

No. 71455-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

GUSTAVO NELSON ARZOLA, an individual, MICHAEL KLATT,  
an individual and SUSAN PROSSER, an individual,

Appellant/Cross-Respondent,

vs.

NAME INTELLIGENCE, INC., a Washington corporation,  
and JAY WESTERDAL, an individual,

Respondents/Cross-Appellants.

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE CAROL A. SCHAPIRA

RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF  
IN SUPPORT OF CROSS-APPEAL

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## I. INTRODUCTION

The trial court erred in reducing the rate on its award of prejudgment interest from 12% to 5%. While the right to restitution is equitable in nature, the rate for an award of prejudgment interest on a liquidated sum is, in Washington, a legal issue. Appellants ignore this distinction in advancing an argument that is contrary to established authority. Once a trial court has determined that prejudgment interest should be awarded, it is awarded at the statutory judgment interest rate. This Court should remand with directions that the judgment be modified to provide for prejudgment interest at 12% against appellants Arzola, Klatt and Nelson and in favor of respondents Name Intelligence and Jay Westerdal.

## II. REPLY ARGUMENT

**A. The right to restitution under RAP 12.8 is discretionary, but the rate of prejudgment interest on a liquidated sum is not.**

Appellants Arzola, Klatt and Nelson (plaintiffs) confuse the equitable authority of the court to make a restitutionary award under RAP 12.8 with the right to prejudgment interest at the rate of 12% per annum on a liquidated sum. While the former is equitable

and discretionary, the latter is established by case law and non-discretionary.

Plaintiffs have repeatedly conceded that the trial court's authority to grant restitution of the property taken from Name Intelligence and Westerdal under RAP 12.8 is discretionary. (App. Br. 8, Reply Br. 5, 8) But the issue on cross-appeal is not whether restitution is proper under RAP 12.8, or whether prejudgment interest is proper on the liquidated sum of money paid by Name Intelligence and Westerdal to satisfy the judgment.

Instead the issue on cross-appeal is the trial court's authority to assess prejudgment interest at a rate less than the statutory judgment interest rate. Where, as here, the trial court has awarded prejudgment interest, the rate of interest on that liquidated sum is not a matter of discretion but governed by an established legal principle: "Prejudgment interest is allowed in civil litigation at the statutory interest rate, RCW 4.56.110, RCW 19.52.020. . . ." *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775, ¶ 34, 115 P.3d 349 (2005).

Plaintiffs cite no authority to support their contention that interest at the rate of 12% per annum is a "windfall rate" (Reply Br. 9), or that the prejudgment interest rate is dependent upon the rate

of return that the party owing the interest has obtained on its investments prior to entry of judgment. Nor can plaintiffs distinguish this Court's cases rejecting their argument that a trial court has discretion to reduce the prejudgment interest rate because it feels the statutory rate is too high. See *Wright v. Dave Johnson Ins., Inc.*, 167 Wn. App. 758, 775 ¶ 31, 275 P.3d 339, *rev. denied*, 175 Wn.2d 1008 (2012); *Crest*, 128 Wn. App. at 775; *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 162, 810 P.2d 12, 814 P.2d 699, *rev. denied*, 117 Wn.2d 1029 (1991). (Resp. Br. at 28-32) *Accord, Grochowski v. Daniel N. Gordon, P.C.*, 2014 WL 1516586 at \*3, n.2 (W.D. Wash. Apr. 17, 2014) ("When the parties have not agreed in writing to a different rate, the rate of prejudgment interest is statutorily set at twelve percent (12%) per annum")<sup>1</sup>

That the right to post-judgment interest is statutory and the right to prejudgment interest is a common law right does not

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<sup>1</sup> Washington courts have recognized a single narrow exception to the right to interest at the statutory rate: In dissolution cases, a court has the discretion to reduce interest on deferred payments below the rate set by statute, but its decision must be supported by adequate findings. See *Marriage of Harrington*, 85 Wn. App. 613, 631-32, 935 P.2d 1357 (1997) (reversing trial court's order awarding interest on an equalizing judgment at 7% when it failed to provide "any reasons for fixing the interest rate below the statutory rate."). Plaintiffs make no argument that this limited exception applies here.

support the trial court's reduction of the prejudgment interest rate to 5%. Plaintiffs' argue that RCW 4.56.110 and RCW 19.52.010 do not by their terms apply, but ignore that Washington courts have adopted the statutory rate for prejudgment interest not as a matter of legislative directive but as a matter of public policy:

While RCW 4.56.110(2) provides that the judgment *shall* bear interest, case law indicates that prejudgment interest in a case involving a liquidated claim, or one that is ascertainable with certainty, *will* be awarded as a matter of public policy.

*Bailie*, 61 Wn. App. at 162 (emphasis in original).

“A claimant's entitlement to prejudgment interest in an appropriate case is of the same order as the same party's entitlement to post-judgment interest,” *Bailie*, 61 Wn. App. at 162, because in both cases one has use of funds rightfully belonging to another. Plaintiffs purport to distinguish *Bailie* on the ground that they did not “wrongfully” retain Name Intelligence and Westerdal's money – the funds they received in satisfaction of the judgment that was later reversed on appeal. (Reply Br. 10) Plaintiffs' assertion that they lack malicious intent, however, is irrelevant to their liability for prejudgment interest. The right to interest is based on the principle that plaintiffs have had free use of Name Intelligence's money, while Name Intelligence has not.

Nor do Name Intelligence and Westerdal receive a windfall. Had they superseded the judgment, Name Intelligence and Westerdal would have had to post interest at 12% per annum on top of the principal judgment, as a condition to a stay under RAP 8.1(c)(1). Upon reversal of the judgment, they would have been entitled to return of the entire supersedeas (including the interest posted at 12%), plus any interest earned on the investment during the pendency of the appeal. Name Intelligence and Westerdal are not receiving a windfall by recovering under RAP 12.8 the funds they paid to satisfy the original judgment, plus prejudgment interest – in fact, they are recovering less than they would have gotten back had they superseded the original judgment under RAP 8.1.

A prevailing party's amount of prejudgment interest on a liquidated sum should not turn on the success or failure of the losing party's investments. Yet that is precisely the rule adopted by the trial court, which accepted plaintiffs' argument that because they failed to earn 12% per annum on Name Intelligence's and Westerdal's money, the statutory rate is not a "reasonable, equitable rate" on its liquidated award under RAP 12.8. (CP 98) This Court

should direct that the judgment be modified to provide for prejudgment interest at the rate of 12% per annum.

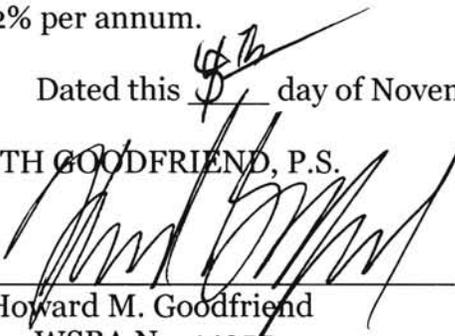
### III. CONCLUSION

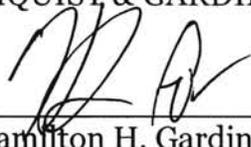
This Court should affirm in all respects, save for the trial court's erroneous rate of prejudgment interest, which should be set at 12% per annum.

Dated this 9<sup>th</sup> day of November, 2014.

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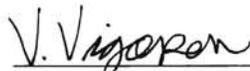
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 4, 2014, I arranged for service of the foregoing Respondents/Cross-Appellants' Reply Brief in Support of Cross-Appeal, to the Court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 4th day of November, 2014.

  
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Victoria K. Vigoren