No. 310914

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

COLLEEN KELLY, an individual,

Appellant,

v.

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

Respondent.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Ms. Kelly's underlying claim is simple. On September 13, 2005, Allianz Life Insurance Company of North American ("Allianz") underpaid her interest she was lawfully owed under RCW 19.52.010, Washington's general interest statute. Her claim accrued at that time: the moment Allianz first violated Ms. Kelly's rights, giving rise to a legal claim for relief. The right to the remaining interest is an express or implied liability arising out of a written agreement, to which a six-year limitations period applies. Therefore Ms. Kelly timely filed her claims on August 19, 2011, less than six years from September 13, 2005. Before September 13, 2005, the parties had no dispute regarding principal or interest amounts, and Ms. Kelly could not have taken Allianz to court. Ms. Kelly seeks a declaratory judgment that she is entitled to the unlawfully withheld interest as restitution for an unfinished rescission.

Allianz seeks to muddy these waters with discussions of when Allianz first was aware of Ms. Kelly's claim in 2006, and whether other limitations periods may apply for claims Ms. Kelly has not asserted. Allianz further seeks to obfuscate the intent of Washington's general interest statute, mislabeling it a "prejudgment interest" statute, despite the absence from the statute's plain language of any reference to judgments, civil proceedings, or litigation.

Allianz has conceded nearly all the determinative legal and factual issues necessary to properly frame this dispute. First, it concedes this is a dispute involving Annuities which were rescinded,[1] according to its own statements made in correspondence before the litigation commenced and in its arguments to this Court. (Respondent's Br. at 4 (referring to the "[r]escission of the three policies..."); Clerk's Papers ("CP") 92 (correspondence from Allianz referring to the "rescinded policies"); CP 108 (same); CP 138 (referring to the "annuity contracts rescinded on September 13, 2005").)

Allianz has also conceded that interest was due to Ms. Kelly on her premiums, by paying interest at three percent. (CP 21.) The three key questions before this Court are (1) what interest rate is necessary to complete the rescission and restore Ms. Kelly to her *status quo ante*, (2) what statute of limitations period applies here, and (3) when her rescission claim for the underpaid interest arose.

Allianz has never explained why it chose three percent interest when it returned Ms. Kelly's premiums. Fortunately, Washington's general interest statute, RCW 19.52.010 (which is not solely a prejudgment interest statute as Allianz claims), provides a clear answer

[1] All defined terms as used herein are consistent with the definitions in Ms. Kelly's Opening Brief.

when the parties have failed to define this term of a contract, stepping in and imposing a 12 percent interest rate as a matter of law. When Allianz breached this obligation to pay 12 percent interest, Ms. Kelly's claim for relief arose, triggering the six-year statute of limitations which applies to any liability, "express or implied arising out of a written agreement." RCW 4.16.040. Accordingly, her claim is timely.

In a "straw man" approach, Allianz seeks to pigeonhole Ms. Kelly's claims into various inapplicable categories in an attempt to discredit her right to relief. These efforts, however, are contrary to the plain terms of the relevant statutes at issue—the general interest statute and the statute of limitations. RCW 19.52.010 imposes a 12 percent interest factor to liquidated sums and amounts of forbearance where the parties have not agreed otherwise—and makes no reference to judgments. RCW 4.16.040 expressly provides that six-year limitations periods encompass any liability "express or implied" arising out of written agreements. A straightforward application of these terms to Ms. Kelly's situation mandates that Allianz not met its obligations to Ms. Kelly to pay her rightfully owed interest, as well as to return the funds she paid as premiums.

Finally, Allianz misapprehends the doctrine of "rescission and restitution" which work hand in hand as a claim for relief and measure of

damages, respectively. Ms. Kelly's rescission claim is subject to a six-year limitations period, and the measure of damages on that rescission claim is defined as restitution, in order to place the parties back in their positions before the contracts. Thus, after a rescission, Ms. Kelly was entitled to restitution—as a measure of her damages from rescission—including 12 percent interest per RCW 19.52.010, to compensate her for her lost time value of money. Because this never occurred, she is entitled to relief.

Restitution is therefore not an independent cause of action in this context – it is the proper manner of calculating her harm on her rescission claim. This distinction appears to elude Allianz, which confuses matters by arguing Ms. Kelly supposedly may have had an entirely separate cause of action for "equitable restitution." (Respondent's Br. at 15.) Even if she had such a claim for relief, which she could have pled in the alternative, Ms. Kelly is not asserting restitution as a cause of action here, so Allianz's argument is without merit. While the word "restitution" may be found in both legal doctrines, that coincidence cannot preclude Ms. Kelly's recovery on her rescission claim. Restitution is the proper measure of damages on her rescission claim.

Allianz's attempts to confuse Ms. Kelly's straightforward claims are unavailing. With no reasonable explanation for its three percent

interest factor, Allianz apparently believes it can ignore applicable Washington statutes and reimburse its insured individuals, using any interest rate it wishes to use. Allianz's readings of both statutory provisions here would read out of the statutes nearly all of their operative terms. For these reasons Allianz's positions must be rejected.

REPLY ARGUMENT

I. Washington's General Interest Statute Applies to Ms. Kelly's Liquidated Sums for the Time they Were Held by Allianz Pursuant to the Annuities.

a. Allianz Mischaracterizes RCW 19.52.010—Washington's General Interest Statute—as a "Prejudgment Interest" Statute: the Statute Requires no Judgment

Allianz mischaracterizes the plain terms of RCW 19.52.010 by continually referring to this provision as a "prejudgment interest" statute. It is not. It is the "general interest statute" in Washington State—and no judgment is required for it to apply. *See Burgess v. Premier Corp.*, 727 F.2d 826, 839 (9th Cir. 1984) (referring to RCW 19.52.010 as the "general interest" statute in Washington State).[2]

As this court has stated, 12 percent interest "applies to *any* 'liquidated' claim; defined as an amount capable of determination without

[2] Of course, courts also refer to RCW 19.52.010 as a prejudgment interest statute, because it applies in that context as well. However, by its terms it is not so limited.

recourse to opinion or discretion"—including a rescission claim. *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 776, 275 P.3d 339 (2012) (emphasis added); *Hornback v. Wentworth*, 132 Wn. App. 504, 132 P.3d 778 (2006). Indeed, the statute itself makes no reference to judgments, civil actions, litigation, and in no way makes its application contingent on the entry of a judgment. The operative text is as follows:

> (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 . . . .

RCW 19.52.010.[3]

Looking to the next sentence of this section, it is abundantly clear that no judgment is required, as the statute expressly refers to agreements in writing among the parties:

> 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.

Id.

The statute refers to "leases," "commercial paper," but never entry of judgments. Of course, liquidated sums pursuant to entered judgments

[3] In *Wright*, previously paid insurance premiums were found sufficiently "liquidated" to fall within the ambit of RCW 19.52.010.

meet the requirements of the section, but a judgment is not a prerequisite to invoking this provision. *See Baxter v. Stevens*, 54 Wn. App. 456, 459-460, 773 P.2d 890 (1989) (analyzing plain language of RCW 19.52.010 (1) to determine whether transaction was legally a loan transaction where no prejudgment interest was in issue).

This court should not read terms into the statute where they do not exist, or construct the statute in a manner which renders any terms a nullity. *Bank of America, N.A. v. Owens*, 173 Wn.2d 40, 57, 26 P.3d 211 (2011) ("It is a well-established canon of statutory construction that a court should avoid interpretations of a statute that render certain provisions superfluous."); *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) ("[I]f the meaning of a statute is plain on its face, we give effect to that plain meaning.") (internal quotations omitted). The only requirements to apply RCW 19.52.010 are that there be a "loan or forbearance of money, goods, or thing in action" and "no different rate is agreed to in writing between the parties." RCW 19.52.010 Courts have logically interpreted this provision to apply to sums that are liquidated and not subject to discretion, and nowhere does the statute require a judgment for its application.

Thus, RCW 19.52.010(1) is not solely a prejudgment interest statute but is in fact the Washington State "general interest statute."

Burgess, 727 F.2d at 839. Allianz's mischaracterization and misapplication of this provision must be rejected.

b. Ms. Kelly's Claims Are for Liquidated Sums

Allianz does not contest that Ms. Kelly's claims are for liquidated sums, or sums certain – there is no dispute regarding the amount of principal held by Allianz for the duration of the Annuities. Ms. Kelly entrusted Allianz by investing her life savings with the company, a total of $136,437.13, in order to generate long-term returns. This amount is not in dispute, rather, the only dispute here is the rate of interest owed when she learned Allianz's agent had defrauded Ms. Kelly and sold her contracts not approved for sale in the Washington.

In this circumstance, Ms. Kelly's claims are liquidated within the meaning set forth in *Wright*, 167 Wn. App. at 776. Allianz has even conceded that interest is owed for the relevant time period by paying Ms. Kelly some interest for that time. (CP 21.) However, it has never identified a factual or legal basis for applying a three percent rate. This Court's role is to simply apply the plain terms of RCW 19.52.010 to the monies held by Allianz for the duration of the contracts. Ms. Kelly should receive compensation for the time her savings was in Allianz's custody, in accordance with RCW 19.52.010.

II. Ms. Kelly's Claim is Timely Under RCW 4.16.040, a Six-Year Limitations Period to Actions for Liability Express or Implied Arising out of A Written Agreement

a. The Plain Meaning of RCW 4.16.040 Requires a Six-Year Limitations Period, Which did not Begin Running Until Allianz Underpaid the Interest

Under the plain language of RCW 4.16.040, the six-year statute of limitations applies here. The statute provides, "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement" (emphasis added) shall be brought within six years. Ms. Kelly's claim for the unpaid interest is plainly a liability "express or implied," that arises "out of a written agreement." *See Hornback*, 132 Wn. App. 504 (applying RCW 4.16.040 to claim for rescission).

As to when Ms. Kelly's claim arose, she had no justiciable claim until Allianz underpaid the interest. For a party to ask a court to grant relief, there must first exist a justiciable controversy between the parties. *Thompson v. Wilson,* 142 Wn. App. 803, 818, 175 P.3d 1149 (2008). The essence of a justiciable controversy is the existence of actual, present, *opposing interests* between the parties that are direct and substantial:

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

> academic, and (4) a judicial determination of which will be final and conclusive.

Id.

Therefore, the only sensible trigger date for beginning the six-year clock is when Allianz acted to deny Ms. Kelly's rights on September 13, 2005, by underpaying her interest. This rule is in keeping with the general, fundamental rules of contract law and disputes arising out of written agreements, which begin the limitations period at the time of breach. *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). Allianz actually concedes that the relevant trigger date that applies to claims under RCW 4.16.040 is upon breach. (Respondent's Br. at 8.)

This conclusion is reinforced by a quick review of the three logical choices for when a limitations period could begin to run for recovery of sums previously paid on subsequently rescinded[4] contract:

1. When the contracts were signed.

[4] It should be noted that according to the Washington State Office of Insurance Commissioner the Annuities would still have been enforceable pursuant to the laws of the State of Idaho. (CP 101.) Accordingly, this case does not involve a contract that was void as a matter of law from the first moment of inception, but rather an instance of mutual mistake as to its legality in Washington, resulting in contracts becoming subject to rescission.

This trigger date should be rejected because it would deprive a party of a right to recovery on contracts after six years had elapsed since formation. For contracts such as the Annuities, designed to last decades, this rule would mean a rescindable contract would nevertheless become effectively legal and enforceable after six years had passed and the limitations period had run. Such a rule is contrary to both common sense and public policy, and may result in infirm contracts, or contracts that are against public policy, becoming enforceable solely on limitations grounds. Moreover, no cause of action could accrue upon entry into such an illegal contract if no breach of the duty to make restitution has yet occurred. *1000 Va. Ltd. P'ship*, 158 Wn.2d at 576; *see also* Respondent's Br. at 8 ("A statute of limitations does not begin to run until a cause of action accrues."). Nor would any actual present and substantial controversy between them exist at this point. *Thompson,* 142 Wn. App. at 818.[5]

2. When one or more parties discovered the illegality.

[5] Ms. Kelly's argument that she had a "right" to the money from the moment of the Annuities were signed is not *contra.* (Respondent's Br. at 10.) Ms. Kelly's right to the return of her principal is distinct from an accrued claim for relief commencing a statute of limitations. Naturally she had rights to the return of her principal from the moment of the Annuities. But that is a distinct analysis from whether her current claims for underpayment of interest in rescission accrued. It is difficult to conceive how Ms. Kelly could have anticipated Allianz's actions in 2005 years earlier, so as to have commenced this litigation to recover underpaid interest.

Allianz concedes that this "discovery rule" is inapplicable to claims governed by RCW 4.16.040 in the contractual context and is not a logical trigger date. (Respondent's Br. at 8 ("A claim arising out of a written contract is subject to the six-year statute of limitations. . . . The discovery rule does not apply to an action for a breach of contract.")). Moreover, this rule necessarily assumes there is a dispute between the parties, a prerequisite for a justiciable controversy. Where, as here, both parties agree to rescind a contract, one cannot run to court to preemptively sue on a dispute which does not exist. *Versuslas, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 321-22, 111 P.3d 866 (2005). Upon discovery of some defect in a contract, the parties may choose to ratify the contract through performance or further written agreement. No dispute necessarily arises just upon discovery.

3. Upon breach, i.e., a violation of a party's rights.

This is the only rule which follows traditional notions of contract law, and comports with the rules of justiciability, i.e., an actual dispute between the parties. *1000 Va. Ltd. P'ship*, 158 Wn.2d at 576; *Thompson v. Wilson,* 142 Wn. App. at 818.

Given the above possible trigger points, Allianz's arguments entirely ignore the doctrine of justiciability. Simply put, *no dispute existed between the parties* as of September 12, 2005 – and Allianz cannot

point to a scintilla of evidence in the record which would have given Ms. Kelly the right to claim an actual, present substantial dispute with Allianz at that time. Without such a dispute, a claim for relief had not accrued and no limitations period could have begun to run. *Erickson v. Chase*, 156 Wn. App. 151, 157, 231 P.3d 1261 (2010).

Allianz contends that Ms. Kelly could have sued it on September 12, 2005 for 12 percent interest. However, it is difficult to conceive how Ms. Kelly or her counsel could have ethically filed a pleading in court asserting a claim for relief on September 12, 2005, because the parties *were in agreement* regarding the underlying rescission, and *no dispute* regarding interest had yet arisen. *See* Rules of Professional Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a *basis in law and fact* for doing so that is not frivolous . . . .") (emphasis added).

Moreover as a matter of contract law, Ms. Kelly could not have brought claims for anticipated wrongs which had not yet occurred. Courts and parties should not infer or anticipate a wrongful act or breach before it occurs, absent clear and positive statements to the contrary. *Versuslas, Inc.*, 127 Wn. App. at 321-22. In this case the "clear and positive statements" come on September 13, 2005, in the letter from Allianz underpaying Ms. Kelly interest. (CP 21.)

Allianz does not (and cannot) point to any statements between the parties, much less disagreements, regarding the rate of interest prior to September 13, 2005, because there were none. There was no breach of Ms. Kelly's rights until Allianz wrongfully underpaid interest. She had no factual basis for this lawsuit on September 12, 2005. She could only have filed her claims on September 13, 2005 – at the earliest. Her claim is therefore timely.

b. Ms. Kelly is Entitled to Restitution, as a Measure of Damages, on her Rescission Claim

Allianz conflates two distinct uses of the term "restitution." Restitution can be a cause of action independent from contract law, as Allianz argues. However, Ms. Kelly has not asserted such a cause of action in this litigation.

Instead, Ms. Kelly is claiming restitution as the appropriate measure of damages on a claim for rescission under contract law. Rescission and restitution work in tandem to provide a remedy for parties to a rescinded contract. *Kofmehl v. Baseline Lake, LLC*, 167 Wn. App. 677, 692-93, 275 P.3d 328 (2012) ("as a matter of contract law, not common law, restitution was available") (citing *Hornback*, 132 Wn. App. at 509); *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 90-91, 492 P.2d 1058 (1971) (discussing restitution as an "alternative remedy to damages

for breach of contract")); *cf.* 25 David K. DeWolf, Keller W. Allen, WASH. PRACTICE: CONTRACT LAW AND PRACTICE § 18-303.08 (2d ed. 2007) (providing a jury instruction for restitution in a contract action independent from restitution in a quasi contract action). Thus, Allianz confuses restitution as a measure of damages with restitution as an independent cause of action.

Because Ms. Kelly is seeking restitution as a measure of damages on her rescission claim and not as an independent cause of action, a six-year limitations period applies. *Hornback*, 132 Wn.App. 504.

Allianz's reliance on *Davenport v. Washington Education Association*, 147 Wn. App. 704, 197 P.3d 686 (2008), to claim otherwise is misplaced. *Davenport* applied a three-year statute of limitations to a stand alone restitution claim—a claim Ms. Kelly is not asserting here. Moreover, it is critical to bear in mind that *Davenport* did not involve a dispute surrounding a written contract subject to the six-year statute of limitations in RCW 4.16.040. *See* 147 Wn. App. at 737-38. Instead, the *Davenport* plaintiffs were claiming "a private statutory cause of action and a common law cause of action for conversion," along with a backup claim for restitution. *Id.* at 713. Accordingly, *Davenport* is inapplicable and of limited value precedential where, as here, Ms. Kelly is seeking restitution

as a measure of damages on a distinct rescission claim arising out of a written contract.

Allianz entirely ignores this distinction that the proper measure of relief on rescission is restitution, and instead seeks to force Ms. Kelly's claim to be something it is not in order to impose a shorter limitations period on her. These tactics should be rejected.

c. The Laches Doctrine Involves Questions of Fact that Cannot be Raised for the First Time on Appeal and Are Inappropriate for Determination on Summary Judgment.

Allianz asserts that Ms. Kelly's somehow forfeited her right to relief because her demand for full repayment of interest was made after Allianz's underpaid her. (Respondent's Br. at 18-20.) This fact is irrelevant to the statute of limitations question before this court, which examines when suit was filed, not when a first demand was made.

Rather, the position of Allianz is essentially a laches argument in sheep's clothing. "Laches is 'implied waiver arising from knowledge of existing conditions and acquiescence in them.'" 25 WASH. PRACTICE SERIES: CONTRACT LAW AND PRACTICE § 16:28, at 196 (2012-2013 Supplement 2012) (quoting *Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978)). Laches is an equitable defense to an action that applies where: (1) plaintiff was aware of the facts

underlying the action; (2) plaintiff unreasonably delayed bringing the action; and (3) defendant was materially prejudiced by this delay. *Id.* (citing *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 277, P.3d 18 (2012)).

Whether a plaintiff has delayed unreasonably in commencing an action is a question of fact for the trial court. *See Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 362-63, 177 P.3d 755 (2008) ("[R]easonable minds could differ as to whether an 18-month delay is an "unreasonable" delay for the purposes of laches.") ("The trial court was in the best position to weigh the evidence and determine whether the delay was unreasonable.").

Applying the doctrine here, Allianz's characterization of the time period that lapsed between Allianz underpaying her interest, and her demanding her rightful interest, is inappropriate. Whether that time period was an unreasonable delay is a factual determination not made below and not before the Court of Appeals. So even had Allianz expressly moved for summary judgment on its "laches" defense, there has been absolutely no showing of its entitlement to judgment on this issue as a matter of law.

CONCLUSION

For the above reasons, Ms. Kelly respectfully requests that this Court reverse the decision of the Superior Court granting Allianz summary

judgment and dismissing Ms. Kelly's claims, and remand for further proceedings.

DATED this 13th day of March, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE

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

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