No. 47716-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALEX SAFRANSKI, Appellant

v.

SULTAN WEATHERSPOON, Respondent.

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. David E. Gregerson)

CROSS-APPELLANT SULTAN WEATHERSPOON'S REPLY BRIEF

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I. INTRODUCTION

This cross-appeal hinges on a single issue that Safranski avoids in his Response Brief: Is prejudgment interest allowable to a minority shareholder when the majority shareholder is reimbursed for a legitimate business expense without submitting a receipt for the expense?

At issue in this cross-appeal is an award of $37,429 in prejudgment interest on a principal award of $57,785. The interest award consumes 39 percent of the total award.

The principal award was based upon a single finding by the trial court: Where the majority shareholder did not keep receipts to document expenses he incurred for the company, the court would treat the undocumented expense reimbursements as corporate profit. Thus, the minority shareholder was awarded his percentage of that re-characterized corporate profit.[1]

In making this single finding, the trial court made clear that there was no evidence to support a finding that the majority shareholder did anything wrong, other than failing to keep proper receipts of legitimate business expenses incurred. The court found:

> At the hearing, the parties entered into a stipulation that the Court could use the figure of $279,290 as the amount of undocumented expenses. **The Court makes no finding as to whether the undocumented expense reimbursements were for business expenses or for personal expenses**. The Court finds that defendant Weatherspoon failed in his duty to keep records of those expenses and, therefore, the expense amount will be treated as corporate profit. (**Emphasis added**.)[2]

[1] CP 467.
[2] CP 467.

The trial court then accepted Safranski's argument that he was entitled to prejudgment interest, nearly doubling the principal award, because the principal award was "liquidated."[3]

Safranski argues only that the amount was liquidated because "it was possible to compute the amount with exactness, without reliance on opinion or discretion," citing *Dautel v. Heritage Home Center, Inc.*[4] The exactness of the amount is shown by using the parties' stipulation that the court "could use the figure of $279,290 as the amount of undocumented expenses," and multiplying that figure by Safranski's 20.6 percent share ownership percentage. According to Safranski, eligibility for prejudgment interest is that simple.

This argument, though accepted by the trial court, oversimplifies and misstates the standard for prejudgment interest. Washington law on prejudgment interest is well-established, and has clear limits.

> Prejudgment interest is favored in the law based on the premise that **he who retains money he should pay to another should be charged interest on it.**[5] (Emphasis added.)

The court in *Spradlin Rocket Products, Inc. v. Public Utility District No. 1 of Grays Harbor County*[6] recently explained that "it is the character of the original claim, rather than the court's ultimate method for awarding damages, that determines whether prejudgment interest is allowable."[7] Only where it can be said that "one who has had the use of

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[3] CP 469.
[4] 89 Wn. App. 148, 948 P.2d 397 (1997).
[5] *Universal/Land Construction Co. v. The City of Spokane*, 49 Wn. App. 634, 641, 745 P.2d 53 (1987).
[6] 164 Wn. App. 641, 266 P.3d 299 (2011). Also *see* Response Brief at p. 30.
[7] *Id.* at 665.

money owing to another," can it also be said that the defendant "should in justice make compensation for its wrongful detention."[8]

> The plaintiff should be compensated for the 'use value' of the money representing his damages for the period of time from his loss to the date of judgment.[9]

In an often cited Supreme Court case on prejudgment interest, the Court in *Hansen v. Rothaus*,[10] emphasized it is the nature of the claim, and not its characterization as sounding in contract or negligence, that decides the issue of prejudgment interest.[11]

The *Hansen* Court stated the rule this way: "A defendant should not, however, be required to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to the plaintiff."[12]

Because the purpose of prejudgment interest is to:

> ...compensate the plaintiff for the use value of the money representing liquidated or determinable damages. Prejudgment interest is not a penalty imposed on a defendant for wrongdoing nor is its purpose to deter wrongdoing.[13]

Safranski focuses only on the mathematical exactness of the dollar computation to establish that the claim is "liquidated." In doing so, Safranski ignores the requirement to examine the nature of the claim. If the nature of the claim does not permit a finding that the defendant was retaining money owed to the plaintiff when the wrongful act occurred, then the mathematical exactness of the dollar computation does not matter.

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[8] *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968) (citing C. McCormick, Damages (Hornbook Series) § 54 (1935)).
[9] *Id.*, citing *Mall Tool Company v. Far West Equipment Company*, 45 Wn.2d 158, 177, 273 P.2d 652 (1954).
[10] 107 Wn.2d 468, 730 P.2d 662 (1968).
[11] *Hansen*, 107 Wn.2d 468, 472.
[12] *Id.*, at 473.
[13] *Id.*, at 474-75.

Safranski relies upon the stipulation entered in the trial court proceeding below to support his contention that the damages were "liquidated." As the trial court recited in its finding, the parties stipulated only that the figure of $279,290 could be used by the trial court as the amount of undocumented expense reimbursements. The parties did not stipulate that the expense reimbursements were for either improper personal expenses or legitimate business expenses. Nor did the parties stipulate that Weatherspoon was required to pay any portion of these expense reimbursements to Safranski.

And yet, in attempting to justify prejudgment interest, Safranski contends in his Response Brief: "Because Safranski owned exactly 20.69% of Duma's shares, he was entitled to 20.69% of the stipulated amount of unjustified expenditures, which equals $57,785."[14]

As the finding entered by the Court made clear, Safranski's entitlement to a percentage of the expense reimbursements was not because the expenses were not justified. Rather, the sole legal basis for the court's allocation of expense reimbursements to Safranski was Weatherspoon's failure to submit receipts for the expenses. There is no evidence, and no finding by the trial court, for this Court to assume the expenses were not legitimate business expenses.

Safranski likens this stipulation to an admission in *Spradlin Rocket Products, Inc. v. PUD.*[15] In *Spradlin*, the trial court awarded prejudgment interest on $3,295,748 of the $4,162,500 jury verdict. The trial court did

[14] Response Brief at p. 31.
[15] 164 Wn. App. 641, 266 P.3d 229 (2011).

so because, in closing argument, the defendants' counsel conceded "that it owed Spradlin $3,295,748 on its outstanding invoices."[16]

The admission in *Spradlin* is very different from the stipulation entered by the parties below. In *Spradlin*, the defendant not only stipulated to an amount, but also stipulated "it owed" plaintiff the stipulated amount "on its outstanding invoices." Under such circumstances, of course, prejudgment interest was awardable because the defendant knew, at the time of the invoices, that it was retaining money that was owed to the plaintiff.

When the nature of Safranski's claim is examined, a very different outcome is made clear. In this case, Safranski alleged a claim under RCW 23B.14.300 that Weatherspoon had defrauded him by causing the corporation to reimburse Weatherspoon for personal expenses.

In his Fifth Claim for Relief, Safranski alleged:

> Beginning in 2002 and continuing through 2012, Weatherspoon submitted requests to the Company for reimbursement of at least $350,000 of alleged business expenses. In connection with such reimbursement, Weatherspoon represented that the alleged business expenses were reasonable and necessary business expenses for the Company. The representations were material and induced the Company to pay at least $350,000 to Weatherspoon. The representations regarding business expenses were false and Weatherspoon was paid at least $350,000 for his own personal benefit. Weatherspoon knew the representations were false and intended the Company act on the representations.[17]

Based on that allegation, Safranski claimed under RCW 23B.14.300 that Weatherspoon had acted as a director of the

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[16] *Spradlin*, 164 Wn. App. 641, 666.
[17] CP 171.

corporation in a manner that was fraudulent.[18] He alleged that pursuant to RCW 23B.14.320,

> The court should enter a judgment against Weatherspoon in favor of plaintiff for 20% of (i) the $404,000 that Weatherspoon misappropriate from the Company;…[19]

Had the trial court found in favor of Safranski on his allegation that the expenses were personal and not legitimate business expenses, prejudgment interest would be justified. However, what transpired in the bifurcated bench trial was very different from the claim Safranski had alleged in his Fifth Claim for Relief.

In the bench trial, the parties agreed that the Court had jurisdiction over Duma Video, Inc., as a Washington corporation. Because the corporation was no longer doing business, the parties agreed that the Court should enter an order dissolving Duma Video pursuant to RCW 23B.14.320.

As to Safranski's claim for damages, Safranski did not attempt to prove that the expense reimbursements made by Duma to Weatherspoon were for personal expenses. In fact, Safranski submitted a chart into evidence summarizing the year-by-year claim that Safranski was prepared to prove.[20]

That summary, shown below, identifies a total of $334,747.40 in expense reimbursements at issue. Of this amount, Safranski claimed at the hearing that only $11,619.13 were allegedly "clearly improper personal expenses." Further, Safranski was prepared to prove that $17,040.91 was

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[18] CP 173.
[19] CP 173.
[20] CP 439.

"probably improper personal expenses." The remaining $306,087 in reimbursements was simply undocumented expenses.

Exh No	Year	Undocumented Reimbursements	Clearly Improper Personal Expenses	Probably Improper Personal Expenses	Total
1	2006	$ 33,962.56	$ 0.00	$ 0.00	$ 33,962.56
2	2007	$ 49,008.80	$ 552.90	$ 0.00	$ 49,561.70
3	2008	$ 62,280.78	$ 0.00	$ 0.00	$ 62,280.78
4	2009	$ 20,388.89	$ 0.00	$ 2,164.40	$ 22,553.29
5	2010	$ 80,388.81	$ 814.92	$ 654.36	$ 81,858.09
6	2011	$ 47,141.76	$ 9,149.59	$14,222.15	$ 70,513.50
7	2012	$ 12,915.76	$ 1,101.72	$ 0.00	$ 14,017.48
		$306,087.36	$11,619.13	$17,040.91	$334,747.40

Safranski could have attempted to introduce evidence that all of the expense reimbursements were for personal expenses, and not business expenses. Or, he could have required Weatherspoon to testify as to the purpose of the expenses. Safranski was not required to accept a stipulation.

The distinction between personal expenses and business expenses in this analysis is crucial. A shareholder's mere failure to keep a receipt for a business expense does not change the legitimacy of the expense. A business expense is a business expense, whether it is documented or not.

Reimbursement by the corporation to a shareholder of a legitimate business expense without a receipt would not cause Weatherspoon to know he owes anything to Safranski. He might be entitled to demand that Weatherspoon keep better records, but that would not result in any financial reward to Safranski.

Because it is "the nature of the claim" that must be examined, the nature of Safranski's claim does not permit a conclusion that

Weatherspoon was using Safranski's money when the corporation reimbursed Weatherspoon for business expenses.

Safranski skips over this part of the prejudgment analysis, except to say that Weatherspoon "was on notice that such an expense could be deemed to be unjustified."[21] This argument does not meet the standard under Washington law.

The only "notice" Weatherspoon would have had pertaining to a legitimate business expense reimbursement would be "notice" to submit receipts – not pay Safranski any money.

The facts in this cross-appeal are like the facts confronting the Washington Supreme Court in *Hansen*, *supra*. One of the parties in *Hansen* argued that a lump sum damage award included items that justified prejudgment interest. Because the award was in a lump sum, the appellate court could not distinguish between those items that justified prejudgment interest, and those that did not.

> While perhaps such a claim might be liquidated (in that once the facts are decided the amount is readily ascertainable) we cannot so conclude here. All that is before us is an undifferentiated lump sum amount representing maintenance, cure, and unearned wages.[22]

In the same way, this Court is confronted with a lump sum of undocumented expenses in the amount of $279,290. When such an undifferentiated lump sum is awarded, there is no justifiable basis to allow prejudgment interest on the entire lump sum, when some portion of that lump sum (or all of it) represented legitimate business expenses.

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[21] Response Brief at p. 32.
[22] *Hansen*, 107 Wn.2d 468, 478.

Weatherspoon is mindful, as Safranski points out, that the standard of review for an award of prejudgment interest is abuse of discretion. A trial court's award of prejudgment interest should be reversed if this Court finds that the award is "manifestly unreasonable" or "based on untenable grounds."[23] Here, it is both.

It is manifestly unreasonable to misapply the standard for prejudgment interest, particularly under these circumstances. Weatherspoon should not be required to compensate Safranski in the form of interest for reimbursements that were legitimate.

Unless this Court reverses the prejudgment interest award, Weatherspoon would be penalized for not keeping proper receipts of business expenses, when prejudgment interest is not "a penalty imposed on a defendant for wrongdoing nor is its purpose to deter wrongdoing."[24]

II. CONCLUSION

Cross-Appellant Weatherspoon respectfully requests the Court reverse the trial court's award of prejudgment interest to Safranski in the amount of $37,429.

DATED this 23rd day of June 2016.

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[23] Response Brief at pp. 29-30.
[24] *Hansen*, 107 Wn.2d 468, 475.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 23rd day of June, 2016, I served a copy of the foregoing **CROSS-APPELLANT SULTAN WEATHERSPOON'S REPLY BRIEF** via First Class United States Mail, postage prepaid, to the following persons:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: June 23, 2016

At: Vancouver, Washington

/s/ Heather Dumont
HEATHER A. DUMONT

LANDERHOLM PS

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Cross-Appellant Sultan Weatherspoon's Reply Brief

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