NO. 310914-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

COLLEEN KELLY, an individual,

Appellant,

vs.

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

Respondent.

RESPONDENT'S BRIEF

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Claire Been, WSBA #42178
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I. INTRODUCTION

In this appeal, Plaintiff-Appellant Colleen Kelly attempts to fit a square peg into a round hole. Each legal theory she asserts fails. Her claims are untimely, justifying dismissal. They also are meritless.

Ms. Kelly purchased three annuities from Defendant-Respondent Allianz Life Insurance Company of North America that she later contended were not authorized for sale where she lived. When she learned the annuities were potentially unauthorized, she requested that the annuities be rescinded, without penalty. Allianz voluntarily rescinded the annuities, and returned Ms. Kelly's premiums plus 3 percent interest. She accepted the funds.

Half a year later, Ms. Kelly decided she wanted more interest. Ms. Kelly now asserts that she is entitled to 12 percent interest under the pre-judgment interest statute, though there was no judgment and no judicial determination regarding the annuities—only a voluntary mutual rescission. She failed to file suit within the six-year statute of limitations for an action on a written contract. She puts forth some creative legal theories to try to resurrect her tardy claim—arguing that her "claim" is one for "wrongful payment of interest," and it did not accrue until Allianz repaid her premiums plus 3 percent. If her claim is for "wrongful payment of

interest," then she actually has brought a claim for equitable restitution, which is subject to a three-year statute of limitations that bars the claim. If her claim is truly an action on the contract like she contends, then it accrued when the "illegal" contracts were issued. Ms. Kelly's arguments are internally inconsistent and contrary to law. Whatever the label, her claim is time-barred.

As an alternative ground for affirmance, the merits of her claim fail. First, her failure to communicate that any more money was due at the time of the rescission ends the dispute pursuant to clear Washington precedent. Further, RCW 19.52.010, the interest statute on which she attempts to rely, does not offer a stand-alone claim for interest. Never having obtained a judgment of rescission because the parties privately resolved the rescission, Ms. Kelly is not entitled to pre*judgment* interest. The trial court properly granted summary judgment and this Court should uphold its decision.

II. STATEMENT OF THE ISSUES

1. A cause of action on a written contract accrues when the party has the right to apply to the Court for relief. Ms. Kelly's cause of action for rescission accrued when the allegedly illegal contracts were issued. Did the superior court properly find that Ms. Kelly's suit was time-barred, when it was commenced more than six years after accrual?

2. Ms. Kelly argues that she did not have a justiciable claim for relief prior to Allianz' payment of 3 percent interest. In her complaint, she sought equitable restitution. If Ms. Kelly's claim really arises out of Allianz's "wrongful" payment of interest, is it barred by the three-year statute of limitations for equitable restitution?

3. Alternatively, does RCW 19.52.010 entitle Ms. Kelly to a stand-alone award of 12 percent interest where the action is solely one for interest, there is no judgment to award interest upon, and the parties mutually rescinded the contract without judicial assistance?

III. STATEMENT OF THE CASE

The parties voluntarily resolved the issues in this case over seven years ago. In 2004, Ms. Kelly purchased three annuity contracts from Curtis Horton, an Allianz insurance agent. (CP 51). In June of 2005, Ms. Kelly learned that the annuities may not have been authorized for sale in Washington. (CP 101). Through the Office of the Insurance Commissioner, Ms. Kelly requested that Allianz rescind the policies: "Ms. Kelly is requesting that the contracts be terminated at their current value, without penalty." (CP 104). There was no mention of interest.

Allianz complied with Ms. Kelly's request. On September 13, 2005, Allianz communicated by letter to Ms. Kelly that it agreed to rescind the three annuity policies and return her premiums with 3 percent

interest. (CP 77). With the rescission letter, Allianz enclosed three checks for all of Ms. Kelly's premium monies and 3 percent interest on the funds for a total amount of $141,221.69. (CP 82–84). Rescission of the three policies was complete. Ms. Kelly cashed the checks. (CP 51–52).

Over six months later, Ms. Kelly contacted Allianz, stating that she felt entitled to 12 percent interest on her premiums. (CP 108). Evidence submitted by Ms. Kelly about this contact shows that when she later consulted with an attorney, she "was told Allianz should have paid her 12% interest." (CP 94). She therefore called Allianz "to get additional 9% interest sent to her." *Id.* Over the next several years, Ms. Kelly and her attorney engaged sporadically in discussions with Allianz regarding the added interest Ms. Kelly claimed she was owed. (CP 110–131).[1]

Almost 6 years after she had received the payment from Allianz, Ms. Kelly filed suit in Spokane County Superior Court on August 19, 2011. (CP 172). In her Complaint, Ms. Kelly asserted one cause of action

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[1] For example, evidence also submitted by Ms. Kelly shows that in December 2008 Ms. Kelly instructed Allianz to communicate with a lawyer she had retained, and Allianz invited her lawyer on December 4, 2008 to "e-mail me back with her concerns and we will open a complaint and respond to you accordingly." (CP 116). Eleven months later in November 2009, not having heard from the lawyer, Allianz emailed him advising that they had never received any response. The first formal assertion of a claim for 12 percent interest from Ms. Kelly arrived by her attorney's letter seventeen months after that, dated May 9, 2011. (CP 123).

for unpaid interest under RCW 19.52.010. (CP 174–178). Allianz filed a Motion to Dismiss Pursuant to CR 12(b)(6). (CP 179). On December 12, 2011, the superior court denied Allianz's motion, but ordered Ms. Kelly to submit an amended complaint making a more definite statement under CR 12(e). (CP 183–184). Ms. Kelly's amended complaint was filed December 19, 2011. (CP 1). In her amended complaint, Ms. Kelly asserted a cause of action for declaratory judgment and a cause of action for rescission and full restitution. (CP 6–8). She prayed for judgment of $14,354, which represents "that remaining portion of full restitution which Allianz Life has not made." (CP 8, ¶¶ 50, A)

Allianz brought a Motion for Summary Judgment, seeking dismissal on the ground that Ms. Kelly could not bring a stand alone action for interest under RCW 19.52.010 and that her claims were barred by the statute of limitations. (CP 34–45).[2] The court granted Allianz's motion and dismissed Plaintiff's stale claims with prejudice. (CP 169–171). Ms. Kelly challenges the dismissal. Because the superior court's determination was supported by the law and the evidence, this Court should affirm.

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[2] For purposes of this appeal, Allianz does not assert an accord and satisfaction defense that was raised to the trial court and not reached. *See* 7/27/12 VR 15-16. Allianz will reserve the issue for trial, if necessary.

IV. STANDARDS OF REVIEW

Allianz agrees with Ms. Kelly that the standard of review on appeal of a summary judgment order is *de novo*. *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). Statutory construction is also reviewed *de novo. Id.* Whether a statute applies to a case is a matter reviewed by this court *de novo*. *Hornback v. Wentworth*, 132 Wn. App. 504, 510, 132 P.3d 778 (2006).

CR 56(c) provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Summary judgment is also appropriate where, despite viewing the evidence in the light most favorable to the nonmoving party, no reasonable juror could have found in favor of the nonmoving party. *Olson v. City of Bellevue*, 93 Wn. App. 154, 156, 968 P.2d 894 (1998). Applying these standards, this Court should affirm.

V. ARGUMENT

The trial court correctly dismissed Ms. Kelly's claims. Her action is time-barred under any theory. From the inception of this litigation, Ms. Kelly's claims have been a moving target to avoid these consequences. It remains unclear whether Ms. Kelly pursues a statutory action, an action on the contract, or an action for restitution. Ms. Kelly's tortured interpretation

regarding accrual of her claim is a last-ditch effort to fit her claim into any statute of limitations. But she cannot split her claim into component pieces to avoid clearly established rules regarding accrual and statutes of limitation. Additionally, Allianz's payment does not support tolling and, even if it did, this argument was not preserved because it was not presented to the trial court.

Finally, if the claim is not time-barred this Court should affirm the dismissal on the merits as a matter of law because RCW 19.52.010 provides no cause of action and, in any event, does not apply to the voluntary mutual rescission of the annuities in this case. There was no judicial determination and no judgment upon which to award interest.

A. This Court should affirm the trial court's summary dismissal of Ms. Kelly's time-barred claims

Ms. Kelly sued Allianz too late. The trial court correctly granted summary judgment dismissing Ms. Kelly's tardy claims as time-barred. The trial court's application of the statute of limitations was consistent with Washington law. If Ms. Kelly's action was truly an action on the contract (though she alleges no breach of contract and the parties already mutually rescinded) then it is barred by RCW 4.16.040(1).[3] If her claim is

[3] RCW 4.16.040(1) reads:

The following actions shall be commenced within six years:

one for equitable restitution for "wrongful payment of interest," then it is barred by the three-year statute of limitations. This Court should affirm the trial court's summary judgment order dismissing Ms. Kelly's claims with prejudice.

1. If the six-year statute of limitations applies to Ms. Kelly's claim, the trial court properly determined that her claim accrued when the annuities were issued.

If Ms. Kelly is correct that the six-year statute of limitations applies to her claim, this results in dismissal. A claim arising out of a written contract is subject to the six-year statute of limitations. RCW 4.16.040. A statute of limitations does not begin to run until a cause of action accrues. *1000 Va. Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 576, 146 P.3d 423 (2006). A cause of action accrues when a party has the right to apply to the court for relief. "[T]his court has consistently held that accrual of a contract action occurs on breach." *Id.* (citing cases). The discovery rule does not apply to an action for a breach of contract. *1000 Va. Ltd. P'ship v. Vertecs*, 158 Wn.2d at 576 (overruling *Architechtonics Constr. Mgmt. v. Khorram*, 111 Wn. App. 725, 45 P.3d 1142 (2002)). If the Allianz annuities were indeed illegal and justified rescission, then Ms.

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(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement, except as provided for in RCW 64.04.007(2).

Kelly's right to rescission and the attendant remedy accrued immediately upon issuance of the annuities. *See Noel v. Cole*, 98 Wn.2d 375, 383, 655 P.2d 245 (1982) ("Since the contract was void at its purported inception, Alpine was entitled to immediate restitution of these amounts . . .").

It is uncontested that Ms. Kelly did not sue Allianz until more than six years after Allianz issued the annuities. Allianz issued the annuities to Ms. Kelly in April and December of 2004 (CP 58–75). Ms. Kelly did not commence her action until August 2011, over seven years later. (CP 172). Ms. Kelly's claims are barred by RCW 4.16.040.

Even if the discovery rule applied to Ms. Kelly's claims, which it does not, or if the claim accrued upon discovery of the illegality, the claims still would be time-barred because she learned of the annuities' purported illegality on or about June 27, 2005 (CP 101–102), more than six years before she commenced her action. Thus, even with the benefit of the discovery rule, Ms. Kelly's claim is tardy.

The trial court properly held that Ms. Kelly's claims were time-barred, stating, "I agree with the points made out by the defense here. I believe that there is a statute of limitations component here such that the statute has run. I disagree that it's—that in this particular set of facts that it would be six years from September 13th of 2005 [Allianz's payment]." 7/27/12 VR 15. The trial court's decision should be affirmed.

2. This Court should reject Ms. Kelly's argument that her claim accrued when Allianz returned her premiums.

Ms. Kelly seeks to avoid dismissal under the six-year statute of limitations by toying with the accrual date. This attempt fails. Ms. Kelly cannot avoid dismissal through a tortured description of her claim and manipulation of the accrual date. Washington law does not support the conclusion that her claim accrued when Allianz returned the premiums with 3 percent interest.

Ms. Kelly mischaracterizes her claim to focus on the subsequent return of the premiums, arguing that her claim accrued then and not before. But the return of the premiums did not give rise to her claim. If anything, the return of the premiums with 3 percent interest reduced the scope of her already-existing claim. Her claim, in fact, accrued long before then when she purchased the allegedly unauthorized annuities.

Ms. Kelly acknowledges this, claiming that "she had a right to the money from the moment she paid for the illegal investment Annuities . . . ." *Opening Brief*, at 10. Ms. Kelly could have asserted that she was due 12 percent interest at any time after the annuities were issued, including in her first request for rescission. At the very least, her claim accrued on or about June 27, 2005, when she learned the annuities were

(allegedly) unauthorized. This Court should reject her unsupported, contradictory theory that her claim arose later and affirm.

In her attempt to fit within the statute of limitations, Ms. Kelly sometimes characterizes her claim as one for "wrongful payment of interest." *Opening Brief*, at 20. She presents no authority recognizing such a cause of action. She goes on to acknowledge, as she does throughout most of her brief, that her claim is one for breach of contract. *Id.* (arguing when her "contractual claim" accrued). She in essence appears to wish she could assert a hybrid claim: one that is contractual in nature, therefore supporting application of the six year statute, but arises not from the contract but from Allianz's conduct in paying, in her view, inadequate interest. This claim does not exist in Washington, if anywhere.

Another reason the Court should reject Ms. Kelly's accrual argument is because the contract itself does not provide for 12 percent interest if the contract is rescinded. She freely admits this. ER 4 (Amended Complaint, ¶ 19 ("The Annuities did not provide for a rate of interest applicable to the Annuity premium payments in event of rescission.")). She is not, in other words, alleging that Allianz failed to perform *a term of the contract*. She claims, instead, that upon her right to rescind the contract her remedy should include 12 percent interest. Again, this relief arises from her rescission claim which was ripe when the annuities were

issued. It does not arise from any later failure of Allianz to perform according to the contract. The Court should reject as inapplicable her discussion at pp. 20–21 regarding accrual on breach of a contract.

This Court also should reject her accrual argument because its underlying reasoning is too strained to be credible. Ms. Kelly argues that her claim accrued on September 13, 2005 because "[p]rior to September 13, 2005, Ms. Kelly could have no actual dispute with Allianz regarding the amount of interest to be paid on her principal amounts." *Opening Brief*, at 22. She most certainly could have. Merely because the parties did not discuss interest, let alone a rate of interest, does not establish that prior to September 13, 2005 the parties *could not have* disputed the rate. As already noted, Ms. Kelly herself states that "she had a right to the money from the moment she paid for the illegal investment Annuities . . . ." *Opening Brief*, at 10. This echoes her allegations, including the following: "In conjunction with rescission of the written Annuities, Allianz Life was under a duty to make full restitution to Ms. Kelly including the initial premiums along with interest thereon." (CP 4). The right to interest was "in conjunction with rescission" and accompanied the right, according to Ms. Kelly, to return of her premiums.

That the parties did not discuss interest does not establish lack of a judicial controversy. It would be unworkable to weave into the

justiciability analysis a requirement that the parties actually articulate all aspects of their claim or positions to each other in order for the dispute to exist. Based on the cases cited by Ms. Kelly, *see Opening Brief* at 18–20, this is not how the justiciability doctrine operates. Ms. Kelly could have brought a lawsuit for rescission claiming 12 percent interest prior to September 13, 2005. Nothing that occurred on September 13, 2005, including the payment from Allianz, changes this. Additionally, Ms. Kelly's failure to demand 12 percent interest at the time she requested rescission neither delays accrual nor extends the statutory limitations period.

Ms. Kelly's claim, if it is a contract claim, accrued when the annuities were issued or, at the latest, when she discovered the annuities were "unauthorized." She cannot break her claim into smaller components to avoid the statute of limitations. Assuming, arguendo, that Ms. Kelly is entitled to 12 percent interest, then on September 13, 2005, when Allianz returned her premium plus 3 percent interest, Ms. Kelly's claim was reduced, it did not accrue.

3. Ms. Kelly not only failed to preserve any argument for tolling based on "partial payment," the argument fails.

Ms. Kelly failed to preserve any argument that Allianz's "partial payment" tolled the statute of limitations. She failed to present this

argument to the trial court. Even if this Court considered the argument, it fails.

Ms. Kelly never presented to the trial court any argument that the check she received on September 13, 2005 constituted a partial payment sufficient to toll the statute of limitations. She has not preserved the argument. A party may not raise a new argument or theory for the first time on appeal. RAP 2.5(a); *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992).

Even if this Court considers Ms. Kelly's partial payment argument under RCW 4.16.270, which it should not, the Court should conclude there was no tolling. Allianz's letter and payment do not satisfy the requirements for tolling by partial payment. "Where reliance is placed upon a part payment to remove the bars of the statute, the burden of proving the payment within the statutory period rests upon the party asserting it. Where circumstances are relied upon to toll the running of the statute of limitations, *they must show a clear and unequivocal intention on the part of the obligor to keep alive the debt*." *Walker v. Sieg*, 23 Wn.2d 552, 561, 161 P.2d 542 (1945) (citations omitted) (emphasis in original). In other words, the circumstances of the payment must show "an intentional acknowledgement by the debtor of his liability for the <u>whole</u> debt as of the date of payment, from which arises a new implied promise,

supported by the original consideration, to pay the residue." *Walker*, 23 Wn.2d at 562 (*quoting J.M. Arthur & Co. v. Burke*, 83 Wash. 690, 145 P. 974 (1915)) (emphasis added). No evidence is present here of Allianz's intention to renew a debt, let alone a *clear and unequivocal* intention. No facts support the conclusion that Allianz intended to pay more in the future. Where no reasonable juror could find for the nonmoving party, summary judgment is proper. Thus, even if Ms. Kelly had presented the argument, it should not have prevented summary judgment to Allianz.

This Court should disregard Ms. Kelly's partial payment argument. It was not raised before the trial court and is entirely unsupported by the evidence.

4. If Ms. Kelly's claim is based on non-payment of interest, her action is for equitable restitution and is barred by the three-year statute of limitations.

The alternative theory of an equitable restitution claim cannot save Ms. Kelly's action. Arguably, her claim for "wrongful payment of interest" is one for equitable restitution, not an action on a contract. An action for equitable restitution, also known as unjust enrichment, is subject to a three-year statute of limitations. Ms. Kelly's action viewed through this lens remains time-barred.

Ms. Kelly's pleading is centered on restitution. In her Prayer for

Relief in her Amended Complaint, Ms. Kelly sought "A judicial declaration that Plaintiff is entitled to *full restitution* from Allianz Life . . ." (CP 8) (emphasis added). She admitted in her opposition to Allianz's Motion for Summary Judgment that her claim is one to enforce her "common law right to equitable restitution...." (CP 147). These statements are at odds with her position that her claim sounds in contract. They may represent, however, the correct theory of her case.

A plaintiff may bring an action for equitable restitution, also known as unjust enrichment, separately from a contract claim. This type of claim stands on its own, as the Court of Appeals recently described:

> A more important misconception is that restitution is essentially a remedy, available in certain circumstances to enforce obligations derived from torts, contracts, and other topics of substantive law. On the contrary, restitution (meaning the law of unjust or unjustified enrichment) is itself a source of obligations, analogous in this respect to tort or contract. A liability in restitution is enforced by restitution's own characteristic remedies, just as a liability in contract is enforced by what we think of as contract remedies.

Davenport v. Wash. Ed. Ass'n, 147 Wn. App. 704, 725-26, 197 P.3d 686 (2008) (citing The Restatement (Third) of Restitution and Unjust Enrichment, § 1 cmt. h at 12–13 (Discussion Draft 2000)).

Ms. Kelly does not embrace this theory of her case, presumably, because it carries with it a three-year statute of limitations that she also has exceeded. "[T]he statute of limitations that applies to a common law action for unjust enrichment (which . . . is the equivalent to a cause of

action for restitution and unjust enrichment), is three years." *Davenport*, 147 Wn. App. at 737. On September 13, 2005, Allianz rescinded the annuities and returned Ms. Kelly's principal annuity payment plus interest. (CP 77–84). Ms. Kelly filed suit seeking more interest approximately 5 years and 11 months afterwards. Any claim for restitution arising out of that rescission and payment is barred by the three-year statute of limitations. Ms. Kelly, again, is too late.

B. If the claims are not time-barred, this Court alternatively should affirm the summary judgment for lack of merit: Kelly is not entitled to 12 percent interest under RCW 19.52.010 as a matter of law.

Dismissal also was warranted on the merits of Ms. Kelly's claim because Ms. Kelly's reliance on RCW 19.52.010[4] to support her claim is misplaced. Even if her claim was not time-barred, she is not entitled to 12 percent interest pursuant to RCW 19.52.010. First, she agreed to rescission upon the amount offered when she accepted the checks without reserving additional claims or further communicating with Allianz for more than six months. Her waiver of any claim to additional money is plain from Washington case law. Further, RCW 19.52.010 offers no cause of action and is not applicable in these circumstances.

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[4] RCW 19.52.010 reads in pertinent part:

> (1) Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties . . . ."

While the trial court did not reach the issue whether Ms. Kelly states a claim concerning RCW 19.52.010, instead finding that Ms. Kelly's claim was barred by the statute of limitations, the Court may affirm on any correct ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

1. **Ms. Kelly waived any claim for additional amounts by accepting the rescission monies without communicating a rejection of the rescission or that more money was due.**

Ms. Kelly has no claim where her objective acts establish that the parties mutually rescinded the annuities. Her failure to indicate that she claimed more money at the time she accepted Allianz's checks ends this dispute. Ms. Kelly at times characterizes her claim as one for rescission, wrongly asserting that "[r]escission of the annuities was never completed or fully consummated." *Opening Brief*, at 2. Ms. Kelly cites no authority for this proposition. Case law is to the contrary. On the undisputed facts, the rescission is accomplished.

Parties to a contract may rescind that contract by mutual agreement. An agreement to rescind a contract must itself constitute a contract. *In re Marriage of Fox*, 58 Wn. App. 935, 939, 795 P.2d 1170 (1990). All parties must assent to rescission and there must be a meeting of the minds. *In re Estate of Wittman*, 58 Wn.2d 841, 844, 365 P.2d 17

(1961). A proposal to rescind a contract becomes a binding agreement when it is accepted. Assent to an offer of rescission may be express or implied. *Knapp v. Hoerner*, 22 Wn. App. 925, 928, 591 P.2d 1276 (1979).

In this case, the parties rescinded the contract by mutual agreement. Through the Office of the Insurance Commissioner, Ms. Kelly made a request that Allianz rescind the annuity contracts on certain terms. The Office of Insurance Commissioner sent Allianz a letter stating "Ms. Kelly is requesting that the contracts be terminated at their current value, without penalty." (CP 104). Allianz assented to the rescission. Allianz's September 13, 2005 letter reads:

> We were advised by the Washington Department of Insurance that you stated your applications for the above three policies were actually signed in the State of Washington, not the State of Idaho as stated on the applications. Due to this fact, we have agreed to cancel the policies.
>
> Enclosed are three checks representing the premium we received for the above three policies as well as 3% interest.
> If you have any questions, please feel free to contact me.

(CP 77). Ms. Kelly then accepted the rescission and cashed the checks. (CP 52). Notably, she communicated nothing indicating that she did not accept the rescission. All objective signs indicated a contract to rescind. It was not until six months later that Ms. Kelly asserted a demand for more

interest. (CP 108).[5]

Applying fundamental contract theories to this exchange, there was a contract for mutual rescission complete with sufficient meeting of the minds. Ms. Kelly's letter constituted a proposal or offer of rescission with specific terms: full restitution of her premiums without penalty. Allianz in turn expressly accepted her offer through performance and in writing: rescinding without penalty, as well as voluntarily paying Ms. Kelly 3 percent interest.

Even if Allianz's beneficial addition of the 3 percent interest was deemed a material change in the offer, transforming Allianz's September 13, 2005 letter into a counteroffer of rescission, a mutual agreement to rescind still was reached.[6] Ms. Kelly accepted this counteroffer by cashing the check. An acceptance of an offer of mutual rescission can be implied.

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[5] The Opening Brief inaccurately portrays these facts by failing to reflect the six month time delay between when Ms. Kelly received the checks and cashed them, and when Ms. Kelly contacted Alliance by phone to assert dissatisfaction. *See Opening Brief*, at 26 ("When Ms. Kelly received the checks from Allianz, Ms. Kelly contacted Alliance by phone and spoke with Ms. Fleischhacker.") citing CP 96, ¶ 8. The documents demonstrate, and Ms. Kelly has not contradicted them, that after receiving the September 2005 letter and payment, Ms. Kelly did not contact Allianz until March 20, 2006. (CP 94, 108).

[6] What constitutes a material variation in terms sufficient to qualify as a counteroffer is dependent upon the facts of each case. *Northwest Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 980-81, 640 P.2d 710 (1981).

Knapp, 22 Wn. App. at 928. Though Ms. Kelly claims she never *subjectively* agreed that the rescission was complete, Washington follows the objective manifestation theory of contracts. *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 517, 408 P.2d 382 (1965). Washington courts "impute to a person an intention corresponding to the reasonable meaning of his words and acts. Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between the two parties." *Plumbing Shop*, 67 Wn.2d at 517. Certainly Ms. Kelly's actions would lead a reasonable person to believe that she had accepted Allianz's performance as rescission of the contract, or accepted its counteroffer. She cashed the checks, and did not contact Allianz for months. The actions of the parties evidence a meeting of the minds regarding mutual rescission of the annuities with no penalties and restitution of all principal plus 3 percent interest to Ms. Kelly. Ms. Kelly's belated change of heart does not alter the agreement.

Where a mutual rescission occurs, a party must specifically reserve any claims arising out of that rescinded contract. "If a contract is rescinded by mutual consent or by demand on one side acquiesced in by the other, and there is no express reservation of claims for damages previously sustained under it, there is an implied waiver of any such claims." *Letres v. Wash. Co-Operative Chick Ass'n*, 8 Wn.2d 64, 68, 111 P.2d 594 (1941)

(quoting *Stanley Drug Co. v. Smith, Kline & French Laboratories*, 313 Pa. 368, 170 Atl. 274 (1934)). Ms. Kelly not only agreed to 3 percent interest, but failed to reserve any claim for further additional interest or damages.

The rescission is accomplished and Ms. Kelly has no remaining claim on these facts pursuant to *Knapp*, *Plumbing Shop* and *Letres*.

2. RCW 19.52.010 itself offers no cause of action and does not apply in these circumstances.

This Court should hold as a matter of law that RCW 19.52.010 does not entitle Ms. Kelly to any relief. Ms. Kelly relies on RCW 19.52.010 to support this action throughout her Second Amended Complaint and her Opening Brief. This reliance fails.

Ms. Kelly is not entitled to any judgment to which prejudgment interest could or should attach. Because the parties rescinded the annuities by mutual rescission, with no judicial intervention, RCW 19.52.010 has no application. Ms. Kelly cites the case *Hornback v. Wentworth* for the proposition that an award of interest is proper upon rescission of a contract. *Opening Brief*, at 12–13. One of the critical distinctions that Plaintiff misses in *Hornback* is that the Hornbacks applied to the *court* for rescission. 132 Wn. App. at 509. The court made a judicial determination that rescission was proper, and awarded interest upon the *judgment*. *Id.* Similarly, in other cases in which interest is awarded pursuant to RCW

19.52.010, the plaintiff had brought some other cause of action—and interest was awarded upon that *judgment amount*. *See Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 603, 141 P.3d 652 (2006); *Mehlenbacher v. DeMont*, 103 Wn. App. 240, 11 P.3d 871 (2000); *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 100 P.3d 814 (2004).[7]

In this case, there is no court order or judgment to which prejudgment interest can be applied. Here, the parties voluntarily agreed to rescind. (CP 51). RCW 19.52.010 does not provide Ms. Kelly a means to second-guess her private contractual agreement. It is merely a prejudgment interest statute, and a gap-filler at that, not a cause of action unto itself. *See, e.g.*, *Taylor v. Shigaki*, 84 Wn. App. 723, 731, 930 P.2d 340 (1997). The statute is ineffectual absent a viable cause of action leading to a judgment. Because RCW 19.52.010 does not apply where there is no judgment, Ms. Kelly is not entitled to 12 percent interest. Dismissal as a matter of law was proper.

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[7] This court in *Bailie Communications Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 810 P.2d 12 (1991), stated that prejudgment interest is in fact awarded based upon case law and not RCW 19.52.010. Numerous courts, including the Washington State Supreme Court, have referred to RCW 19.52.010 as dictating the rate of prejudgment interest. *See, e.g.*, *Smith v. Olympic Bank*, 103 Wn.2d 418, 425, 693 P.2d 92 (1985); *Architectural Woods v. State*, 92 Wn.2d 521, 523, 598 P.2d 1372 (1979), superseded by statute or other grounds as stated in *Wells Fargo Bank, N.A. v Dep't of Revenue*, 166 Wn. App. 342, 358, 271 P.3d 268 (2012). In all of these cases, an obligation to pay prejudgment interest was attendant to a judgment.

That Ms. Kelly has no cause of action to pursue is underscored by her claim to interest on the interest. Ms. Kelly asserts under RCW 19.52.020 a right to "prejudgment interest" of $14,354 as the principal judgment sought, (ER 8 at A), and then prays that the court award "prejudgment and postjudgment interest" on that amount pursuant to RCW 19.52.020. (ER 8 at C). This Court should conclude that Ms. Kelly is attempting to use RCW 19.52.020 improperly. The statute provides her no cause of action and no "right" in the first instance to $14,354.

The doctrine of justiciability also applies here to prevent this action. The rescission affected privately by the parties ended any other remedy that Ms. Kelly might have pursued in the courts. Ms. Kelly accepted the rescission offered by Allianz when she accepted the payment without reserving any additional claim. RCW 19.52.010 does not provide a cause of action and, even assuming it would have applied to a court action for rescission, has no applicability to her. "All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedies. . . ." *Nissen v. Obde*, 58 Wn.2d 638, 641, 364 P.2d 513 (1961). The private rescission ended any recourse to the courts and RCW 19.52.010.

Further, as already noted, Ms. Kelly's claim truly is one in equity.

As the *Hornback* case states, where rescission is requested a plaintiff seeks "an equitable remedy." *Hornback*, 132 Wn. App. at 511. This is a point from *Hornback* that Ms. Kelly also glosses over. The Court of Appeals in *Hornback* rejected the plaintiff's claim that specific damages, attorney fees and certain interest "should" have been awarded, and emphasized that in a judicial rescission the trial court has discretion to do equity. *Id.* at 512–13. Statutory remedies, thus, are not mandatory and interest may or may not be awarded in any case of rescission. Allianz was not "required" to pay 12 percent interest, nor did it "violate" the statute as Ms. Kelly would have this Court believe. The essential premise of Ms. Kelly's Amended Complaint—that she has a claim at law for interest under RCW 19.52.010—is wrong.

VI. CONCLUSION

Allianz respectfully requests that this Court reject Ms. Kelly's challenges and uphold the trial court's summary judgment. Ms. Kelly brought her claims too late. She cannot combine the six year statute of limitations that she desires with a claim for equitable restitution arising from Allianz's payment. She asserts either a time-barred action on the contract, or a time-barred action for equitable restitution. Anything else is unsupported by established case law and the facts.

Alternatively, her claims fail on the merits because RCW 19.52.010 does not apply. There was no judgment upon which to award prejudgment interest. Ms. Kelly and Allianz mutually rescinded the annuities by private agreement. Ms. Kelly then was silent for half of a year, waiving any additional rights. Allianz is not required to pay the statutory rate of prejudgment interest now under any legal theory. The trial court's decision should be affirmed.

DATED this 8th Day of February, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2013, I caused to be served the foregoing *Respondent's Brief* on the following parties at the following addresses by first class United States mail:

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