisal of the property.
   b. Within 30 days of the date on which Mr. Grant identifies the parcel to be encumbered, the bank shall obtain an appraisal of that property, at the bank's expense.
   c. If the appraised value is less than $1 million, the parties shall negotiate additional collateral, which may include the 56-acre parcel owned by GO Merced.
   d. In addition to providing a deed of trust, Mr. Grant will pledge his membership interest or other ownership interest in any entity holding title to the property to be encumbered.

3. All claims against all parties in the litigation will be dismissed with prejudice within five days of the date upon which the promissory note and deed of trust referred to in paragraphs 1 and 2 are executed and the deed of trust is recorded. The parties shall immediately notify the court of this settlement by filing a notice of settlement of all claims pursuant to Local Rule CR 41(a)(2).

The omission: the term sheet does not contain an acceleration clause or similar provision allowing the bank to advance the date for payment of the $1 million if Grant defaults.

The term sheet imposed three pertinent obligations on Grant and Algo: (1) payment of $1 million in 60 months, (2) delivery of a signed promissory note, and (3) delivery of a first position deed of trust securing payment of the note. When Grant and Algo did not deliver the note and deed of trust, the bank first asked for summary judgment on the claims asserted in its complaint. When the trial court denied this relief, the bank asked for summary judgment on the term sheet based on Grant's failure to provide the note and deed of trust. The bank requested damages for this breach and dismissal of all remaining claims of all parties. The bank's motion asked for $1 million in damages but provided no legal analysis to support that amount.

Grant disputed the amount of the bank's damages, relying on the discounts described in the term sheet and the undisputed fact that the term sheet called for a payment in 60 months, requiring a discount to present value. The bank responded with two arguments. First, the term sheet provides for 12 percent interest on default. Second, the court could apply the current discount rate of .75 percent charged by the Federal Reserve Bank to its member banks. Washington Federal provided no evidence that this was an appropriate discount rate and asked the court to take judicial notice of the rate amount.

Grant asked the trial court to reconsider its initial decision to award the bank damages of $1 million. In response, the bank, for the first time, argued that extrinsic evidence established its right to acceleration of the amount due in the event of Grant's breach. The bank claimed that the promissory note prepared by the bank's lawyer to

implement the term sheet showed the parties' intent to provide for debt acceleration because Grant never objected to the following note provision:

> **6. DUE ON SALE:** This Note is secured by a Deed of Trust and a Pledge of Membership Interest (the "Collateral") and the property described in such security instruments may not be sold or transferred without the Holder's consent. The breach of this provision shall constitute and [sic] an event of default, and Holder may declare all sums due under this Note immediately due and payable, unless prohibited by applicable law.

The trial court did not accept this argument. Instead, it modified the principal judgment amount to $850,000. On cross appeal the bank now challenges this decision, claiming it is entitled to the principal sum of $1 million.

On appeal, the bank appropriately makes no claim that Grant's failure to deliver the note and deed of trust caused it $1 million in damages because the record provides no support for this claim. The record contains no evidence of the appraised values of any of the real estate parcels described in the term sheet as possible collateral. The term sheet itself recognizes that the parcels may not have a $1 million value and provides for the negotiation for additional collateral. The record includes no evidence of the amount that the bank could realize from the sale of the described collateral or any evidence about Grant's financial circumstances or future ability to pay an unsecured debt. Thus, the record contains no evidence from which the court could determine, by summary judgment, the amount required to place the bank in the same position as it would have been had Grant delivered the signed note and security agreement.

Recognizing the shortcomings of the record, the bank limits its argument on appeal. It contends that it had the right to accelerate the due date for payment of the $1

million when Grant defaulted. It relies exclusively on the quoted paragraph 6 of the draft note. This argument fails for two reasons. First, paragraph 6 is not a general acceleration clause that advances the due date for payment upon any default. It only purports to accelerate the due date if the collateral is sold without the note holder's consent. The absence of a general acceleration provision in the note prepared by the bank undermines rather than advances its position. Paragraph 6 shows that the bank was aware of the need for an acceleration clause, and the absence of a general acceleration clause in the note suggests no mutual intent to include one in the transaction.

Second, the bank's preparation of a note well after the signing of the term sheet and Mr. Grant's failure to identify objections to this note in a later deposition provide no evidence of mutual intent about a breach of the term sheet. At best, these facts show that the terms of the note were acceptable to Mr. Grant had he been willing to provide the required collateral.

For these reasons, the bank's claim of a right to accelerate the term sheet due date for payment fails. Without citation to any authority or evidence, the majority states, "We conclude that Washington Federal was entitled to $1 million as a principal amount because Grant's material breach of the Settlement Agreement allowed Washington Federal to demand the entire $1 million due immediately." The majority fails to cite any supporting authority or evidence for good reason. None exists.

For over a century, Washington courts have required that a contract contain a provision allowing a creditor to advance the due date for payment before allowing a

creditor to recover for a debt not otherwise due.[2] As I have explained, the term sheet does not contain any provision allowing the bank to advance the due date for payment.

The majority also claims that "[b]ecause of Grant's breach, Washington Federal will receive nothing." The record contains no evidence of either Grant's current or future ability to pay. We would reverse a trial court that made this finding on summary judgment on our record.

The majority also boldly claims that a discount to present value has no application in this case. It reaches this conclusion because it cannot find any case applying the principle to breach of a contract with a liquidated sum. The majority apparently concedes that the right to receive unliquidated future damages is worth less than the right to receive the amount of those damages now. But the majority's conclusion necessarily assumes that the right to receive a liquidated sum in 60 months has the same value as the right to receive it now. This conclusion defies common sense and reality.

I cannot think of any reason for distinguishing unliquidated from liquidated sums in this context. A sum is unliquidated because a fact finder must exercise some discretion to determine its amount. But that fact finder must decide on a number that represents the amount of unliquidated future damages. Once this number has been determined, no meaningful distinction exists between liquidated and unliquidated future damages. Each represents a fixed amount intended to put the injured party in the same future position

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[2] Llewellyn Iron Works v. Littlefield, 74 Wash. 86, 89-90, 132 P. 867 (1913); see also 27 MARJORIE C. ROMBAUER, WASHINGTON PRACTICE: CREDITORS' REMEDIES—DEBTORS' RELIEF § 3.4, at 140 (1998).

that party would have but for the injury. Reducing either to present value accounts for the time value of money. The time value of this amount of money is not affected by the method used by the fact finder to determine it. Thus, no logical reason appears to exist for the majority's distinction.

Because I agree that the trial court erred in awarding $850,000 in damages, I would remand for further proceedings consistent with this dissent.

# APPENDIX B

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

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| WASHINGTON FEDERAL SAVINGS, a United States corporation,<br><br>Respondent/Cross-Appellant,<br><br>v.<br><br>ALGO, INC., a Washington corporation; and ALLEN R. GRANT, individually and his marital community; JANE DOE GRANT, her marital community,<br><br>Appellants/Cross-Respondents. | No. 72114-3-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

The appellants/cross-respondents, Algo, Inc. and Allen R. Grant, have filed a motion for reconsideration. The court has taken the matter under consideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 16th day of March, 2017.

FOR THE COURT:



Trickey, ACJ

Mann, J.