

copy

RECEIVED  
NOV 06 2007

No. 36218-0-II  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

---

DAVID SITTERSON,

Appellant,

v.

EVERGREEN SCHOOL DISTRICT NO. 114,

Respondent.

---

APPELLANT'S OPENING BRIEF

---

Steven E. Turner  
Miller Nash LLP  
500 East Broadway, Suite 400  
Vancouver, Washington 98666-0694  
(360) 699-4771

Attorneys for Appellant  
David Sitterson

## TABLE OF CONTENTS

	Page
I. ASSIGNMENT OF ERROR .....	1
II. ISSUE PRESENTED.....	2
III. STATEMENT OF THE CASE.....	2
IV. LEGAL AUTHORITY AND ANALYSIS.....	15
A. Liquidated Claims Are Entitled to Prejudgment Interest as a Matter of Right.....	15
B. Whether a Claim is "Liquidated" is a Question of Law .....	16
C. The Jury's Verdict Included \$111,250 in Liquidated Damages.....	18
V. CONCLUSION.....	22

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>CKP, Inc. v. GRS Construction</i> , 63 Wn. App. 601, 821 P.2d 63 (1991).....	16, 19
<i>Colonial Imports v. Carlton N.W.</i> , 83 Wn.App. 229, 921 P.2d 575 (1996).....	17
<i>Dautel v. Heritage Home Center, Inc.</i> , 89 Wn.App. 148, 948 P.2d 397 (1997).....	2, 15-16
<i>Hadley v. Maxwell</i> , 120 Wn. App. 137, 84 P.3d 286 (2004).....	2, 19, 21
<i>Lakes v. von der Mehden</i> , 117 Wn. App. 212, 70 P.3d 154 (2003).....	21
<i>McConnel v. Mothers Work, Inc.</i> , 131 Wn.App. 525, 128 P.3d 128 (2006).....	16
<i>Scoccolo Construction, Inc. v. City of Renton</i> , 158 Wn.2d 506, 145 P.3d 371 (2006).....	16

## **I. Assignment of Error**

Appellant David Sitterson provided financial services to the Respondent Evergreen School District (the "District"), culminating in the District's sale of \$59 million in bonds. Under his written contract with the District, Mr. Sitterson was to receive a commission of \$111,250 from the sale, but the District wrongfully terminated Mr. Sitterson's contract in an effort to avoid paying his commission. Mr. Sitterson asked the jury to award him \$111,250, but the jury awarded Mr. Sitterson nearly \$40,000 more than he requested, for a total verdict of \$151,000.

After the trial, Mr. Sitterson asked Superior Court Judge John P. Wulle to award prejudgment interest on the liquidated sum of \$111,250, but Judge Wulle refused. Because the jury had awarded more than the liquidated sum requested, Judge Wulle indicated that he was going to "decline to act at this time because I think it's something for the Court of Appeals to give us direction on."<sup>1</sup> Mr. Sitterson assigns error to Judge Wulle's refusal to award prejudgment interest on the liquidated sum of \$111,250.

---

<sup>1</sup> Reporter's Transcript ("RT") Vol. VI 940:8-11.

## II. Issue Presented

Washington "has historically treated prejudgment interest as a matter of right when a claim is liquidated."<sup>2</sup> A claim is liquidated when the amount of the damages can be computed "with exactness," and "without reliance on opinion or discretion."<sup>3</sup> Here, the District breached the contract knowing that Mr. Sitterson's commission was going to be exactly \$111,250, and it has retained this sum since 2002. "Generally prejudgment interest is favored because the law assumes that one who retains money owed to another should be charged interest on it."<sup>4</sup> Should the District be charged prejudgment interest on the money it wrongfully withheld from Mr. Sitterson?

## III. Statement of the Case

Mr. Sitterson is a sole proprietor who provides financial consulting and advice to public entities, almost entirely for school districts.<sup>5</sup> Mr. Sitterson has more than twenty-six years of experience with helping

---

<sup>2</sup> *Dautel v. Heritage Home Center, Inc.*, 89 Wn.App. 148, 153, 948 P.2d 397 (1997).

<sup>3</sup> *Id.* at 153 (citations omitted).

<sup>4</sup> *Hadley v. Maxwell*, 120 Wn. App. 137, 142, 84 P.3d 286 (2004).

<sup>5</sup> RT Vol. I-A 104:15-105:10.

school districts raise funds through the sale of bonds and other methods.<sup>6</sup>

Mr. Sitterson provides his services on a commission basis: if his client puts a bond on the ballot, and the voters approve it, Mr. Sitterson is paid a commission calculated as a percentage of the proceeds of the bond sale;<sup>7</sup> however, if his client never puts a bond on the ballot—or the voters never approve a bond—Mr. Sitterson receives nothing for his services.<sup>8</sup>

Mr. Sitterson has worked for some districts for as long as nine years without ever receiving any compensation.<sup>9</sup> In his many years in the field, Mr. Sitterson estimates that he has assisted in the sale of more than \$1 billion in bonds.<sup>10</sup>

In December 1997, the District sent out a Request for Proposal seeking the services of a financial advisor.<sup>11</sup> Mr. Sitterson responded to the request and—after a vigorous selection process—he was awarded the contract.<sup>12</sup> The Request for Proposal described the duration of the contract as follows:

Services to begin immediately upon award of proposal and signing of contract. Contract will be for three years and

---

<sup>6</sup> RT Vol. I-A 101:14-103:13; RT 105:15-17.

<sup>7</sup> RT Vol. I-A 108:11-109.

<sup>8</sup> RT Vol. I-A 109:12-20.

<sup>9</sup> RT Vol. I-A 109:21-110:6.

<sup>10</sup> RT Vol. I-A 122:20-25.

<sup>11</sup> Exhibit 6.

<sup>12</sup> Exhibits 18 and 19.

may be renewed for two additional years, if mutually agreed, not to extend beyond February 1, 2003.

The Request for Proposal also spelled out the grounds upon which the contract could be terminated. Termination of the contract was limited to three possible reasons: (1) "by mutual written agreement," (2) "by the District for breach by the vendor/contractor," and (3) "by the District for non-appropriation of funds."<sup>13</sup>

Mr. Sitterson commenced working under the contract as soon as it was awarded to him.<sup>14</sup> Among other things, Mr. Sitterson assisted the District in the sale of \$58.5 million of bonds.<sup>15</sup> Mr. Sitterson received a commission from that sale based on a percentage of the bond amount. Mr. Sitterson and the District negotiated a "sliding scale" formula for compensation, under which Mr. Sitterson was to receive .3% of the first \$15 million, .2% of the next \$15 million, and .125% of the remaining bond amount.<sup>16</sup> Applying this formula, Mr. Sitterson received \$110,625 in commission from this sale.<sup>17</sup>

Mr. Sitterson's commission appears in a report prepared by the underwriter for the bond sale. In the report, entitled "Bond Sale Results,"

---

<sup>13</sup> Exhibit 6, page 4.

<sup>14</sup> RT Vol. I-A 142:22-143:1.

<sup>15</sup> RT Vol. I-A 152:14-153:2.

<sup>16</sup> RT Vol. I-A 149:20-150:9; Exhibit 26, page 2.

<sup>17</sup> RT Vol. II 175:18-176:2.

the "Financial Advisor Fee" is shown as a line item in the amount of \$110,625.<sup>18</sup> When asked whether this accurately reflected the commission formula agreed to by the parties, the District's Director of Budget and Fiscal Services, John Nissen, admitted that it did.<sup>19</sup>

Q. And what does that – what's that line item called?

A. "Financial Advisor Fee."

Q. And what's the amount?

A. \$110,625.

Q. And is that consistent with the fee that you negotiated with Mr. Sitterson for the any amount over 30 million?

A. Yes.

While the bonds were being sold, Mr. Nissen's boss, Assistant Superintendent Marcia Fromhold, saw the amount that Mr. Sitterson was going to receive from the sale. She questioned Mr. Nissen and expressed her concern about the amount.<sup>20</sup>

Q. Now, who was your boss on March 2<sup>nd</sup> of 1999?

A. Marcia Fromhold.

Q. And did she ask you any questions about this \$110,000 fee to Mr. Sitterson?

A. Yes.

---

<sup>18</sup> Exhibit 35, page 9.

<sup>19</sup> RT Vol. II 333:1-9.

<sup>20</sup> RT Vol. II 333:10-16.

Q. What did she say?

A. She says, "Why are we paying this much?"

In spite of her concerns about Mr. Sitterson's commission, however, Ms. Fromhold decided to renew Mr. Sitterson's contract after the initial term. The renewal process was handled by the District's Purchasing agent, Connie Bosckis. She sent an e-mail to her boss, Doug Peters, asking whether the District wanted to renew Mr. Sitterson's contract.

Mr. Peters responded as follows:<sup>21</sup>

I have asked Mike Merlino if he wants to renew the contract. He wants to talk it over with Marcia. He said he will let me know by Friday. He does know of someone else that might be cheaper.

Ultimately, Ms. Fromhold decided not to hire the "cheaper" financial advisor, and she decided to renew Mr. Sitterson's contract.<sup>22</sup> Her decision was communicated in a letter from Ms. Bosckis to Mr. Sitterson offering him a renewal of the contract "under the same terms and conditions" for two more years, through February 1, 2003. February 1, 2003 was the last day authorized by the Request for Proposal.<sup>23</sup> As Ms. Bosckis wrote in her renewal letter:

---

<sup>21</sup> Exhibit 37.

<sup>22</sup> RT Vol. III 492:9-493:4

<sup>23</sup> Exhibit 38.

Dear Mr. Sitterson:

Please be advised that Evergreen School District would like to renew its contract with DBS Financial Services for the contract period February 24, 2001 through February 1, 2003.

Mr. Sitterson reviewed the District's offer and decided to accept it.<sup>24</sup> As requested in the letter, Mr. Sitterson signed the renewal letter and returned it to Ms. Bosckis.<sup>25</sup> Thereafter, Mr. Sitterson carried on as before, providing the District with his expertise and knowledge as the District considered the next bond issue to fund its capital needs.<sup>26</sup>

During this two-year renewal period, Mr. Sitterson assisted the District's bond committee. He met with the committee and provided his advice regarding the options for how the District could fund its substantial capital needs, which were estimated in the range of \$160 million.<sup>27</sup> Ms. Fromhold, who also served on the bond committee, took notes at one of the meetings showing Mr. Sitterson's ideas and input.<sup>28</sup>

Mr. Sitterson also asked the underwriter to run financial projections for different scenarios, varying the amount of the bonds and

---

<sup>24</sup> RT Vol. II 179:1-15; 181:14-182:7.

<sup>25</sup> Exhibit 38.

<sup>26</sup> RT Vol. II 185:8-16.

<sup>27</sup> RT Vol. II 186:3-190:13; RT Vol. III 401:19-403:5.

<sup>28</sup> Exhibit 39.

the methods of repaying the bonds.<sup>29</sup> It was during this process that Mr. Sitterson realized the District should seek voter approval for the total capital-needs budget all at once, rather than in successive ballot measures.<sup>30</sup> By structuring the bond sales and repayments in a certain way, it was Mr. Sitterson's opinion that the voters could still be presented with a levy rate low enough to garner support for the entire \$160 million on one ballot measure.<sup>31</sup>

Mr. Sitterson presented his advice to the District's Board during a workshop to discuss the District's capital facility needs.<sup>32</sup> The Board followed Mr. Sitterson's advice, and it proved to be correct.<sup>33</sup> The Board put on the ballot a measure seeking authority to sell \$167.93 million in bonds.<sup>34</sup> The voters approved the measure by the necessary super-majority, and the District thereby obtained the authority to borrow the total amount.<sup>35</sup>

After Mr. Sitterson presented his recommendations, Ms. Fromhold decided that she would try to save the District some money by terminating

---

<sup>29</sup> Exhibit 40; RT Vol. II 190:18-192:4.

<sup>30</sup> RT Vol. II 192:19-23.

<sup>31</sup> RT Vol. II 193:25-195:2.

<sup>32</sup> RT Vol. II 193:25-195:2.

<sup>33</sup> RT Vol. II 195:3-12.

<sup>34</sup> Exhibit 45; RT Vol. II 195:13-24.

<sup>35</sup> Exhibit 46.

Mr. Sitterson's contract. A few months after the workshop, Ms. Fromhold summoned Mr. Sitterson to her office and notified him of her decision to terminate his contract. Mr. Sitterson described this meeting in his testimony:<sup>36</sup>

Q. And where did that meeting take place?

A. In Marcia Fromhold's office.

Q. Who was there?

A. Mike Merlino and Marcia Fromhold.

Q. And what did they tell you when you got to the meeting?

A. That they were terminating my contract.

Q. Did they engage you in a discussion about whether they should terminate your contract?

A. No.

Q. Did it seem to you more of a notification of a termination than a debate?

A. It was a – a fait accompli. I would – they had already made the decision.

When Mr. Sitterson was asked whether the District gave him any reason for terminating his contract, he testified as follows:<sup>37</sup>

Q. Did they tell you any indication whatsoever as to why they were terminating your contract?

---

<sup>36</sup> RT Vol. II 199:5-18.

<sup>37</sup> RT Vol. II 200:7-11.

A. Marcia Fromhold at the end of the meeting turned away from me and muttered under her breath, but loud enough for me to hear, "It's just so much money."

Not surprisingly, then, Ms. Fromhold and her colleague, Mike Merlino, congratulated themselves on the amount of money they had saved the District by terminating Mr. Sitterson's contract. In an e-mail to Ms. Fromhold sent shortly before the bond sale, Mr. Merlino reported that terminating Mr. Sitterson's contract resulted "in a savings of \$111,510 on the 2002 bond issue."<sup>38</sup> Ms. Fromhold responded: "Thanks!"<sup>39</sup>

Mr. Merlino's estimate was off by only a few hundred dollars. Several weeks after he sent his e-mail, the District sold \$59 million of bonds in July of 2002.<sup>40</sup> Based on the agreed commission formula, Mr. Sitterson would have received \$111,250 from the proceeds of this sale. But because of Ms. Fromhold's decision to terminate Mr. Sitterson's contract, Mr. Sitterson received zero commission from this sale.

While Mr. Sitterson did not agree that the District had the right to terminate him, he did not immediately sue the District. Given the nature of Mr. Sitterson's business, he thought the negative publicity generated by suing one of his former clients could make it more difficult to attract and

---

<sup>38</sup> Exhibit 48.

<sup>39</sup> Exhibit 48.

<sup>40</sup> Exhibit 49.

keep other school districts as clients. So Mr. Sitterson was willing to "take his lumps" and move on.<sup>41</sup>

But then Mr. Sitterson came to believe that Ms. Fromhold was saying things to other school districts that were hurting his relationships and his business.<sup>42</sup> Mr. Sitterson figured that if he was going to suffer the negative publicity anyway, he might as well try to get the commission he was owed.<sup>43</sup> Mr. Sitterson made several attempts to negotiate a solution with the District's Superintendent, Richard Melching,<sup>44</sup> but Mr. Melching simply deferred to Ms. Fromhold. She assured Mr. Melching that Mr. Sitterson was not owed any money.<sup>45</sup>

Left with no other choice, Mr. Sitterson sued the District in the Clark County Superior Court for damages.<sup>46</sup> Mr. Sitterson's complaint sought damages for breach of the contract or, in the alternative, quantum meruit.<sup>47</sup> In the prayer for relief, the complaint sought "Judgment against the District in the amount of at least \$111,250, as well as interest on that

---

<sup>41</sup> RT Vol. II 202:23-203:16.

<sup>42</sup> RT Vol. II 203:17-24.

<sup>43</sup> RT Vol. II 204:12-22.

<sup>44</sup> RT Vol. II 204:23-205:23; Exhibits 53, 54, and 56.

<sup>45</sup> RT Vol. IV-A 644:4-14.

<sup>46</sup> RT Vol. II 211:4-17.

<sup>47</sup> Clerk's Papers ("CP") 5-32.

amount at the rate of 12% per anum from July of 2002 until paid off in full."<sup>48</sup>

Mr. Sitterson's case proceeded to a jury trial in January of 2007. Mr. Sitterson presented evidence in support of his claims and his damages. This included evidence of other commissions and compensation earned by Mr. Sitterson for work done for the District during the contract term. Mr. Sitterson's services were not limited to the issuance of new bonds. But erring on the conservative side, Mr. Sitterson asked the jury to award him only the liquidated sum of \$111,250.<sup>49</sup>

The jury received the Washington Pattern Jury Instructions relating to Mr. Sitterson's claim. Instruction No. 24 was based on the pattern instruction regarding the measure of damages for breach of contract. This instruction allowed the jury to award Mr. Sitterson his "actual damages," which the instruction further described as "the sum of money that will put Mr. Sitterson in as good a position as he would have been in if both he and the District had performed all of their promises under the contract."<sup>50</sup>

While the juror's were deliberating, they presented a question to the judge: "Under instruction 24, what, if any, latitude do we have to

---

<sup>48</sup> CP 9:10-11.

<sup>49</sup> RT Vol IV-B 880:13-881:2.

<sup>50</sup> CP 176.

adjust the sum of money up or down."<sup>51</sup> After conferring, counsel for both sides agreed to the following response: "That is a decision for the jury."<sup>52</sup> After receiving this response, the jury rendered a verdict in favor of Mr. Sitterson in the amount of \$151,000.<sup>53</sup>

After trial, Mr. Sitterson asked the trial court judge to award prejudgment interest. Mr. Sitterson did not seek interest on the entire verdict amount—only on the liquidated sum of \$111,250. The District opposed Mr. Sitterson's request.

At the oral argument, Judge Wulle stated that he could "see the merits in both arguments ...."<sup>54</sup> But Judge Wulle repeatedly indicated he needed guidance from the appellate courts. He initially expressed his belief that "this question needs to go up and let them come back and tell us what the interpretation of this kind of—and I'm gonna use a term that I'm comfortable with—nebulous finding gives us in terms of whether it was liquidated, implied or what it was based on."<sup>55</sup> Judge Wulle reiterated his need for guidance. "So therefore I'm going to decline to act at this point. Okay, I suspect that this case is going up either way, and I think this is an

---

<sup>51</sup> RT Vol. V 914:15-21.

<sup>52</sup> RT Vol. V 914:15-21.

<sup>53</sup> RT Vol. V 916:6-14.

<sup>54</sup> RT Vol. VI 939:17.

<sup>55</sup> RT Vol. VI 938:1-6.

issue to give to the Court of Appeals to give us some clear judgment."<sup>56</sup>

Once more, Judge Wulle stated: "at this point I'm gonna decline to act at this time because I think it's something for the Court of Appeals to give us direction on. Or the Supreme Court."<sup>57</sup>

Later in the hearing, Judge Wulle further revealed that he would not have awarded prejudgment interest to Mr. Sitterson even if the jury's verdict had matched the liquidated sum of \$111,250. He explained that he would not award prejudgment interest "[e]ven if the liquidated amount were \$20" under the contract "[a]nd the jury came back with \$20," because the jury "never said, That's liquidated."<sup>58</sup> Thus, Judge Wulle seemed to believe that prejudgment interest could never be awarded unless the jury is given a special verdict form that segregates the verdict into liquidated and unliquidated sums—even when the plaintiff sought only a liquidated sum.

If the jury had awarded the liquidated sum requested, and the trial court had awarded prejudgment interest on that liquidated sum, Mr. Sitterson's total recovery would have been more than \$173,000. But because the trial court refused to grant any prejudgment interest,

---

<sup>56</sup> RT Vol. VI 938:9-13.

<sup>57</sup> RT Vol. VI 940:8-11.

<sup>58</sup> RT Vol. VI 949:9-15.

Mr. Sitterson's damage recovery stands at \$151,000—\$22,000 less than the minimum he should have received. To cure this inequity, Mr. Sitterson respectfully requests this Court to reverse Judge Wulle's decision and remand the matter with instructions to award prejudgment interest from July 2002 through the judgment date.

#### **IV. Legal Authority and Analysis**

##### **A. Liquidated Claims Are Entitled to Prejudgment Interest as a Matter of Right**

In general, prejudgment interest is to be awarded—as a matter of right—whenever a plaintiff recovers damages on a liquidated claim. "Washington law has historically treated prejudgment interest as a matter of right when a claim is liquidated."<sup>59</sup> A claim is "liquidated" when the amount of damages for the claim can be calculated based on objective facts, and does not require the exercise of judgment or discretion. "A liquidated claim is one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion."<sup>60</sup> Moreover, a dispute between the parties regarding the amount of damages does not, in itself, make the

---

<sup>59</sup> *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 153, 948 P.2d 397 (1997) (citation omitted).

<sup>60</sup> *Ibid.* (internal quotations and citation omitted).

claim unliquidated. "The fact that a dispute exists over all or part of a claim does not make the claim unliquidated."<sup>61</sup>

**B. Whether a Claim is "Liquidated" is a Question of Law**

There is some confusion as to the proper standard of review to be applied to trial court rulings regarding prejudgment interest. On the one hand, Washington's Courts have described prejudgment interest as "a matter of right" when the claim is for a liquidated amount. Moreover, at least one very recent opinion has stated, in the context of prejudgment interest, that the question of "whether the damages were liquidated" is "a question of law, and our review is *de novo*."<sup>62</sup> But other opinions have said "[t]he award of prejudgment interest is reviewed for abuse of discretion."<sup>63</sup> Still other opinions do not mention which standard of review is being applied, but they seem to apply a *de novo* standard when reviewing whether a claim is liquidated or unliquidated.<sup>64</sup>

---

<sup>61</sup> *Ibid.* (citation omitted).

<sup>62</sup> *McConnel v. Mothers Work, Inc.*, 131 Wn.App. 525, 536, 128 P.3d 128 (2006) (citation omitted).

<sup>63</sup> *Scoccolo Construction, Inc. v. City of Renton*, 158 Wn.2d 506, 145 P.3d 371 (2006) (citation omitted).

<sup>64</sup> See e.g., *Dautel, supra*, 89 Wn. App. 148 (appellate court reversed decision regarding prejudgment interest); *CKP, Inc. v. GRS Construction*, 63 Wn. App. 601, 821 P.2d 63 (1991) (appellate court reversed decision regarding prejudgment interest).

This confusion creates a tension between the plaintiff's "right" to an award of prejudgment interest and the trial court's "discretion" to deny prejudgment interest. A careful review of the cases, however, suggests that a different standard of review applies depending on the reason for the court's ruling on prejudgment interest.

Oftentimes, the trial court may find the damages to be liquidated, but it still may deny an award of prejudgment interest if it finds that the plaintiff was dilatory in prosecuting the claim, thereby inflating the amount of prejudgment interest. For example, one opinion held "that prejudgment interest on liquidated claims ordinarily is a matter of right, but that Washington trial judges have discretion to disallow such interest during periods of unreasonable delay in completing litigation that is attributable to claimants."<sup>65</sup> In this circumstance, it makes sense to give the trial court broad latitude because it is in a much better position to evaluate the reason for any delay in bringing the case to trial.

But when the trial courts have denied prejudgment interest based on a determination that the claim is not liquidated, the appellate courts routinely apply a *de novo* standard—expressly or not—to reviewing such a determination. This also makes sense because the appellate court is in at

---

<sup>65</sup> *Colonial Imports v. Carlton N.W.*, 83 Wn. App. 229, 245, 921 P.2d 575 (1996).

least an equal position to evaluate whether a claim is liquidated or unliquidated.

It is true that a *de novo* standard of review would mean Judge Wulle's decision would be given no extra deference, above the deference given to any other jurist. But Judge Wulle's comments at the hearing also made clear that he treated the question as a "narrow ruling of law,"<sup>66</sup> and that "this is an issue to give to the Court of Appeals to give us some clear judgment."<sup>67</sup> Accordingly, Mr. Sitterson asks this Court to review *de novo* the question of whether he is entitled to prejudgment interest on the liquidated portion of his claim.

**C. The Jury's Verdict Included \$111,250 in Liquidated Damages**

There is absolutely no dispute that—had the District not improperly terminated Mr. Sitterson's contract—Mr. Sitterson would have received the sum of exactly \$111,250 in July 2002. The District knew exactly what Mr. Sitterson was owed because there was a precise, agreed upon formula for calculating his commission. This same formula was used to provide Mr. Sitterson with a commission of \$110,625 just a few

---

<sup>66</sup> RP Vol. VI 945:19-20.

<sup>67</sup> RP Vol. VI 938:9-13.

years earlier. The determination of the commission amount was purely a mathematical calculation, requiring no discretion or opinion. In sum, there is no dispute, and there can be no dispute, that the liquidated portion of the damages caused by the District's breach was \$111,250.

Had the District allowed Mr. Sitterson to complete the two-year extension of the contract, there is no doubt that—in addition to any other sums he would have received—Mr. Sitterson would have received \$111,250. This money, however, was wrongfully retained by the District. Mr. Sitterson has lost the use of this money, while the District has enjoyed an interest-free loan, at Mr. Sitterson's expense, since July of 2002.

This case presents a perfect situation for the application of prejudgment interest, because "when a defendant retains money that is owed to another, he should be charged interest upon it."<sup>68</sup> This rule is equitable, because it prevents the wrongdoer from benefiting from the wrongful conduct, and it helps make the victim whole by recognizing the effects of inflation and the time-value of money. "Generally prejudgment interest is favored because the law assumes that one who retains money owed to another should be charged interest on it."<sup>69</sup>

---

<sup>68</sup> *Id.* at 154 (footnote and citation omitted).

<sup>69</sup> *Hadley v. Maxwell*, 120 Wn. App. 137, 142, 84 P.3d 286 (2004).

If the jury had awarded Mr. Sitterson the sum of exactly \$111,250, there can be no question but that Mr. Sitterson would be entitled to prejudgment interest on that liquidated sum "as a matter of right." Contrary to the trial court's comments, there is no requirement that the jury be polled or questioned as to whether the verdict is for a liquidated or unliquidated sum. This inquiry has not been required in other cases awarding prejudgment interest to liquidated claims. If the jury had simply limited its award to the liquidated sum of \$111,250, and the trial court had simply awarded prejudgment interest on that sum, Mr. Sitterson would have received a total damage award of more than \$173,000.

But the jury awarded damages above the liquidated sum of \$111,250, choosing instead to award damages of \$151,000. This raises the question of who should enjoy the benefit of the jury's larger award—Mr. Sitterson or the District. The District has argued that because the jury awarded more than the liquidated damages, the entire award by the jury thereby became unliquidated and unworthy of prejudgment interest. But this argument ignores the evidence and instructions presented to the jury.

The jury was presented with ample "evidence [that] furnishes data which, if believed, makes it possible to compute the amount with

exactness, without reliance on opinion or discretion."<sup>70</sup> There was a precise, mathematical formula for calculating Mr. Sitterson's commission, expressed as a percentage of the bonds sold. And the amount of the bonds sold was not in dispute. Thus, this is not a case where the defendant was "unable to ascertain the amount owed."<sup>71</sup>

The gravamen of Mr. Sitterson's claim, and the bulk of the jury's award, was for the liquidated claim of \$111,250. The District will argue that it is pure "speculation" to assume that the jury's award of \$151,000 included the liquidated sum of \$111,250. But given the clear and undisputed nature of Mr. Sitterson's commission from this one bond sale, it does not take any blind leap of faith to conclude that the verdict included, at a minimum, this liquidated amount.

The fact that Mr. Sitterson was awarded unliquidated damages on top of his liquidated damages does not convert the entire verdict into an unliquidated sum. The District may argue that the \$151,000 in damages was awarded on Mr. Sitterson's alternative claim—for quantum meruit—and that prejudgment interest is not allowed on quantum meruit awards. But this argument would ignore the question the jury asked during its

---

<sup>70</sup> *Ibid.* (internal quotations and citation omitted).

<sup>71</sup> *Lakes v. von der Mehden*, 117 Wn. App. 212, 217, 70 P.3d 154 (2003).

deliberations. The jury asked: "Under instruction 24, what, if any, latitude do we have to adjust the sum of money up or down." Instruction No. 24 was the instruction that related to the measure of damages solely for Mr. Sitterson's breach of contract claim. There was a separate instruction—Instruction No. 25—that applied to Mr. Sitterson's quantum meruit claim. In sum, the jury asked whether it could award more damages than Mr. Sitterson sought under the breach of contract claim, and when the jury was told "[t]hat is a decision for the jury," the jury awarded Mr. Sitterson some unliquidated damages on top of the liquidated claim of \$111,250.

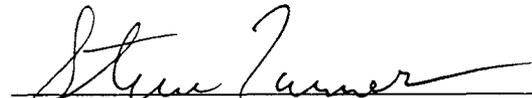
## **V. Conclusion**

In sum, it is Mr. Sitterson—not the District—who should benefit from the jury's decision to award him more than the liquidated sum of \$111,250. If Mr. Sitterson is denied prejudgment interest on this liquidated amount, then it would lead to an inequitable and absurd result—a defendant who actually pays less because the jury awarded more. Therefore, Mr. Sitterson respectfully requests that this Court award Mr. Sitterson prejudgment interest on the liquidated sum of \$111,250 and remand this case with directions to correct the judgment to include

prejudgment interest at the statutory rate of twelve percent from July of  
2002.

DATED this 5<sup>th</sup> day of November, 2007.

MILLER NASH LLP

A handwritten signature in cursive script, appearing to read "Steven E. Turner", is written over a horizontal line.

Steven E. Turner  
WSBA No. 33840

Attorneys for Appellant  
David Sitterson

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Appellant's Opening Brief on:

Mr. Bruce White  
Mitchell Lang & Smith  
2000 One Main Place  
101 SW Main Street  
Portland, Oregon 97204-3230

Mr. Todd Baran  
Todd Baran P.C.  
4004 SE Division St  
Portland, OR 97202-1645

RECEIVED  
NOV 06 2007

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

by the following indicated method:

- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.

DATED this 5<sup>th</sup> day of November, 2007.

  
Steven E. Turner