

No. 71455-4-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

---

GUSTAVO NELSON ARZOLA, MICHAEL KLATT, and  
SUSAN PROSSER

Appellants/Cross Respondents,

v.

NAME INTELLIGENCE, INC. and JAY WESTERDAL

Respondents/Cross Appellants.

---

INITIAL BRIEF OF APPELLANTS

---

Joseph A. Grube, WSBA #26476  
Karen Orehoski, WSBA#  
Breneman Grube, PLLC  
Attorneys for Appellant  
1200 Fifth Avenue, Suite 625  
(206) 624-5975

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 JUN 23 AM 11:57

**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR.....2

A. Assignments of Error. ....2

1. The trial court erred by failing to conduct an evidentiary hearing before entering a restitution judgment against the Appellants. ....2

2. The trial court erred in the amounts it awarded as restitution.....2

3. The trial court erred in the form of the judgment. ....2

B. Issues Pertaining to Assignments of Error. ....2

1. Was it error for the trial court to refuse to conduct an evidentiary hearing to determine the appropriate amount of restitution owing to the Respondents? (Assignment of Error No. 1) .....2

2. Was it error for the trial court to award pre-restitution judgment interest at the rate of five percent (5%) absent any evidence that Appellants received such a “benefit” prior to the restitution award? (Assignments of Error Nos. 1-2) .....3

3. Was it error for the trial court to make a restitution award to include amounts that Appellants were required to pay (and did pay) to the federal government in income taxes and therefore did not receive the “benefit” of? (Assignments of Error Nos. 1-2) .....3

4. Was it error for the trial court to award a restitution amount for attorney fees which were never received directly by the Appellants, were paid to counsel for the Appellants, and which are not refundable? (Assignments of Error Nos. 1-2). ....3

5. Was it error for the trial court to enter a restitution award against the Appellants jointly for all amounts when the reversed judgment contained individual amounts awarded to the Appellants? (Assignment of Error 3) .....3

6.	Was it error for the trial court to award restitution to Respondent Jay Westerdal when he never made any payment to Appellants? (Assignment of Error 3) .....	3
III.	STATEMENT OF THE CASE.....	3
A.	Plaintiffs obtain a judgment for breach of contract and unlawful wage withholding.....	3
B.	NI pays the judgment without posting a bond. ....	4
C.	This Court reverses a portion of the judgment.....	5
D.	The trial Court refuses to hold an evidentiary hearing and enters a restitution judgment against all the plaintiffs jointly.....	6
IV.	SUMMARY OF ARGUMENT .....	7
V.	DISCUSSION .....	8
A.	Standard of Review .....	8
B.	Restitution following partial reversal of a trial court award is not a matter of right. Rather it is a matter of equity governed by the common law of restitution and unjust enrichment. ....	9
C.	The analysis for determining restitution amounts when a judgment is reversed is based on the principle that enrichment from a money payment is measured by the <i>lesser</i> of the increase in the defendant’s net assets or the amount of the payment.....	11
D.	The trial court abused and/or did not exercise its discretion in awarding restitution to Defendants without a hearing. ....	12
1.	The trial court’s failure to conduct an evidentiary hearing before making a restitution award was error. ....	12
2.	The trial court’s award of pre-restitution judgment interest of five percent was an error of law, an abuse of discretion and is unsupported by substantial evidence.....	13

3.	It was error for the trial court to require repayment of amounts paid to the federal government in income taxes.....	15
4.	The trial court erred by requiring the Plaintiffs to repay sums for attorney fees which were never received directly by the Appellants, were paid to counsel for the Appellants, and which are not refundable.....	16
5.	The trial court erred by entering a joint judgment against all of the Plaintiffs because each Plaintiff received an individual (and different) amount.....	17
6.	The trial court erred by naming Jay Westerdal (who made no payments to Plaintiffs) as a judgment creditor.....	18
VI.	CONCLUSION.....	18

**TABLE OF AUTHORITIES**

**CASES**

*Arzola v. Name Intelligence, Inc.*, 172 Wn.App. 51 (2012) ..... 1, 4, 6

*Atlantic Coast Line Railroad Co.*, 295 U.S. 301, 395 (1935)..... 10

*Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 589 (2007)... 8,  
9, 10

*Hornback v. Wentworth* 132 Wn.App. 504, 512 (Div. 3 2006)..... 15

*In re Marriage of Littlefield*, 133 Wn.2d 39, 47 (1997) ..... 8

*Irwin Concrete v. Sun Coast Properties, Inc.*, 33 Wn.App. 190, 200 (1982)  
..... 15

*Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn.App. 86, 95 (Div. 2  
1980)..... 15

*Prier v. Refrigeration Eng'g, Co.*, 74 Wn.2d 25, 32 (1968)..... 15

*State v. Brown*, 132 Wn.2d 529, 572 (1997)..... 8

*Town Concrete Pipe of Wash., Inc. v. Redford*, 43 Wn.App. 493 (1986)... 10

**STATUTES**

49.48 RCW ..... 5

49.52 RCW ..... 5

**RULES**

RAP 12.8..... 9, 14, 18

## TREATISES

Restatement (First) of Restitution § 142.....	12
Restatement (First) of Restitution § 142, Comment f.....	12
Restatement (First) of Restitution § 49 (2) .....	11
Restatement of Restitution § 142, Comment f.....	16
Restatement of Restitution § 49(2) .....	16
Restatement of Restitution § 50.....	11, 14
Restatement of Restitution § 50(3) .....	11
<i>See</i> Restatement (First) of Restitution § 1 comment d).....	11
The Restatement (First) of Restitution § 74.....	11

## I. INTRODUCTION

When a trial court judgment in favor of plaintiffs is paid (rather than superseded) before it is partially reversed by an appellate court, any restitution granted should not put the plaintiffs in a worse position than if the judgment had not been paid. The trial court has the duty to examine what the plaintiffs actually received as a result of the payment and must *then* exercise its equitable discretion.

This case arises out of a significant financial dispute between three former employees (the Plaintiff-Appellants)<sup>1</sup> of Name Intelligence (“NI”) and its principal Jay Westerdal. After a trial, the Plaintiffs were individually awarded various amounts for breach of contract, double damages pursuant to RCW 49.52 et seq., and attorney fees. Without any collection action being initiated by Appellants, Respondent NI voluntarily paid the full judgment amount rather than posting a supersedeas bond. This Court’s prior opinion subsequently reversed the portion of the judgment that was based on the classifications of the disputed amounts as wages. *Arzola v. Name Intelligence, Inc.*, 172 Wn.App. 51 (2012).

---

<sup>1</sup> Because the parties have both been Appellants and Respondents in this litigation, they will be referred to herein as “Plaintiffs” or “Defendants” for the sake of clarity.

Following that decision, the trial court entered a restitution judgment against the Plaintiffs in this case. Despite Plaintiffs' repeated requests, the trial court refused to conduct a hearing regarding the restitution amounts, including the applicability (and rate, if any) of prejudgment interest, the effect of federal taxes paid on the prior payment, and the repayment of attorneys' fees which had been awarded and paid to counsel for Appellants. The restitution awarded by the trial court put the Plaintiffs in a worse position than if the judgment had never been paid, in violation of RAP 12.8.

This appeal follows.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error.**

1. The trial court erred by failing to conduct an evidentiary hearing before entering a restitution judgment against the Appellants.
2. The trial court erred in the amounts it awarded as restitution.
3. The trial court erred in the form of the judgment.

### **B. Issues Pertaining to Assignments of Error.**

1. Was it error for the trial court to refuse to conduct an evidentiary hearing to determine the appropriate amount of restitution owing to the Respondents? (Assignment of Error No. 1)

2. Was it error for the trial court to award pre-restitution judgment interest at the rate of five percent (5%) absent any evidence that Appellants received such a “benefit” prior to the restitution award? (Assignments of Error Nos. 1-2)
3. Was it error for the trial court to make a restitution award to include amounts that Appellants were required to pay (and did pay) to the federal government in income taxes and therefore did not receive the “benefit” of? (Assignments of Error Nos. 1-2)
4. Was it error for the trial court to award a restitution amount for attorney fees which were never received directly by the Appellants, were paid to counsel for the Appellants, and which are not refundable? (Assignments of Error Nos. 1-2)
5. Was it error for the trial court to enter a restitution award against the Appellants jointly for all amounts when the reversed judgment contained individual amounts awarded to the Appellants? (Assignment of Error 3)
6. Was it error for the trial court to award restitution to Respondent Jay Westerdal when he never made any payment to Appellants? (Assignment of Error 3)

### **III. STATEMENT OF THE CASE**

#### **A. Plaintiffs obtain a judgment for breach of contract and unlawful wage withholding.**

When this case was initially commenced in August 2009, the Plaintiff employees sought damages for two installment payments owing to them under Stock Right Cancellation Agreements (the “SRC

Agreements”).<sup>2</sup> The payments (each collectively \$145,007) were due in May of 2009 and May of 2010 respectively. *Arzola v. Name Intelligence, Inc.*, 172 Wn.App. 51, 55. On March 8, 2010 the trial court granted summary judgment for the principal amount of the May 2009 payment, which was paid on March 11, 2010. On May 24, 2010 NI made a partial payment of the May 2010 amount, but did not pay the full amount. *Id.* at 56. The trial court granted summary judgment on the difference (\$11,007) in the Plaintiffs’ favor.

The case went to trial on the claims of statutory wage withholding violations. The trial court found that the amounts at issue were wages, and awarded double damages pursuant to RCW 49.52.070. *Id.*<sup>3</sup> The trial court also awarded prejudgment interest in the amount of \$15,774, attorney fees of \$97,860, and litigation costs totaling \$4,350. *Id.*

**B. NI pays the judgment without posting a bond.**

Although NI and Westerdal appealed, they did not post a bond. Rather, NI voluntarily tendered the full judgment amount (plus post-judgment interest) in “full satisfaction” of the judgment. CP 109. Jay Westerdal did not personally pay the judgment. *Id.* Pursuant to Plaintiffs’

---

<sup>2</sup> Each Plaintiff was party to a separate SRC. The Plaintiffs each asserted their individual entitlement to double damages; Susan Prosser (14%), Gustavo Nelson (33%), and Michael Klatt (53%).

<sup>3</sup> Ultimately the trial court awarded \$145,007 plus \$7,381.82 in double damages.

agreement with their counsel, they were legally obligated to pay their attorneys for fees and outstanding costs and they did so. CP 88. That money is not refundable. CP 89.

Net of payment for attorney fees and costs, Susan Prosser received \$21,851.65 as her gross portion of the award (14%). CP 81. Of that amount, she paid \$6,474.00 in additional federal income taxes. *Id.* In other words, she received a net distribution of \$15,377.65. *Id.* She did not put the money into any separate account. *Id.* However, her BECU savings account paid approximately .41% per annum. *Id.*

Gustavo Arzola received \$51,507.46 as his gross portion of the award (33%). CP 85. Of that amount, he paid \$14,421.00 in additional federal income taxes (a net distribution of \$37,086.46). *Id.* Michael Klatt received \$82,721.10 as his gross portion of the award (53%). CP 77. Of that amount, he paid \$23,723 in additional federal income taxes (a net distribution of \$59,001.46). *Id.* He placed that money in an Emigrant Direct account that pays .5% annually. *Id.*

**C. This Court reverses a portion of the judgment.**

On appeal, this Court determined that the payments under the SRC agreements were not wages. “We hold that the payments under the SRC are not ‘wages,’ as defined by chapter 49.48 RCW and chapter 49.52 RCW.”

*Arzola*, at 60.

**D. The trial Court refuses to hold an evidentiary hearing and enters a restitution judgment against all the plaintiffs jointly.**

On November 13, 2013 Defendants brought a Motion for Entry of Judgment. CP 13. In response, Plaintiffs specifically requested a hearing so that the court could exercise its discretion on the amounts owing to the Defendants. CP 64. The Plaintiffs also provided declarations of each of them detailing the actual amounts they had received as a result of the 2011 NI satisfaction of judgment. CP 76-89. Those Declarations identified the interest (if any) each plaintiff had earned on the disputed and/or reversed amounts. *Id.* The Defendants presented no evidence of any interest being earned by any Plaintiffs.

Instead of granting a hearing, the trial court entered an Order Granting in Part Defendant's Motion for Entry of Judgment pursuant to RAP 12.8. CP 97-98. As part of that Order the trial court awarded restitution in the amount of \$254,598.36 and awarded an "equitable rate of interest of 5% on the above amount of restitution, from the date of payment of the judgment on March 2, 2011." CP 98.

The trial court entered a judgment on that order on December 23, 2013. CP 124-125. That judgment awarded \$35,713.52 in prejudgment interest for a total judgment of \$293,691.50. CP 125. The trial court made

no findings as to any net increase in the Plaintiffs' estates, or that the equities are in favor of Defendants.<sup>4</sup>

#### IV. SUMMARY OF ARGUMENT

Restitution following partial reversal of a trial court award is not a matter of right. It is a matter of equity governed by the common law and the law of innocent unjust enrichment. The measure of restitution when a monetary judgment is reversed is the *lesser* of the increase in the payees' net assets or the amount of the payment.

Despite Plaintiffs' request, the trial court declined to hold an evidentiary hearing to determine the amount of restitution. The only evidence as to the disputed increase in the Plaintiffs' "net assets" was that (1) the Plaintiffs paid income taxes on the amounts received; (2) the Plaintiffs received nominal (if any) interest on the amounts received; and (3) the Plaintiffs paid attorney fees that were not refundable. To the extent it was proper for the Court to exercise its discretion and make an award, absent a hearing, the Court erred in awarding interest at five percent from the date of payment, the repayment of the fees, and the repayment of

---

<sup>4</sup> In addition to the form of the judgment, Plaintiffs only appeal the award of (1) prejudgment interest (2) repayment of amounts paid in federal taxes; and (3) repayment of amounts paid in nonrefundable attorney fees.

amounts already paid in income taxes.<sup>5</sup>

Additionally, the trial court entered the restitution judgment jointly against all the Plaintiffs (although they each received different amounts of money for individual claims) and improperly named Jay Westerdal as a judgment creditor even though he paid nothing in satisfaction of the judgment.

## V. DISCUSSION

### A. Standard of Review

A trial court's determination whether to award restitution under RAP 12.8 is reviewed for abuse of discretion. *Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 589 (2007). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Brown*, 132 Wn.2d 529, 572 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*In re Marriage of Littlefield*, 133 Wn.2d 39, 47 (1997). As discussed

---

<sup>5</sup> The trial court specifically stated: "The Court does not make a finding or ruling that the attorneys' fees paid to Plaintiffs' counsel or taxes paid by Plaintiffs are nonrefundable." CP 98. Certainly this "non-finding" cannot be a basis for arguing that the net assets of the Plaintiffs' estates were increased by these amounts.

below, the trial court's refusal to grant an evidentiary hearing and failure to make findings as to the basis for its award is an abuse of discretion. Additionally, an award of 5% prejudgment interest under the facts of this case is an abuse of discretion.

**B. Restitution following partial reversal of a trial court award is not a matter of right. Rather it is a matter of equity governed by the common law of restitution and unjust enrichment.**

Defendants brought the motion for restitution exclusively based on RAP

12.8. RAP 12.8 provides, in part:

If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, **or in appropriate circumstances, provide restitution.**

RAP 12.8 (emphasis added). The language of RAP 12.8 does *not* make restitution mandatory after a trial court decision is modified by the appellate court. Because restitution is to be provided by the trial court "in appropriate circumstances," restitution is "not a matter of right," nor is it "automatic upon the modification of a judgment by an appellate court."

*Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 597 (2007).

Restitution under RAP 12.8 is an *equitable* remedy.

**[T]he Court of Appeals errs in suggesting that**

**under RAP 12.8 reversal of a trial court judgment entitles judgment debtors to restitution of attorney fees as a matter of right.** This assertion is fundamentally at odds with the equitable nature of the restitution remedy.

*Id.* at 596 (emphasis added). As explained by the United States Supreme Court and quoted with approval by *Ehsani*:

Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it.

*Atlantic Coast Line Railroad Co.*, 295 U.S. 301, 395 (1935). This Court has itself previously recognized this fundamental principal of restitution law. *See Town Concrete Pipe of Wash., Inc. v. Redford*, 43 Wn.App. 493 (1986) a party must make restitution when he has been unjustly enriched at the expense of another. The mere fact of benefit alone is not enough. Liability only attaches where the circumstances of the benefit would make it unjust to retain it.”) Trial courts have broad discretion to fashion equitable remedies, reviewable for abuse of discretion. *Ehsani*, 160 Wn.2d at 589. Appropriate circumstances for providing restitution may be identified by looking to the common law of restitution. *Ehsani*, 160 Wn.2d at 590-91.

**C. The analysis for determining restitution amounts when a judgment is reversed is based on the principle that enrichment from a money payment is measured by the lesser of the increase**

**in the defendant's net assets or the amount of the payment.**

The Restatement (First) of Restitution § 74 provides:

A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

It further provides that

Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth.

*See* Restatement (First) of Restitution § 1 comment d.

**Enrichment from a money payment is measured by the amount of the payment or the resulting increase in the defendant's net assets, whichever is less.**

Restatement (First) of Restitution § 49 (2).

[P]rinciples of unjust enrichment **will not support the imposition of a liability that leaves an innocent recipient worse off...**than if the transaction with the claimant had never taken place.

Restatement of Restitution § 50(3) (emphasis added). The liability in restitution may not exceed the cost to the claimant of conferring the benefits in question. Restatement of Restitution § 50.

The right of a person to restitution from another

because of a benefit received is terminated or diminished if, after receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

Restatement (First) of Restitution § 142.6.

The trial court made no findings as to any of these factors or principles (although they were cited to the court prior to its rulings – *see* CP 64-75).<sup>7</sup> For example, the trial court made no finding as to the net benefit to each plaintiff's estate as a result of NI's voluntary payment. It made no finding as to the enrichment of any particular plaintiff. In fact, it expressly declined to make a finding as to two facts (whether or not the Plaintiffs will be entitled to a refund of income taxes and/or attorney fees previously paid). This untenable refusal to conduct a hearing or make findings with respect to these factors is manifestly unreasonable, is an abuse of discretion, and is grounds for reversal.

**D. The trial court abused and/or did not exercise its discretion in awarding restitution to Defendants without a hearing.**

1. The trial court's failure to conduct an evidentiary hearing before making a restitution award was error.

---

<sup>6</sup> "If part of the subject matter is lost or destroyed, the recipient still has a duty of making restitution of the remainder." Restatement (First) of Restitution § 142, Comment f.

<sup>7</sup> A finding adverse to the Plaintiffs would be unsupported by the evidence nonetheless.

It is undisputed that the Plaintiffs requested a hearing on the issue.

In the second sentence of their Response they requested

that [the trial court] conduct a hearing and exercise its equitable discretion to determine a fair and equitable amount of restitution rather than the excessive (and legally unjustified) windfall sought by the Defendants.

CP 64. Only as an alternative to that request did they request the Court enter a restitution award as to the undisputed amounts. CP 64. To the extent the Court believed there was no dispute of material fact requiring a hearing, it should have accepted the Plaintiffs' declarations as to the net benefit to their estates. Failure to conduct a hearing was an abuse of the trial court's discretion.

2. The trial court's award of pre-restitution judgment interest of five percent was an error of law, an abuse of discretion and is unsupported by substantial evidence.

There should have been no award of "pre-restitution judgment" interest to NI or Westerdal in this case for several reasons.

First, the Defendants presented no evidence to the trial court as to the "use value" of the monies previously paid. The only evidence submitted to the trial court was from the Plaintiffs – establishing that the actual annual interest rate achieved on the reversed amounts was between .41% and .5%. CP 77, 81. Nonetheless, the trial court determined (without

a hearing) an “equitable interest” rate of five percent – well above even the US Treasury “constant maturity” rate of .18% in 2011 and .17 in 2012 and five times the highest interest rate introduced in to evidence. The trial court failed to support its decision with any findings or explanation.

Second, a person obtains “restitution” when he is restored to the position he formerly occupied. Rather than being “restored” to its previous position, NI sought to obtain profit at a rate well above any market interest rate over the past four years.<sup>8</sup> Paying a legally binding judgment (rather than posting a bond) should not be used as an investment opportunity and should not be treated as such. Payment of five percent interest to NI will result in NI being put in a better position (not the same position) than it would have had it not lost in the trial court. As the liability in restitution “may not exceed the cost to the claimant of conferring the benefits in question”, Defendants are not entitled to such a windfall. Restatement of Restitution § 50.

Finally, Plaintiffs are not aware of any authority that states that a party who has paid a judgment under RAP 12.8 is entitled to any prejudgment interest. In fact, Washington Courts have consistently held that a “liquidated” claim “is a claim where the evidence...makes it possible

---

<sup>8</sup> NI initially sought a twelve percent prejudgment interest rate. CP 14.

to compute the amount...without reliance on opinion or discretion” or “without reference to extrinsic evidence.” *Prier v. Refrigeration Eng’g, Co.*, 74 Wn.2d 25, 32 (1968). *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn.App. 86, 95 (Div. 2 1980). As discussed above, RAP 12.8 and the cases discussing it instruct the trial court to use its broad **discretion** to make a restitution award. Because the amount of restitution, if any, is subject to an equitable analysis it cannot be “liquidated” for purposes of prejudgment interest. In cases governed by equitable principles, the trial court has a measure of discretion when fashioning a remedy involving prejudgment interest. 14A Washington Practice, Civil Procedure § 35:13. “Even if it were an enforceable legal right, equity may prevent enforcement to do substantial justice.” *Hornback v. Wentworth* 132 Wn.App. 504, 512 (Div. 3 2006). *See also Irwin Concrete v. Sun Coast Properties, Inc.*, 33 Wn.App. 190, 200 (1982)(“Here, the claim and resulting award were based upon quantum meruit. Pre-judgment interest is not allowable in a quantum meruit case.”). The award of five percent prejudgment interest (\$35,713.52) should be reversed.

3. It was error for the trial court to require repayment of amounts paid to the federal government in income taxes.

It was undisputed that once NI paid the judgment amount, the Plaintiffs had no choice but to declare that income on their federal income

taxes. Specifically, Arzola paid \$14,421, Klatt paid \$23,723, and Prosser paid \$6,474 in taxes. The taxes paid by Plaintiffs are not a “net benefit” to their estates and are effectively “lost” to the Plaintiffs within the meaning of the Restatement of Restitution § 142, Comment f. Requiring the Plaintiffs to repay the *full amount* of the exemplary damages paid to them (when they have already paid taxes on those sums) leaves the Plaintiffs “worse off...than if the transaction with the claimant had never taken place.” Restatement (First) of Restitution § 142, Comment f.

4. The trial court erred by requiring the Plaintiffs to repay sums for attorney fees which were never received directly by the Appellants, were paid to counsel for the Appellants, and which are not refundable.

The portion of NI’s payment constituting attorney fees did not “increase [the plaintiff’s] net assets” and therefore should not be calculated as a portion of the restitution. *See* Restatement of Restitution § 49(2). As discussed above, plaintiffs were legally required to pay the attorney fees and costs awarded pursuant to a contract with their attorneys. There is no obligation to refund those fees (and the trial court did not find otherwise). As such, the Plaintiffs’ estates never received the “benefit” of that portion of the payment. The amount awarded and paid for attorney fees is not subject to restitution.

5. The trial court erred by entering a joint judgment against all of the Plaintiffs because each Plaintiff received an individual (and different) amount.

Plaintiffs originally sued the Defendants asserting individual claims based on breaches of individual contracts (the SRC Agreements). After the trial, the court issued findings of fact specifically finding that the SRC Agreement signed by Nelson Arzola provided for a cash payment of \$47,759 on May 2, 2009 and \$47,759 on May 2, 2010. CP 26. It found that Michael Klatt's agreement provided for a cash payment of \$76,415 on May 2, 2009 and \$76,415 on May 2, 2010. CP 26. It found that Susan Prosser's agreement provided for a cash payment of \$20,833 on May 2, 2009 and an additional payment of \$20,833 on May 2, 2010. CP 26. The *sum* of each group of payments is \$147,007.

Based on its interpretation that the disputed payments were wages, the trial court originally awarded exemplary damages in the sum of the collective amounts it deemed wrongfully withheld. CP 30. It was that decision that was reversed by this Court.

The restitution amount should have been specific to each individual and what they actually received from NI. Otherwise, the restitution award leaves each of the Plaintiffs "worse off" than if the payment had never taken place – in contravention of Restatement (3d) of Restitution § 50(3).

The trial court should be instructed to calculate several (individual) restitution based on the evidence of what each Plaintiff actually received. Despite an objection to the form of the judgment (See CP 101-106) the trial court entered its restitution judgment against the Plaintiffs jointly.

6. The trial court erred by naming Jay Westerdal (who made no payments to Plaintiffs) as a judgment creditor.

Despite an objection from the Plaintiffs, the trial court further erred by naming Jay Westerdal as a judgment creditor. CP 139. RAP 12.8 provides that if a

**party** has...wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders...appropriate to restore to the **party...property taken from that party.**"

RAP 12.8 (emphasis added). Mr. Westerdal was not the party who satisfied the decision. Rather, it was solely NI. CP 45. Mr. Westderal has no standing under RAP 12.8 to seek a judgment against the plaintiffs of any kind and should be removed as a judgment creditor of any judgment that survives this appeal.<sup>9</sup>

## VI. CONCLUSION

The trial court's restitution judgment is contrary to the uncontradicted evidence submitted in opposition to Defendants' motion. Plaintiffs respectfully

---

<sup>9</sup>The Plaintiffs were notified (prior to entry of the restitution judgment) that a substantial judgment creditor of NI (Ray Bero) claims entitlement to any proceeds of the restitution judgment pursuant to a security agreement and RCW 62A.9A-406(A). CP 110-111.

request this Court: (1) reverse the judgment as to the award of prejudgment interest (\$35,713.52); (2) reverse the judgment as to the amount of federal taxes paid (\$44,618); (3) reverse the judgment as to the attorney fees paid (\$97,860); (4) remand to the trial court for an entry of judgment as to each Plaintiff with respect to the individual amounts received; and (5) remove of Jay Westerdal as a judgment creditor.

Respectfully submitted this 23<sup>rd</sup> day of June, 2014

BRENEMAN GRUBE, PLLC

  
Joseph A. Grube, WSBA 26476  
(Attorney for Appellants)

CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Breneman PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On June 23<sup>rd</sup>, 2014, I caused a copy of the foregoing BRIEF, to be served on the following parties:

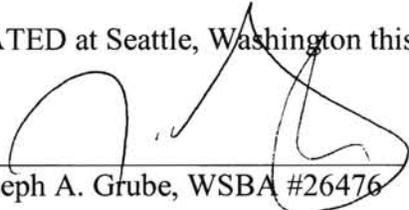
Via LEGAL MESSENGER:

Smith Goodfriend, P.S.  
Howard M. Goodfriend  
1109 First Avenue, Suite 500  
Seattle, WA 98101-2988

Hamilton Gardiner  
Holmquist & Gardiner, PLLC  
1000 2<sup>nd</sup> Avenue, Suite 1770  
Seattle, WA 98104

I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 23<sup>rd</sup> day of June, 2014.

  
\_\_\_\_\_  
Joseph A. Grube, WSBA #26476

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 JUN 23 AM 11:57