

No. 40481-8-II

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COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION II

COASTAL CONSTRUCTION GROUP, INC., a Washington
corporation, JAMES C. HEWITT and TARINA THOMAS, as
individuals,

Respondents,

v.

STELLAR J CORP., a Texas corporation, and TRAVELERS
CASUALTY AND SURETY COMPANY, a foreign corporation,

Appellants.

APPEALED FROM LEWIS COUNTY SUPERIOR COURT
CAUSE NO. 06-2-00913-2

Judge Nelson Hunt

**RESPONDENTS COASTAL CONSTRUCTION, HEWITT
AND THOMAS' RESPONSE BRIEF**

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P.M. 1/8/10

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I. INTRODUCTION

A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box¹.

A Lewis County Jury saw the harsh reality of Stellar J, a large contractor, trying to use its size and money to take advantage of Coastal Construction, a small electrical subcontractor, and the damages it caused by refusing to pay what it owed. After 10 days of trial, and weighing the evidence, the Jury rejected Stellar J's arguments, found in Coastal's favor, and awarded Coastal what it was owed for the labor and materials it provided, \$322,056.12. The Trial Court properly exercised its discretion in making rulings during the case and the Jury was properly instructed². As a result, the Verdict and resulting Judgment should be affirmed.

II. RE-STATEMENT OF THE ISSUES

A. Pre-Trial.

1. Did the Jury's Verdict confirm Stellar J's Motion for Summary Judgment was properly denied?
2. Is expert testimony proper in response to a Summary Judgment motion?

¹ People v. Barnum, 104 Cal. Rptr 2d 19, 24 (Cal. Ct. App. 2001), rev. granted by 21 P.3d 1188 (2001).

² Stellar J has not appealed the Jury Instructions given or the Jury's actual Findings.

3. Did the Trial Court properly exercise its discretion by denying adding new parties and causes of action one month prior to Trial?
4. Did the Trial Court properly exercise discretion by denying Stellar J's request to exclude evidence of Coastal's damages?
5. Did the Trial Court properly exercise discretion by ruling that Stellar J could not circumvent the denial of its motion to amend?
6. Did the Trial Court properly exercise discretion by excluding an expert opinion not timely disclosed?
7. Are choice of law provisions enforceable?

B. Trial.

8. May an ER 702 witness offer opinions to assist the Jury?
9. Did the Trial Court properly admit evidence that Stellar J received payments from Flowserve?

C. Post-Trial.

10. Based on the evidence presented, as the Jury did, could a reasonable person rule in Coastal's favor?
11. Is prejudgment interest recoverable on contract amounts due which are capable of calculation based on a formula?
12. Did Stellar J's fraud claims fail as a matter of law?
13. Is a Surety liable when its Principal fails to pay for labor and materials provided on a public project?

14. Does Washington's interest rate apply to a Washington Judgment?
15. Is a Subcontractor on a Public Project that prevails entitled to recover attorney fees and costs?

III. STATEMENT OF THE CASE

Stellar J was the General Contractor on a Public Works project for the City of Chehalis, and Coastal Construction was one of its sub-contractors/suppliers. **EXs 300, 5, and 6**³. After the project started, Stellar J was responsible for significant changes and months of delay that caused Coastal Construction to incur additional labor and materials. See e.g. 1/5/10 RP⁴ p.20, ll. 20-22; p. 29, ll. 1-5; ll. 17-20; and **EX 24**. In the middle of the project, Stellar J stopped paying Coastal. 1/4/10 RP p. 99, ll. 3-7. Despite being the one responsible for the delays, as justification for withholding payments owed, Stellar J later claimed that Coastal caused it to incur expense for extended by-pass pumping. At trial, Coastal proved that Stellar J's claim was without merit and that Coastal was owed not only the unpaid original contract balance but also contract amounts for the additional labor and materials incurred as a result of extra work and

³ "EX" refers to Trial Exhibits.

⁴ The Report of Proceedings were provided by date.

delays caused by Stellar J. 1/5/10 RP p. 36, ll. 19-25; 1/6/10 RP p. 142-144, ll. 1-10.

A. The Riverside/Prindle Project.

Chehalis awarded Stellar J a \$3,624,127.66 contract to demolish and construct and install new equipment for two Wastewater pumping stations (“Riverside/Prindle Project”). Coastal Construction submitted a bid to Stellar J for the electrical and instrumentation work. 1/4/10 RP, p. 73, ll. 9-13. Coastal’s bid included all of the labor, electrical materials and equipment for the electrical work identified in the City’s contract documents. Id. at ll. 14-18. However, Stellar J did not accept all aspects of Coastal’s bid. Instead Stellar J elected to accept only a portion and took responsibility for providing the primary electrical components - the generator, instrumentation, adjustable frequency drives and programming for both pump stations. 1/4/10 RP p. 77, ll. 3-10; **EX. 4.** Stellar J’s lack of experience and co-ordination with regard to the electrical equipment would later cause delays in the submittal process. 1/4/10 RP p. 85-86; 91; and 96. Oddly, Stellar J also required Coastal to split its Sub-contract into a contract for labor and

a separate Purchase Order agreement for the materials Coastal provided. 1/4/10 RP, p. 80, ll. 25; p. 81, ll. 1-6.; **EXs. 5 and 6.** Yet, Stellar J paid by one check. 1/5/10 RP p. 149, ll. 13-20. The only significant pieces of electrical equipment Coastal contracted to provide were the Motor Control Centers (“MCC’s”) based on the specifications as they existed at that time. 1/4/10 RP, p. 84, ll. 2-9; **EX. 6.** The MCC’s are complex pieces of equipment whose design relied upon the design and configuration of other pieces of equipment. RP 1/4/10 p. 85, ll. 7-25; p. 86-87. Ultimately, so many changes occurred to the equipment that Stellar J provided that the MCC’s Coastal actually provided were based on plans and specifications that differed from the original plans and specifications Coastal was provided when it entered into the Purchase Order. RP 1/4/10 p. 90, ll. 16-20; p. 91, ll. 1-8.

Prior to the project beginning, the City’s engineers recognized that a potential problem existed because Stellar J’s planned construction schedule did not include any “float”. **EX. 13;** 1/5/10 RP p. 115, ll. 12-18. As bid, Coastal Construction’s work was originally scheduled to be performed and completed in the early fall.

EX 203. However, almost immediately there were numerous delays on the project that were Stellar J's responsibility as the general contractor. For example, mobilization to the project started 137 days late and the project itself finished 154 days later than planned. RP 1/6/10 p. 100, ll. 9-15; **EX. 203.** The demolition of the existing stations ran significantly behind schedule. 1/5/10 RP p. 20, ll. 20-22. See also EXs. 20 and 33. Demolition of the Prindle pump station alone took 43 days longer than Stellar J planned. **EX. 203.** Thus, the actual construction of the buildings was delayed into December, 2005. 1/5/10 RP p. 30, ll. 7-18. Thus, Coastal was working in the winter instead of the fall.

During the project, Coastal's performance was also directly impacted by delays relating to equipment Stellar J was providing and Coastal forced to incur extra costs. RP 1/6/10 p. 110, ll. 1-8. These delays included Stellar J holding responses to Coastal's submittals (1/6/10 RP p. 129, ll. 3-6); production for the MCC's being pushed into the holiday season (1/6/10 RP p. 130, ll. 23-25); and changes being made to other equipment being supplied by Stellar J that resulted in changes to the MCC's (e.g. **EXs 60, 64 and 105**).

While the initial delivery date for the MCC's according to the Purchase Order was August 15, 2005, the delays caused by Stellar J made it impossible for Coastal to have the MCC's, the design and configuration of which depended entirely on other equipment which was being supplied by Stellar J or its vendors, delivered and installed at the project sites until January 19, 2006. 1/4/10 RP p. 85-87; 1/4/10 RP p. 90-91; 1/4/10 RP p. 97, ll. 3-18; 1/5/10 RP p. 18, ll.7-8. Additionally, there were numerous and substantial changes in the scope and extent of Coastal's work under the contracts that required additional time and materials. **EXs. 23; 27; 41; 60; 64; 110; 178; 198; 244; 249;** 1/6/10 RP p. 136.

Coastal's performance on the job was extended a total of at least 155 days. RP 1/6/10 p. 110, ll. 1-8. As a result of the delays and changes caused by Stellar J, Coastal incurred additional overhead expenses and had to provide extra materials and labor. RP 1/6/10 p. 135, ll. 3-14; RP 1/6/10 p. 144, ll. 6-10. Stellar J had requested and was granted additional time by the City to complete the project. 1/5/10 RP p. 125, ll. 15-22. Notably, Stellar J was fully paid by the City.

In January, 2006, Coastal submitted a \$50,000 invoice to Stellar J for labor and material it provided. 1/4/10 RP p. 97, ll. 19-25; p. 98. Stellar J only paid approximately \$19,000 of that invoice. Id. After February, 2005, Stellar J did not pay any of Coastal's invoices for original contract labor and materials or make any payment. 1/4/10 p. 99, ll. 3-7. Nonetheless, Coastal continued to work. Id. During this time, Coastal was trying to get paid. Around May 1, 2006, Stellar J told Coastal the reason they were not being paid was because the City had not paid Stellar J. 1/5/10 RP p. 154, ll. 16-24. Coastal contacted Chehalis and confirmed that this was not accurate and that, in fact, Stellar J had been paid. Id. at p. 154; 155, ll. 1-3.

During this same timeframe, February to May, 2006, Stellar J did not tell Coastal they were not being paid due to a "*backcharge*" relating to the date the MCC's were delivered. 1/4/10 RP p 98, ll. 15-25; See also EX. 236 – Jeff Walker, May 1, 2006 - "*Regarding payment, as of this date we still have not been paid by the owner, so no payment will be due to your firm this week.*" It was only after May 1, 2006 that Stellar J claimed it was assessing a "*back-charge*"

against Coastal for extended by-pass pumping. **EX. 402.** However, Stellar J had already acknowledged and knew that in addition to the construction and submittal delays, the primary delay that caused the extended by-pass pumping were the pumps, their testing and the SCADA communication which Stellar J, through its suppliers, was responsible for. See **EXs. 110, 115, 152, 169, 198, and 471.** In May, unable to continue to claim it had not been paid by the City, Stellar J decided to attack Coastal by claiming it was entitled to withhold payment for “*extended by-pass pumping*”. Supra.

Ironically, Coastal later learned Stellar J was also blaming and charging another of its subcontractors, Flowserve, for the by-pass pumping. **EXs. 197; 198.** Regarding Stellar J’s contention that Flowserve was responsible for the by-pass pumping, Stellar J’s Vice President Jeff Walker testified by Declaration:

Stellar J suffered significant damages as a result of Flowserve’s failure to timely perform. Stellar J’s damages were caused by the funds that Stellar J was required to expend to supply temporary, full-time, by-pass pumping and support services until Flowserve provided its delivery of the pump components and installation services.

EX. 198. Mr. Walker also acknowledged that Flowserve did not complete its services until March 27, 2006, and that “*Stellar J was not allowed to even engage the pumps until Flowserve completed its installation services.*” **EX. 198** at ¶¶ 11-12. While blaming Flowserve for the extended by-pass pumping, the evidence at trial confirmed that the real reason was because Stellar J had not obtained the proper SCADA communication necessary for the by-pass pumps to be turned off. **EX 135; EX 152; EX 169** and 1/12/10 p. 123, ll. 14-20; p. 127, ll. 20-24. The Jury learned Chehalis rejected Stellar J’s attempt to receive extra payment for the “SCADA Communication links” and did receive extra money from the City for “by-pass pumping”. **EX 471.** See also 1/15/10 p. 69-71.

In the same time period, Stellar J also decided that it would try to dissuade Coastal from seeking payment of what it was owed through intimidation and threats to Coastal’s owner, James Hewitt, and bookkeeper, Tarina Thomas. See EX 406. In a letter dated June 11, 2006, Stellar J threatened that if Coastal did not pay Tacoma Electric’s claim, Stellar J would “*take appropriate legal action against Coastal Construction Group and/or James Hewitt and/or*

Tarina Thomas...” **EX. 406.** Stellar J’s threat was based on its untenable position that Coastal, Hewitt and Thomas were responsible for Tacoma Electric going unpaid because Stellar J failed to pay Coastal what it was owed. **EX 406.** Stellar J took the unsupportable position that the lien releases it required for payment made Coastal, Hewitt and Thomas liable for not paying their suppliers even when they could not because Stellar J did not pay the amount identified in the lien release. However, Stellar J’s position ignored the plain language of the lien releases – “*All persons ... have been paid in full through the period covered by this statement...from funds already received or to be received from this payment.*” **EX 6** – ¶B (emphasis added). In reality, Coastal could not pay from “*funds received from the payment*” because Stellar J refused to pay. 1/5/10 RP p. 167, ll. 1-12. Stellar J’s pretext for not paying Coastal led to this action.

B. Procedural History.

1. Pre-Trial.

On July 19, 2006, Coastal filed suit to recover the amounts it was owed for work performed and materials supplied on the

Riverside/Prindle project. CP 604-612. Duggan Schlotfeldt & Welch subsequently appeared in this action for both Stellar J and Travelers. CP 613-616. Stellar J and Travelers filed a joint Answer alleging counterclaims against Coastal Construction and Third party claims against James Hewitt and Tarina Thomas. CP 667-675. Stellar J's counter-claim allegations were limited to claiming that Coastal breached the Purchase Order by failing to "*indemnify and hold harmless*" Stellar J with regard to the Tacoma Electric bond claim. CP 667-675. The counterclaim allegations did not refer in any way to a Subcontract Agreement or delays. CP 667-675; CP 679-711.

Prior to trial, Stellar J made multiple attempts to delay the litigation process and increase the costs for Coastal. For example, it refused to provide responses to discovery requests, forcing Coastal to incur the expense of having the Court Order Stellar J to produce the information. CP 2141. Then, 30 days before trial, Stellar J asked to amend its complaint and to continue the trial. CP 1262-1281; CP 1258-1261. Those requests were denied. 12/30/09 RP 24-26; CP 1674-1677.

2. Trial

A jury trial was conducted January 4 to January 15, 2010. During the Trial, the Jury was presented substantial evidence that as the general contractor, Stellar J was responsible for significant delays on the project related to the demolition and construction of the buildings; the submittal process for the electrical equipment Stellar J took responsibility for; the delivery and start up of the pumps and most importantly, the fact the SCADA system did not work which was required to be operational prior to the by-pass pumping being removed. Supra. Stellar J presented to the Jury many of the arguments its makes now. A review of its expert's cross-examination reveals exactly how disingenuous Stellar J's position was and why it was not supported by the evidence. 1/12/10 RP p. 91-150. As a result, the Jury correctly found that Stellar J and not Coastal had breached the parties' contracts, that the breaches had proximately caused Coastal damages and entered a Verdict in Coastal's favor. CP 2310-2312. Rather than pay, Stellar J continued its attempt to economically bludgeon Coastal by Appealing in an attempt to try to avoid paying what it owes as confirmed by the Jury.

IV. ARGUMENT

A. Standard Of Review.

1. Abuse of discretion.

Because a trial court has wide discretion in admitting evidence and balancing the value of evidence along with its prejudicial effect; evidentiary rulings are reviewed for abuse of discretion. State v. Brown, 132 Wn.2d 529, 571-72 (1997). The decision to grant leave to amend the pleadings is reviewed for abuse of discretion. Wilson v. Horsley, 137 Wn.2d 500, 505 (1999).

2. De Novo.

The standard of review for a trial court's denial of a motion for JNOV/JMOL is de novo. Hoddevik v. Arctic Alaska Fisheries Corp., 94 Wn. App. 268, 275 (1999). However, a Jury's Verdict will only be reversed if no evidence can sustain a verdict as a matter of law. Id.

B. The Trial Court's Pre-Trial Rulings Were Proper.

1. Summary Judgment Was Properly Denied.

When a trial court denies summary judgment due to factual disputes and trial is held, the losing party must appeal from the

sufficiency of the evidence presented at trial, not from the denial of summary judgment. Adcox v. Children's Orthopedic Hosp. and Medical Center, 123 Wn.2d 15, 35 n. 9 (1993). The Jury decided the genuine issues of material fact in favor of Coastal. Stellar J has not identified any issue of law that should be reviewed de novo.

Stellar J's argument on appeal seems to be that its conduct and all of the facts presented should be ignored and only the date the MCC's were delivered considered. This ignores the fact that any delay in performance is excused if it results from the other party failing to seasonably provide specifications or cooperation. RCW 62A.2-311 (3). This is consistent with the common law. See Boyer v. City of Yakima, 150 Wash. 421, 424 (1928) ("*In every construction contract there is an implied covenant that...the other party thereto will not interfere with, or breach, the same...*").

In August 2005, the lay-out of the electrical components had not even been completed and the MCC's could not be finalized. Supra. Under Washington law, the parties' agreement to let the August 15, 2005 delivery date pass is evidence that the delivery date was extended. See Penberthy Electromelt Intern., Inc. v. U.S.

Gypsum Co., 38 Wn. App. 514 (1984) and Alaska Pacific Trading Co. v. Eagon Forest Products, Inc., 85 Wn. App. 354 (1997). As a result, this was a question of fact that the Jury resolved in Coastal's favor.

Furthermore, a "*party is barred from enforcing a contract that it has materially breached*". Rosen v. Ascentry Technologies, 143 Wn. App 364, 369 (2008). See also U.S. for Use of Acme Granite and Tile Co. v. F.D. Rich Co., 437 F.2d 549, opinion affirmed on rehearing 441 F.2d 1143 (9th Cir. 1970)(Prime contractor could not complain of nonperformance by a subcontractor where prime contractor, through another subcontractor, prevented performance). Coastal presented evidence both in response to the Summary Judgment motion and during Trial that Stellar J was in material breach of the purchase order by failing to pay and that Stellar J interfered with Coastal's ability to provide the MCC's by August 15, 2005. Supra. The Jury confirmed that Stellar J was in breach. As a result, the Trial Court did not err by denying Stellar J's Motion for Summary Judgment.

2. Motion to Strike Declaration.

Stellar J's claim that Mr. Castorina's Declaration did not include a factual basis for his opinions was properly rejected. On appeal, Stellar J fails to identify any factual support for its position. The admission of expert opinion is within the discretion of the trial court. State v. Ortiz, 119 Wn.2d 294, 310 (1992).

Expert opinion [in the form of affidavits] is admissible and may defeat summary judgment if it appears that the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not.

Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985). “An expert's factual basis may consist of information in the record or information not in the record but reasonably relied upon in the field.” Pagnotta v. Buell Trailers of Oregon, Inc., 99 Wn. App. 28, 34 (2000). An expert's affidavit need not “exhaustively detail the factual basis for his or her opinions. Detailed inquiry into the facts and data underlying an expert's opinion is reserved for cross-examination at trial, and is inappropriate at the summary judgment stage.” Biegler v. Kleppe, 633 F.2d 531, 533-34 (9th Cir. 1980). A

review of Castorina's Declarations confirms that this standard was more than met and the Trial Court did not abuse its discretion. CP 1013-1033; CP 1136-1143.

3. Stellar J's Motion to Amend Was Properly Denied And Stellar J Was Not Prejudiced.

After 3 ½ years of litigation, after the Pre-trial conference, and 30 days before a long scheduled Trial, Stellar J asked to Amend its complaint to add two new cross-Defendants and new allegations against Coastal seeking damages based on the Subcontract, which were not mentioned in its Counter-claims. CP 1262-1281; CP 1296-1309. The granting of a motion to amend is not mandatory. Instead, “[t]he decision to grant leave to amend the pleadings is within the discretion of the trial court.” Wilson v. Horsley, 137 Wn.2d 500, 505 (1999). “The trial court’s decision will not be disturbed on review except on a clear showing of abuse of discretion...” Id. Leave to amend should not be given “where prejudice to the opposing party would result.” Caruso v. Local Union No. 690 of Int’l Bd. of Teamsters, 100 Wn.2d 343, 349 (1983). “The factors a court may consider in determining prejudice include undue delay and unfair surprise.” Herron v. Tribune

Publishing Co., Inc., 108 Wn.2d 162, 165 (1987). “*Undue delay on the part of the movant in proposing the amendment, where such delay works undue hardship or prejudice upon the opposing party...constitutes sufficient reason for denial.*” Appliance Buyers Credit Corp. v. Upton, 65 Wn.2d 793, 800 (1965). An amended pleading which would require a new round of discovery creates prejudice justifying denial of leave to amend. Oliver v. Flow Intern. Corp., 137 Wn. App. 655, 664 (2007). Finally, failure to timely file an amended pleading, when a party had knowledge of all relevant facts since the original pleading, is proper grounds to deny leave to amend. Wilson v. Horsley, 137 Wn.2d 500, 507 (1999). The Trial Court properly weighed these factors in denying Stellar J’s last minute Motion to Amend.

a. The Denial of New Cross-claims To Add Parties Was Proper.

After 3 ½ years of litigation and without any excuse for its undue delay, Stellar J’s Counsel asked to add cross-claims against their own client, Travelers and Chehalis. CP 1262-1281. Failure to add defendants as a result of inexcusable neglect is a sufficient ground for denying a motion to add such defendants without a

showing of specific prejudice by the nonmoving party. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 174 (1987). “[I]nexcusable neglect exists when no reason for the initial failure to name the party appears in the record.” South Hollywood Hills Citizens Ass’n v. King County, 101 Wn.2d 68, 78 (1984). Despite being aware Coastal had a bond, Stellar J did not offer any reason for its failure to name Travelers. Nor did Stellar J offer a reason for its delay in seeking to add Chehalis as a Cross-Defendant. Haberman, 109 Wn.2d at 174. As the Trial Court recognized, the mere fact Stellar J ignored the information received during 3 ½ years of litigation did not justify adding Chehalis and Travelers as cross-defendants 30 days before Trial.

Furthermore, because of the timing, adding cross-claims against Travelers and Chehalis would have prejudiced Coastal. It would have resulted in new defenses, additional discovery, and a continuation of the Trial. Finally, the requested amendment would have created a serious ethical issue since Stellar J and Travelers were jointly represented. Thus, the denial was not an abuse of discretion.

b. Stellar J's Attempt to Add New Causes Of Action 30 Days Prior To Trial Was Properly Denied.

i. The Amendment Would Have Subjected Coastal To Unfair Surprise And Prejudice.

Stellar J's Original and Amended Counterclaim alleged that Coastal breached the Purchase Order by not providing indemnification for Tacoma Electric's bond claim. CP 667-675; CP 679-711. Notably, this claim failed when the Jury specifically found that Coastal did not breach the Purchase Order. CP 2310-2312. Stellar J claims that it should have been allowed to add allegations that Coastal also breached the Sub-contract because both the Sub-contract and the Purchase Order "*refer to each other and the Master contract*". However, that argument is factually and legally flawed. First, the Purchase Order merely required the goods to "*conform to contract documents, plans and specifications*". **EX 6**. Second, the Purchase Order does not "refer" to or incorporate the Subcontract. Id.

A complaint must "*apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest*". Kirby v. City of Tacoma, 124 Wn. App. 454, 469-70 (2004). A

defendant is entitled to be advised, by pleadings, of the issues he must be prepared to meet at trial. Vogreg v. Shepard Ambulance Service, 47 Wn.2d 659, 663 (1955). As a result, it is illogical to argue a pleading alleging breach of the Purchase Order based on indemnification placed Coastal on notice that Stellar J was also claiming a breach of the Subcontract. After 3 ½ years of litigation, Stellar J wanted time to amend its Counterclaim to allege Coastal breached the Subcontract agreement, “*failed to comply with the deadlines set forth in the subcontract*”, failed to “*perform all electrical work*”, and “*caused delay damages*”. CP 1276. These were new allegations based on new facts and a document that Stellar J did not place at issue in its claims. CP 1311-1312. A comparison of the pleadings as they existed and the proposed Second Amended Answer confirms this fact. cf. CP 679-711 and CP 1271-1281. This was confirmed by the prayers for relief. Stellar J’s attempt to add those new allegations one month before Trial constituted unfair surprise and would have necessitated additional discovery.

ii. Any Error Was Harmless.

A review of Stellar J's proposed amendment confirms that at best the denial constituted harmless error. The Amendment would have allowed Stellar J to seek affirmative relief for its argument that Coastal was responsible for the delays on the project and the extended by-pass pumping. CP 1271-1281. However, the facts underlying the dispute over who breached the contract and who caused the delays were presented to the Jury and were resolved in Coastal's favor. CP 2310-2312. Indeed, Stellar J argued to the Jury that Coastal was the cause of delays on the project. 1/14/10 RP p. 63, ll. 7-24. Since the Jury rejected that argument and resolved the factual disputes in Coastal's favor, the denial was at best harmless error. See Kelly v. Foster, 62 Wn.App. 150, 157-158 (1991); Hepler v. CBS, Inc., 39 Wn. App. 838, 847 (1985); and Ratliff v. Sprint Missouri, 261 S.W.3d 534, 543 (2008).

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C. The Court's Trial Rulings Were Proper.

1. Coastal's Motions In Limine.

a. Roy Rogers Was Properly Excluded.

While providing numerous justifications for sandbagging, Stellar J did not and does not deny it failed to supplement its responses to Coastal's Expert Interrogatories with regard to Mr. Rogers' opinions. CR 37(d); CR 37(b)(2)(B). As a result, the Trial Court explained why it exercised discretion and found that Stellar J's conduct was a willful ploy to force a continuance. 12/30/09 RP p. 36-37.

*I also wanted to make a record here that **this business of messing around with the dates for the designation of provision of the reports and opinions of the expert is all part of what I perceive to be an attempt on the part of the defendants to get this matter continued. And this is a continuing part of that which I believe happened back on December 4th when we had the arguments about amending the complaint.** Now, other sanctions won't work here, there is monetary sanctions that are not going to cure the problem. The problem here is lack of notice and a violation of the civil rules, continuance rewards the defendant's actions here, those are the two that I can see might be imposed. So at this late date other sanctions won't work.*

12/30/09 RP p. 37, ll. 1-16 (emphasis added). Thus, the Trial Court properly exercised its discretion by considering less harsh sanctions and determining that Stellar J's decision to violate the Civil Rules by failing to disclose Mr. Rogers' opinions was willful. Stellar J asks this Court to condone its gamesmanship.

b. Stellar J Was Properly Excluded From Arguing That Chehalis or the Engineer Caused Its Breach of Contract.

This was a breach of contract action. Unlike tort, there is no “*empty chair defense*”. See CP 12/30/09, PR p. 64-66. Stellar J's arguments concerning its claim Coastal had to seek payments from Chehalis were contradicted by the evidence and rejected by the Jury. In the Main Contract between the Chehalis and Stellar J, Stellar J expressly agreed that Coastal would have no contractual relationship with the City – “*subcontractors will not be recognized as having a direct relationship with the City.*” **EX. 300, p. 00710-9**, Section 2.03(c). As a result, Coastal could not have sought relief from Chehalis for the extra work Stellar J caused and refused to pay for. Notably, Stellar J was allowed to and did argue and present evidence of its incorrect position that Coastal should have made claim directly

to Chehalis rather than Stellar J. **EXs. 373, 396, 397 and 402.** The Jury rejected those arguments. CP 2310-2312.

c. Stellar J Was Allowed to Present Its Arguments Concerning The Purchase Order.

The Trial Court properly ruled that Stellar J could not seek affirmative relief beyond what it pled in its counterclaims. See e.g., 12/30/09 RP pp. 46-63. However, Stellar J was not prevented from presenting evidence to argue that it had the right to withhold funds. 1/13/10 RP (pm) p. 6-12. This included its claims Coastal had late delivery, delay and caused extended by-pass pumping. These were all the factual arguments it claimed would allow it to seek additional affirmative relief through amendment. However, the Jury rejected Stellar J's evidence and found that Coastal did not breach the terms of the Purchase Order, did not delay the project, and did not deliver late. As a result, Stellar J got its day in Court and was not prevented from presenting its theory of the case. CP 2310-2312.

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2. Stellar J's Motions In Limine.

a. Stellar J had Also Claimed Flowserve Delayed The Project.

Stellar J claimed that its breach was excused and it was entitled to withhold payments from Coastal as a “backcharge” as a result of its claim Coastal caused it to incur expense for extended by-pass pumping. As a result, the Jury had to resolve what caused the extended by-pass pumping for the project. Coastal presented evidence that Stellar J was making the exact same claims against Flowserve and had sued Flowserve. **EXs. 159; 197; 198.** There was evidence that prior to asserting a backcharge against Coastal, Stellar J was claiming Flowserve was the cause. **EXs. 110; 115; and 198.** Prior to Trial, Stellar J settled with Flowserve and received payments for the very damages it claimed Coastal had caused. **EX 200.**

As a result, the Flowserve Settlement related directly to the issue of who was responsible for the delay on the project for which Stellar J purportedly back-charged Coastal and the amount of the back-charge. “*The issue of apportioning damages in a case of mutual delay is a question of fact.*” Pathman Constr. Co. v. Hi-Way Elec. Co., 382 N.E.2d 453, 460 (1978). The evidence with regard to

Flowserve and monies recovered from Flowserve were relevant to the issue of damages, refute the backcharge amounts withheld, and were necessary to impeach Stellar J's witnesses who were taking inconsistent positions. **EX 198.** Stellar J was able to make the same arguments to the Jury about Flowserve's involvement that it makes in its Appellate brief. 1/14/10 PR p. 66, 11. 5-24. The Jury soundly rejected those arguments. CP 2310-2312. Stellar J's arguments go to the weight of the evidence and not admissibility.

b. The Trial Court did not Err by allowing Coastal to Present Evidence of the Damages Caused by Stellar J's Breaches of Contract.

Ignoring the language of Coastal's Complaint and the damages disclosed in discovery, Stellar J asked the Court to exclude evidence of damages incurred in excess of \$82,277.00. Coastal pled a breach of contract based on the Purchase Order and the Subcontract. CP 604-612. Coastal alleged, among other things, that it remained unpaid for its work and incurred damages as a result of project delay. CP 606-608. *"In any case, damage questions are usually discretionary and therefore for the trier of fact, so long as damages fall within the range of relevant evidence."* Womack v.

Von Rardon, 133 Wn.App. 254, 263 (2006). The Trial Court correctly denied Stellar J's motion. "*I reviewed the complaint and it certainly appeared to me to give adequate notice of all the causes of actions that have been raised here.*" 12/30/10 RP p. 73, ll. 21-25.

3. Nick Castorina's Testimony Was Proper.

Whether to admit expert testimony is within the discretion of the trial court. State v. Ortiz, 119 Wn.2d 294, 310 (1992). Mr. Castorina provided testimony establishing that he had skill, knowledge, experience, training and education directly related to his opinions and which would assist the jury. ER 702; 1/6/10 RP p. 60-73. Notably, Stellar J presented testimony by an expert with similar credentials but less experience. 1/11/10 RP p.167-178; 1/12/10 RP p. 11-91. The Jury rejected his opinions. CP 2310-2312.

D. The Trial Court's Post-Trial Rulings Were Proper.

1. The Trial Court Correctly Upheld the Jury's Verdict By Denying Stellar J's Motion for JMOL.

"It is well established that an appellate court will not disturb a jury award supported by substantial evidence." Alpine Industries, Inc. v. Gohl, 30 Wn. App. 750, 758 (1981). After trial, a Judgment as a Matter of Law should only be granted if there is "*no competent*

evidence or reasonable inference sustaining the jury's verdict for the nonmoving party." Hill v. GTE Directories Sales Corp., 71 Wn. App. 132, 143 (1993).

*We have oft repeated the rule that a challenge to the sufficiency of the evidence, or a motion for nonsuit, dismissal, directed verdict, new trial, or judgment notwithstanding the verdict, **admits the truth of the opponent's evidence and all inferences which can reasonably be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in a light most favorable to the opponent. No element of discretion is involved. Such motions can be granted only when the court can say, as a matter of law, there is no substantial evidence to support the opponent's claim.***

Davis v. Early Constr. Co., 63 Wn.2d 252, 254-55 (1963)(emphasis added). "In ruling on a motion for judgment notwithstanding the verdict, a trial court exercises no discretion." Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 98 (1994). Furthermore, "[i]f any justifiable evidence exists on which reasonable minds might reach conclusions consistent with the verdict, the issue is for the jury." Mega v. Whitworth College, 138 Wn. App. 661, 668 (2007).

This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues

before it. The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

Id. (citations omitted)(emphasis added).

Stellar J asks this Court to ignore that standard and invade the province of the jury.

a. Coastal Presented Evidence of the Breach of Contract Damages Incurred.

Contract damages are based on a party's expectation interest and are intended to give the injured party the benefit of its bargain. Eastlake Const. Co., Inc. v. Hess, 102 Wn.2d 30, 46 (1984). “[D]amage questions are usually discretionary and therefore for the trier of fact, so long as damages fall within the range of relevant evidence.” Womack v. Von Rardon, 133 Wn.App. 254, 263 (2006). “The difficulty of ascertainment of the amount of damage is not to be confused with the right of recovery.” Dunseath v. Hallauer, 41 Wn.2d 895, 902 (1953). “The measure of damages in any particular case will depend upon the facts in that case.” Id. at 904. “(W)here

the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amounts.” Reefer Queen Co. v. Marine Const. & Design Co., 73 Wn.2d 774, 781 (1968). As the Jury did, a trier of fact confronted with conflicting expert testimony may accept the testimony of one expert and reject the testimony of another. Thornton v. Anest, 19 Wn. App. 174 (1978).

Stellar J’s argument ignores the well-established law supporting the Jury’s Verdict and Coastal’s evidence of the extra materials and costs incurred as a result of Stellar J’s breach in the exact manner established by the Sub-contract. **EX 5**. Extra work was to be paid based on **“a time and material basis providing a mark-up of fifteen (15%) percent.”** Id. at ¶9 (emphasis added). Similar provisions have been recognized as permitting a contractor to recover its costs plus profit. See Com. Dept. of Trans. v. Trumbull Corp., 513 A.2d 1110 (1986).

During trial, Coastal submitted evidence that Stellar J breached its contracts by failing to provide payment and causing extra work and delays. Supra. Coastal also presented evidence of

the damages that were caused by Stellar J's breaches and the extra work. The evidence of damages for the extra work was presented in the format the parties agreed to in their Subcontract – "*time and material*". 1/6/10 RP p. 142-144. Thus, this was not a Quantum Meruit case where Coastal was awarded reasonable values. Instead, the damages awarded by the Jury were damages for Stellar J's breaches of contract. CP 2310-2312. Stellar J's attempt to argue that a "*total cost claims*" are always in "*quantum meruit*" is incorrect. The cases it cites were ones where the party sought quantum meruit. See e.g. Young v. Young, 164 Wn.2d 477, 485 (2008)(Quiet title action where plaintiff sought quantum meruit). Here, the jury decided and awarded breach of contract damages not quantum meruit. As a result, the Jury's Verdict should be upheld.

b. Stellar J's "Total Cost Argument" was properly rejected by the Court and the Jury.

Stellar J also repeatedly and incorrectly refers to Coastal's evidence of damages as a "Total Cost Claim". However, a review of the evidence confirms that, at worst, Coastal presented a modified total cost claim which not only complied with the terms of the Subcontract ("*time and material providing a markup of Fifteen (15%)*")

Percent”), but is also permitted under Washington law. **EX 5.** Indeed, the Washington Supreme Court has held that the modified total cost method is an appropriate measure of damages. Seattle Western Industries, Inc. v. The David A. Mowat Company, et al, 110 Wn.2d 1, 6 (1988) citing Nebraska Pub. Power Dist. v. Austin Power, Inc., 773 F.2d 960, 966 (8th Cir. 1985).

Once the Trial Court determines there is sufficient evidence to create a question of fact with regard to whether the requirements for a modified total cost claim have been met, the issue is “*properly submitted to the jury as the trier of fact.*” Nebraska Public Power, 773 F.2d at 968 (Nebraska Public Power was cited as authority in Seattle Western Industries). See also McKie v. Huntley, 620 N.W. 2d 599, 605 (2000)(whether the claim is sufficient is a question for the Jury). That is precisely what happened in this case. Without objection, the Jury was instructed on the requirements for a modified Total Cost Claim and resolved any question of fact in Coastal’s favor. CP 2507; CP 2310-2312.

Yet, Stellar J insists on misstating the evidence the Jury considered. It simply is not accurate for Stellar J to claim “*Mr.*

Castorina's testimony was the only basis....[he] did not testify to the reasonableness of Coastal's total cost claim...". Stellar J's Brief, p. 19. Indeed, both Mr. Castorina and Mr. Hewitt provided evidence establishing the required foundation creating an issue of fact for the Jury to decide with regard to a modified total cost claim. For example:

- Evidence was presented of substantial changes outside the contracts. **EXS. 23; 27; 41; 60; 64; 110; 198; 244 and 249;** 1/6/10 RP p. 136.
- Mr. Hewitt testified the costs were reasonable. 1/5/10 RP p. 136.
- Mr. Castorina testified that he analyzed whether the original bid was reasonable. 1/6/10 RP p. 137-139.
- Mr. Castorina also reduced the amount for items charged to Coastal (1/6/10 RP p. 128, ll. 4-25) and considered whether other issues raised by Stellar J were Coastal's fault. 1/6/10 RP p. 140.

In addition to the cases cited above, numerous other Courts have upheld jury verdicts based on similar evidence. See e.g. K&K Recycling, Inc. v. Alaska Gold Company, 80 P.3d 702, 723 (2003)(like Coastal, the Court pointed out that "*K&K offered summaries, exhibits, and testimony concerning delays and costs, and it offered testimony about Seuffert's actions and their ramifications.*

Thus, K&K's damages claim cannot be dismissed as a mere total cost case."); Servidone Const. Corp. v. U.S., 931 F.2d 860, 862 (Fed. Cir. 1991); Metro. Atlanta Trans. Rapid Trans. Auth. v. Green Intern. Inc., 235 Ga. App. 419, 421 (1998); Amp-Rite Elec. Co., Inc. v. Wheaton Sanitary Dist., 580 N.E. 2d 622 (2d Dist. 1991)(An electrical contractor demonstrated the reasonableness of its bid and the use of a modified total cost method was approved); and Evergreen Pipeline v. Merritt-Meridian Const. Corp., 890 F. Supp. 1213 (S.D.N.Y. 1995), judgment aff'd in part, vacated in part on other grounds, 93 F.3d 153 (2d Cir. 1996).

Furthermore, in Transpower v. Grand River Dam Authority, 905 F.2d 1413, 1417 (10th Cir. 1990), the court refused to overturn a jury's verdict where the defendant did not produce any "*claim-by-claim calculations*". Likewise, Stellar J merely complains about the proof presented by Plaintiff while failing to present any evidence of "*claim-by-claim*" calculations or that such calculations were even possible. Id. Coastal properly laid the foundation by presenting evidence of the damages caused by and suffered as a result of Stellar

J's breaches of contract. Stellar J presented its arguments on the disputed to the Jury and they were rejected. 1/15/10 RP p. 41-45.

2. The "Fraud" Claims were Properly Dismissed.

a. The Economic Loss Rule Barred The Claims.

The Washington Supreme Court recently clarified how the economic loss rule applies in Washington. Eastwood v. Horse Harbor Foundation, Inc., Slip Opinion, filed November 4, 2010 and attached hereto as **Appendix A**. In order for a tort claim to proceed, there must be some duty that arises independent of a contractual agreement. Eastwood, at p. 2. In this case, no such duty existed between Hewitt and Thomas on the one hand, and Stellar J on the other. The "*representations*" relied upon by Stellar J were contained in contractual Lien Releases. See EX 6 – attached form for Statement of Payment and Lien Release. As a result, the "*duty*" that Stellar J claims was breached arose solely from the contractual lien releases. Of course, the Jury found that Coastal did not breach its agreements. CP 2310-2312. Since there was a contractual relationship – the contractual Lien Releases Stellar J had Hewitt and Thomas sign – which afforded remedies to Stellar J in the event of

breach, Stellar J was limited to contract remedies and its tort claims were barred by the economic loss rule. Therefore, the Trial Court correctly ruled.

b. Stellar J Failed To Present Evidence Supporting The Elements of Fraud.

A trial court's decision may be affirmed on any ground as long as the record is sufficient to permit consideration of the issue. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781 (2009) fn. 21; East Wind Exp., Inc. v. Airborne Freight Corp., 95 Wn.App. 98 (1999). Here, dismissal was also proper because Stellar J failed to present evidence at trial supporting its fraud claims. Fraud requires clear, cogent and convincing evidence of nine elements including falsity of the representation and resulting damages. Stiley v. Block, 130 Wn.2d 486 (1996). The fraud claims were a strategic tool to try to scare Coastal into submission. However, evidence supporting the claims was never submitted. Contrary to Stellar J's assertions, the Trial Court did not find sufficient evidence to support Stellar J's fraud claims, nor did it "*conclude that the facts and circumstances supported Stellar J's third-party complaint against Hewitt and*

*Thomas for fraud.*⁵ Rather, the Trial Court, speaking of Stellar J's claims, stated "*I'm not all that impressed with the proof in this case.*" 1/13/10 (pm) RP p. 57, l. 14.

Here, no evidence was presented indicating the statements in the lien releases were false or that Stellar J suffered any actual damages. The Lien Releases stated that payment would be made "*from funds to be received from this payment*". **EX 6.** Stellar J did not make a complete payment and the only evidence was the funds paid were used to pay suppliers. Therefore, the statement was not false. 1/5/10 RP p. 161-167. Furthermore, in order to recover actual damages, a party has the burden of proving that the party incurred "*economic damages*". CP 2504-05. Economic damages are defined as "*objectively verifiable monetary losses*" and "*monetary losses that are reasonably capable of being verified.*" WPI 30.01.02 Comments. Here, Stellar J failed to present any evidence of actual economic damages. 1/13/10 RP p. 43-44. As a result, evidence supporting the Fraud claim did not exist.

⁵ Stellar J's Brief, page 24.

3. As a Public Project Surety, Judgment was Properly Entered Against Travelers.

A surety's liability is governed by RCW 39.08 and the language of the surety agreement. Colorado Structures, Inc. v. Insurance Company of the West, 161 Wn.2d 577, 593 (2007). The bond here, and statute, obligated Travelers to pay for any work and any materials provided to the project. CP 2316-18. Stellar J was contractually obligated to pay Coastal for the labor and materials Coastal provided and which the Jury awarded. **EXs. 5 and 6.** Travelers' liability was co-extensive with that of Stellar J. Colorado Structures, 161 Wn.2d at 593; CP 2418-2422.

Travelers focuses on a discussion of whether or not Coastal's damages are liquidated which, as explained below, they are, while ignoring the language of the bond and whether the Jury's award was for labor and materials. Whether "liquidated" or not, by contract, Travelers bound itself to provide payment for labor and materials provided to the project. CP 2316-2318.

Attempting to avoid liability, Travelers incorrectly argues Beardmore Heavy Hauling v. Morin, 71 Wn.2d 273 (1967). However, the subcontractor there was not seeking and was not

awarded damages for additional materials or labor it provided to the project.

This cause of action, being one for damages occasioned by the primary contractor's delay in preparing the site and not for any failure or refusal to pay for the materials furnished and work performed, was not the kind of claim contemplated by or included within RCW 39.08.030.

Id. at 275. Unlike Beardmore, this case is the exact type of action contemplated by RCW 39.08.030. Coastal's damages were proven based on materials and labor actually provided to the project and which Stellar J failed and refused to pay. 1/6/10, RP, p. 139-144. Coastal identified for the Jury that the unpaid invoices and additional labor and materials provided, which Stellar J was contractually obligated to pay, exceeded \$300,000. 1/6/10 RP, p. 142-44.

Ignoring the terms of the contracts it entered into agreeing to pay for extra work, Stellar J also erroneously relies on Modern Builders, Inc. of Tacoma v. Manke, 27 Wn.App. 86, 93-94 (1980). In Modern Builders, the trial court's decision to award damages under a theory of quantum meruit was reversed because an express contract existed which was sufficient to compensate the plaintiff for the damages suffered. Modern Builders, 27 Wn.App. at 94.

However, that holding does not apply to this case where the Jury found and awarded Coastal contract damages. CP 2310-2312. Accordingly, the Trial Court properly found Travelers liable for the damages awarded as required by Washington law.

4. The Award of Pre-Judgment Interest Was Proper.

Prejudgment interest is allowed on unliquidated claims if there is a fixed standard contained in a contract.

(1) When an amount claimed is 'liquidated' or (2) when the amount of an 'unliquidated' claim is for an amount due on a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.

CKP, Inc. v. GRS Constr. Co., 63 Wn.App. 601, 614 (1991), rev. denied, 120 Wn.2d 1010 (1992) quoting, Prier v. Refrigeration Eng.'r Co., 74 Wn.2d 25, 32 (1968). In this case “*the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion*” Prier v. Refrigeration Eng.'r Co., 74 Wn.2d at 32. Coastal’s damages were for “*an amount due on a specific contract for the payment of money and the amount due is determinable by computation with reference*

to a fixed standard contained in the contract.” CKP, Inc., 63 Wn.App. at 614. Stellar J’s arguments to the jury that a different or lesser amount was owed does not change this fact.

The fact that the parties disputed the amount owed does not affect this result. Mere difference of opinion as to the amount is . . . no more a reason to excuse [a party] from interest than difference of opinion whether he legally ought to pay at all, which has never been held an excuse.

Taylor v. Shigaki, 84 Wn.App. 723, 732, 930 P.2d 340 (1997).

Thus, the fact the jury may have believed some of Stellar J’s evidence and reduced the amount requested does not mean Coastal should be deprived of prejudgment interest. CP 2310-2312.

Furthermore, even if the amount awarded includes unliquidated sums, it is appropriate to award prejudgment interest on those liquidated sums which have not been paid. See Weyerhauser v. Comm'l Union Ins., 142 Wn.2d 654, 685, 15 P.3d 115 (2000). Here, the original contract balances owed were liquidated. **EXs. 217 and 228.**

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5. Oregon Law Was Properly Applied To Any Conflict Of Law Arising From the Subcontract.

a. Stellar J Did Not Assign Error To The Instructions Given.

Stellar J assigned error to the Trial Court's pretrial ruling denying Stellar J's motion "*voiding the Oregon law provision of the parties' contract.*" 1/4/10 RP p. 10, ll. 16-21⁶. As an initial matter, this issue is not properly before this Court. First, Stellar J failed to assign error to any of the jury instructions given in this case. RAP 10.3(g). "*Instructions to which no exceptions are taken become the law of the case.*" Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 917 (2001). Second, Stellar J did not object to the only Jury Instruction arguably based on the conflict of law between Oregon and Washington law. CP 2502. Failure to object to jury instructions waives an objection to that instruction on appeal. Peterson v. Littlejohn, 56 Wn.App. 1, 11 (1989). As a result, it has waived the argument it now makes.

Third, the Jury determined that Coastal complied with all contractual notice requirements. CP 2310. Therefore, the distinction between Oregon law and Washington law relating to

⁶ Ironically, Stellar J was asking to void a provision in the contract it drafted.

actual notice is meaningless since the Jury found Coastal complied with the contract. Finally, as explained below, the Trial Court properly applied the conflict of law analysis.

b. Stellar J's Motion Was Properly Denied.

Washington courts only “void” choice-of-law provisions in limited circumstances. Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 694 (2007). Before engaging in a conflict of laws analysis, it must be established that an actual conflict exists between the laws of Washington and the laws of another state. Id. at 692. Washington and Oregon law appeared to conflict on the issue of what type of notice of contractual claims were required. 1/4/10 RP p. 19-20.

Where the parties have made an express contractual choice of law, Washington has adopted Section 187 of the Restatement. Id. at 694.

The parties, generally speaking, have power to determine the terms of their contractual engagements. They may spell out these terms in the contract. In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law. In such instances, the forum will apply the applicable provisions of the law of the designated state in order to effectuate the intentions of the parties. So much has never been doubted.

Restatement § 187 cmt. c.

The issue of what notice is required is an issue that relates to the construction of the contract, i.e. whether actual notice of extra work is sufficient. Thus, the issue bears on an excuse for nonperformance. As to these matters, Section 187 of the Restatement instructs that the provisions of the chosen law apply. Stellar J chose the law of Oregon for the contract it drafted. **EX 5.**

Stellar J again relies on inapplicable authority. Byrne v. Cooper, 11 Wn.App. 549 (1974) provides the specific pleading requirements for pleading the laws of a foreign country, not the law of another United States jurisdiction. CR 9(k)(1) applies relative to the law of another state. Coastal complied by alleging the Subcontract “*provided[d] for the application of Oregon law to disputes arising out of the contract.*” CP 606.

c. Stellar J’s “Waiver” Argument Is Meritless.

Choice-of-law is only waived if it is raised for the first time in post-trial proceedings or at the appellate level. See Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986). Coastal timely pled the Subcontract’s provision for Oregon law and raised it in its

trial brief. CP 604-612; 1984-1985. As the Trial Court recognized, Stellar J's motion for partial summary judgment on the Purchase Order did not raise the issue of whether Oregon law applied. 1/4/10 RP p. 21, ll. 5-20 (*"This specific issue wasn't previously litigated"*). As a result, the Trial Court properly found there was no waiver.

d. Even if There Were Error It Was Harmless.

Even under Washington's law regarding the contractual notice requirements, the outcome in this case would not have changed. The jury was specifically asked "*did Coastal Construction follow all required contractual and statutory requirements, including the proper change order procedure, to maintain the claims it asserted against Stellar J Corporation?*" CP 2310. The Jury's response was "*Yes.*" Id. Thus, the Jury determined that Coastal satisfied all contractually required notice requirements to maintain its claims - a decision which Stellar J has not appealed. See Assignments of Error. As a result, under Washington law the outcome is the same.

6. Washington's Post-Judgment Interest Rate Applies To The Judgment

A forum state generally applies its own procedural law even if other law governs the substantive issues in the case. Smith v. American Mail Line, Ltd., 58 Wn.2d 361, 366 (1961). Thus, Washington law applies to issues like venue, proper parties, service of process, pleadings, trial by jury, manner and notice of proof of foreign law, enforcement of judgments, and procedural matters. 15 KARL B. TEGLAND, WASH. PRAC. § 54:3.; see e.g. In the Matter of the Marriage of Ulm, 39 Wn.App. 342, 345 (1984). Post-judgment interest (RCW 4.56.110) is a purely procedural issue.

Stellar J's cases do not apply here. In Paul v. All Alaskan Seafoods, Inc., 106 Wn.App. 406, 428-29, the issue was whether Admiralty law or Washington law would apply with regard to prejudgment interest. In Jackson v. Fenix Underground, Inc., 142 Wn.App. 141, 146-47, the court merely stated that contracting parties may agree to a different interest rate. No such specific provision exists here. The Court's decision to apply Washington's post-judgment interest rate should be affirmed.

7. Coastal's Award Of Attorney Fees Stellar J Caused To Be Incurred Was Proper.

Stellar J offers no meaningful argument disputing the propriety or amount of the award of attorney fees and costs to the prevailing party, Coastal.

V. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

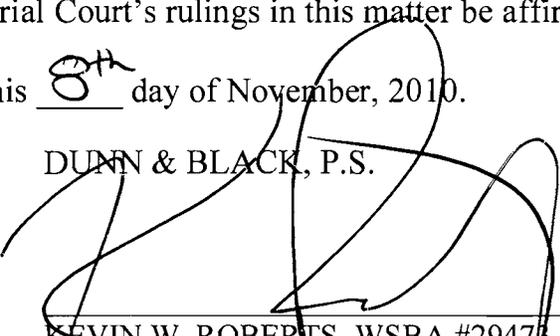
Respondents respectfully requests an award of the reasonable attorney fees and costs incurred based on RAP 18.1, RCW 39.08.03; RCW 39.04.250; RCW 60.28.030, and the contracts at issue.

VI. CONCLUSION

Pursuant to the foregoing, Coastal Construction Group, Inc. James C. Hewitt and Tarina Thomas respectfully request the Jury's Verdict and the Trial Court's rulings in this matter be affirmed.

DATED this 8th day of November, 2010.

DUNN & BLACK, P.S.



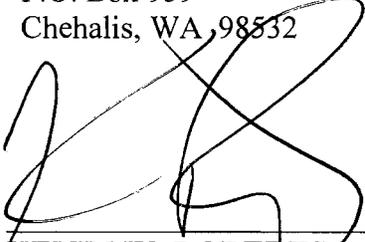
KEVIN W. ROBERTS, WSBA #29475
WESLEY D. MORTENSEN, WSBA #39690
Attorneys for Respondent Coastal Construction Group, Inc.; James Hewitt and Tarina Thomas

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of November, 2010, I caused to be served a true and correct copy of the foregoing document to the following:

<input type="checkbox"/>	HAND DELIVERY	Albert F. Schlotfeldt
<input checked="" type="checkbox"/>	U.S. MAIL	Mark Wheeler
<input type="checkbox"/>	OVERNIGHT MAIL	Shawn Elpel
<input type="checkbox"/>	FAX TRANSMISSION	Duggan Schlotfeldt & Welch, PLLC
<input checked="" type="checkbox"/>	EMAIL	900 Washington Street, Suite 1020 P.O. Box 570 Vancouver, WA 98666

<input type="checkbox"/>	HAND DELIVERY	William T. Hillier
<input checked="" type="checkbox"/>	U.S. MAIL	Hillier, Scheibmeir, Vey & Kelly, P.S.
<input type="checkbox"/>	OVERNIGHT MAIL	299 N.W. Center St.
<input type="checkbox"/>	FAX TRANSMISSION	P.O. Box 939
<input type="checkbox"/>	EMAIL	Chehalis, WA, 98532



KEVIN W. ROBERTS

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STATE OF WASHINGTON
BY _____ DEPUTY
COURT CLERK
DIVISION II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LINDA EASTWOOD, dba DOUBLE KK)
FARM,)

Petitioner,)

No. 81977-7

v.)

HORSE HARBOR FOUNDATION, INC.,)
a Washington corporation; MAURICE)
ALLEN WARREN, a single person; and)
KATHERINE DALING and MICHAEL)
DALING, a husband and wife, and the)
marital community composed thereof,)

EN BANC

Filed November 4, 2010

Respondents.)

FAIRHURST, J. — Since the 1800s, lessors of real property in Washington have been able to recover damages for the tort of waste. In this case, however, the Court of Appeals interpreted our jurisprudence on the economic loss rule and concluded that lessor Linda Eastwood was limited to contractual remedies for the

damage done to her horse farm by lessee Horse Harbor Foundation, Inc. *See Eastwood v. Horse Harbor Found., Inc.*, noted at 144 Wn. App. 1009, 2008 WL 1801332. The Court of Appeals also held that Horse Harbor's employee and board directors could not be individually liable for breach of contract. We reverse. The availability of a tort remedy depends on the existence of a tort duty arising independently of a contract's privately negotiated terms, not on whether an injury can be labeled an economic loss. Because the duty to not cause waste is a tort duty independent from a lease's covenants, Eastwood had a cause of action for waste, and the trial court properly concluded she may recover tort damages from Horse Harbor's employee and two of its board directors.

I. FACTUAL AND PROCEDURAL HISTORY

Eastwood owns the Double KK Farm horse farm in Poulsbo, Washington. Horse Harbor, a nonprofit organization incorporated in 1997 under the Washington Nonprofit Corporation Act, chapter 24.03 RCW, cares for abused and abandoned horses. Maurice Allen Warren is Horse Harbor's paid manager, and Katherine and Michael Daling were two of Horse Harbor's corporate directors.

Eastwood and Horse Harbor entered into a lease for a portion of the Double KK, with covenants obligating Horse Harbor to maintain the farm and to return it to Eastwood in good condition. Eastwood accepted a rental rate below fair market

value in exchange for Horse Harbor's pledge to maintain the property. But "there was a broad, persistent, and systemic failure" to maintain the leasehold, according to the trial court. Clerk's Papers (CP) at 131. After moving 15 to 16 horses to the farm, Horse Harbor permitted manure and urine to accumulate, and the Kitsap County Health District cited Horse Harbor for unlawful burning of solid waste and improper management of horse manure. Horse Harbor also failed to keep the farm and its improvements properly drained, resulting in pools of standing water and accumulating mud. Other maintenance problems included broken fencing, a damaged riding arena floor, and the horses chewing wood surfaces.

Members of Horse Harbor's board of directors, including the Dalings, had the opportunity to observe the farm's condition. The board received written complaints and a video from Eastwood documenting maintenance issues. The Dalings visited the Double KK frequently. At one point, the board took a walking tour of the Double KK and then met to discuss the growing dispute and the legal ramifications. At the meeting, six people were present, including Warren and the Dalings. The board took no action.

Eastwood sued for breach of lease, the commission of waste, and negligent breach of a duty to not cause physical damage to the leasehold. She named Horse Harbor, Warren, and the Dalings as defendants. Following a bench trial, the trial

court found Horse Harbor committed waste and breached the lease covenant to maintain the leasehold. The court found Warren and the Dalings were grossly negligent and therefore individually liable for the damage they proximately caused. At no point did the court or the parties raise the economic loss rule.

On appeal, Horse Harbor, Warren, and the Dalings argued that the trial court erred by finding that their conduct rose to the level of gross negligence. They retried the case, rehashing the trial testimony and exhibits. They also argued that Horse Harbor's corporate form protected Warren and the Dalings from being held individually liable. At no point did they cite the economic loss rule.

The Court of Appeals did not address Eastwood's claim for waste or cite the waste statute, RCW 64.12.020, which gives a lessor a right of action for damages if the lessee commits waste. *See Eastwood*, 2008 WL 1801332. On its own motion and without argument, the court cited *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007), our most recent case discussing the economic loss rule, a doctrine that has attempted to describe the dividing line between the law of torts and the law of contracts.

The Court of Appeals characterized Eastwood's claims as economic losses because they "result[ed] from [Horse Harbor's] actions that led to damages and breach of the lease agreement." *Eastwood*, 2008 WL 1801332, at *2. Based on

these circumstances, the court held the economic loss rule applied and limited Eastwood to recovery only for breach of lease, and Warren and the Dalings could not be individually liable for the damages. *Id.* at *2-*3. The Court of Appeals denied Eastwood's motion for reconsideration.

We granted Eastwood's petition for review. *Eastwood v. Horse Harbor Found., Inc.*, 165 Wn.2d 1016, 199 P.3d 411 (2009).¹

II. ISSUES

- A. When a lessee breaches a lease covenant requiring the lessee to repair and maintain the leased property, is the lessor limited to contract remedies, or may the lessor also recover for the tort of waste?
- B. Are employees of a lessee liable for the waste they cause?
- C. Does RCW 4.24.264 insulate the directors of a lessee nonprofit corporation from liability for permitting waste that rises to the level of gross negligence?
- D. Is Eastwood entitled to attorney fees?

III. ANALYSIS

- A. When a lessee breaches a lease covenant requiring the lessee to repair and maintain the leased property, is the lessor limited to contract remedies, or may the lessor also recover for the tort of waste?

“Waste is a tort.” William Woodfall, *The Law of Landlord and Tenant* 469

¹Horse Harbor did not appear before us. But Warren and the Dalings did, arguing in favor of affirming the Court of Appeals.

(6th ed. 1822). Arising in the context of a lease for real property, waste is a breach of the lessee's duty to avoid "an unreasonable and improper use" of the leasehold and "to treat the premises in such a manner that no harm be done to them, and that the estate may revert to those having the reversionary interest, without material deterioration." *Moore v. Twin City Ice & Cold Storage Co.*, 92 Wash. 608, 611, 159 P. 779 (1916). Only damage rising to the level of "substantial injury" is considered waste. *Id.* A lessor thus has a right to the reversionary interest in the property remaining free from substantial material injury. Rights and remedies go together, and a statutory remedy for waste has been available to lessors in Washington since the first territorial assembly enacted one in 1854. *See* Laws of 1854, XLIV, § 403. The current landlord-tenant waste statute, RCW 64.12.020, provides, "If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages."

A lease is a contract as well as a conveyance of a property interest, and the tort law duty to not cause waste is usually supplemented by a lease covenant allocating responsibility for repairs between the lessor and the lessee. *See* 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 6.39, at 367 (2d ed. 2004) ("A well drafted lease will make

provision for repairs, creating a contractual duty for either the landlord or tenant to make repairs or apportioning repair duties between the parties.”). When a lessee breaches such lease provisions and consequently harms the property, the issue is whether the lessor’s injury is only an economic loss remediable under the law of contracts or whether it is also the tort of “waste” within the meaning of RCW 64.12.020. Stated another way, can a breach of lease simultaneously be a breach of a tort duty that arises independently of the lease’s terms? We hold it can because an independent tort duty can overlap with a contractual obligation.

1. *The “economic loss rule”*

In reaching the opposite conclusion, the Court of Appeals picked several statements from *Alejandre* to support its analysis. *Alejandre* defined an economic loss as an injury in a contractual relationship “where the parties could or should have allocated the risk of loss, or had the opportunity to do so.” 159 Wn.2d at 687. The lease between Eastwood and Horse Harbor actually allocated the risk of the property falling into disrepair, as the lease assigned most responsibilities for maintenance to Horse Harbor. The Court of Appeals thought the breach of this contractual arrangement was therefore an economic loss under *Alejandre*. The court also noted the statements from *Alejandre* that “the purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship

exists and the losses are economic losses,” and “[i]f the economic loss rule applies, the party will be held to contract remedies, regardless of how the plaintiff characterizes the claims.” *Id.* at 683. Seeing both a contractual relationship and an economic loss, the Court of Appeals believed that *Alejandre* therefore compelled a holding that Eastwood’s only remedy was a recovery for breach of lease. *Eastwood*, 2008 WL 1801332, at *2. The Court of Appeals’ broad reading of this court’s jurisprudence on the economic loss rule, while perhaps understandable, is not correct.

The term “economic loss rule” has proved to be a misnomer. It gives the impression that this is a rule of general application and any time there is an economic loss, there can never be recovery in tort. This impression is too broad for two reasons. First, it pulls too many types of injuries into its orbit. When a contractual relationship exists between the parties, any harm arising from that relationship can be deemed an economic loss for which the law of tort never provides a remedy. Further, any injury that can be monetized can be thought of as an economic loss presumptively excludable under the rule because the legislature has defined “[e]conomic damages” as “objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of

employment, and loss of business or employment opportunities.” RCW 4.56.250(1)(a).

Second, and most importantly, the broad application of the economic loss rule does not accord with our cases. Economic losses are sometimes recoverable in tort, even if they arise from contractual relationships. For instance, we recognize the torts of intentional and wrongful interference with another’s contractual relations or business expectancies, *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314, 322 (1992); wrongful discharge in violation of public policy, *Smith v. Bates Technical College*, 139 Wn.2d 793, 803-04, 991 P.2d 1135 (2000); failure of an insurer to act in good faith, *American States Insurance Co. v. Symes of Silverdale, Inc.*, 150 Wn.2d 462, 469, 78 P.3d 1266 (2003); fraudulent concealment, *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960); fraudulent misrepresentation, *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969); negligent misrepresentation, *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 825, 959 P.2d 651 (1998); breach of an agent’s fiduciary duty to act in good faith, *Moon v. Phipps*, 67 Wn.2d 948, 956, 411 P.2d 157 (1966); and negligent real estate appraisal, *Schaaf v. Highfield*, 127 Wn.2d 17, 27, 896 P.2d 665 (1995). “We will not overrule such binding precedent sub silentio.” *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049, 1056 (1999). Thus, the fact that an

injury is an economic loss or the parties also have a contractual relationship is not an adequate ground, by itself, for holding that a plaintiff is limited to contract remedies.

2. *The rule is merely a case-by-case question of whether there is an independent tort duty*

The question is how a court can distinguish between claims where a plaintiff is limited to contract remedies and cases where recovery in tort may be available. A review of our cases on the economic loss rule shows that ordinary tort principles have always resolved this question. An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. The court determines whether there is an independent tort duty of care, and “[t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.” *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation marks omitted) (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994)); see also *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, No. 82738-9, at 7-8 (Wash. Nov. 4, 2010). Where this court has stated that the economic loss rule applies, what we have meant is that considerations of common sense, justice, policy, and precedent in a particular set of circumstances led us to the legal

conclusion that the defendant did not owe a duty. When no independent tort duty exists, tort does not provide a remedy.

For example, *Alejandre v. Bull* involved a real estate sales contract, and the Alejandres (buyers) complained that Bull (seller) failed to tell them about a defect in the home's septic tank. 159 Wn.2d at 677. The Alejandres sued for negligent misrepresentation, and so the issue was whether Bull owed them a "duty of care under the *Restatement (Second) of Torts* § 552 (1977)," which is the duty to use ordinary care in obtaining or communicating information during a transaction. 159 Wn.2d at 686.

Although we couched our analysis in terms of looking for an "exception" to the economic loss rule, the core issue was whether Bull, as the home seller, was under a tort duty independent of the contract's terms. The contract between Bull and the Alejandres contained ample disclosures about the home, the Alejandres agreed that "[a]ll inspection(s) must be satisfactory to the Buyer, in the Buyer's sole discretion," *id.* at 678 (alteration in original) (quoting ex. 4), the Alejandres acknowledged "their duty to 'pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation,'" *id.* at 679 (quoting ex. 5), and the Alejandres had their own inspection done. With significant information communicated about the home in the

course of contractual negotiations, Bull had no independent tort duty to obtain or communicate even more information during a transaction. The contract sufficed, and the Alejandres' negligent misrepresentation claim did not survive. We recognized, however, that Bull's independent duty to not commit fraud persisted, and we would have allowed the Alejandres to sue for fraudulent concealment if they had offered enough evidence to support that tort claim. *Id.* at 689-90.

In *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 819-20, 881 P.2d 986 (1994), the general contractor for a school construction project sued the architect, structural engineering company, and construction inspector for negligence. As a result of the defendants' inadequate design plans and faulty inspection work, the contractor claimed that it spent more money than expected and also endured delays in construction, with \$3.8 million in losses. *Id.* at 819. The contractor conceded these were economic losses. *Id.* But we did not automatically dismiss the contractor's claims. Rather, we carefully weighed the public policy considerations to decide whether the defendants owed an independent tort duty to avoid the contractor's risk of economic loss. *See id.* at 826-28. We held that the general contractor could not sue in tort to recover damages for lost profits. *Id.* at 826. The contractor's losses were the increased costs of doing business. We reasoned, as a policy matter, that if design professionals were under a

tort duty to avoid a risk of increased business costs, the construction industry could not rely on the risk allocations in their contracts and would have an insufficient incentive to negotiate risk. The case might have been different if a structure had collapsed.

In *Atherton Condominium Apartment-Owners Ass'n Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990), plaintiff condominium owners claimed fraudulent concealment, negligent construction, and negligent design. Fraudulent concealment in a real estate transaction is a cause of action that has long been recognized in Washington. *Perkins v. Marsh*, 179 Wash. 362, 367-68, 37 P.2d 689 (1934). Independent of the obligations in a lease or a residential real estate sales contract, the vendor or lessor has an affirmative duty to “disclose material facts,” of which the vendor or seller has knowledge, and which are “not readily observable upon reasonable inspection by the purchaser” or lessee. *Hughes v. Stusser*, 68 Wn.2d 707, 711, 415 P.2d 89 (1966); *see also Obde*, 56 Wn.2d at 452. Thus, it is a well-rooted tort duty that arises independently of the contract, and we recognized in *Atherton* that the plaintiffs could pursue their fraud claim. 115 Wn.2d at 525-26.² As for the plaintiffs’ claim of negligent construction,

²This is the same affirmative duty to disclose material facts, of which the seller has knowledge, that would have been the basis for the Alejandres’ fraud claim in *Alejandre* had they offered enough evidence. This is a slightly different, though potentially overlapping, duty from the duty of ordinary care that can be the basis for a negligent misrepresentation claim.

however, we held they could not recover, because the defendant builder did not owe an independent tort duty to avoid defects in construction quality. *Id.* at 526. Similarly, we rejected the plaintiffs' claim for negligent design against the architect because they failed to show that the architect "breached any duty of care and that such breach was the proximate cause of the alleged damages." *Id.* at 534 n.17.

In *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987), we decided whether plaintiffs could recover damages in tort for construction defects in a condominium complex. *Id.* We recognized that original purchasers could recover damages from the condominium builder-vendor for breach of an implied warranty of habitability under the law of contracts. *Id.* at 421. But, with an eye toward public policy considerations, we refused to recognize a tort duty to avoid defects in quality, lest builder-vendors "become the guarantors of the complete satisfaction of future purchasers." *Id.* We cautioned, however, that when a court considers whether recovery in tort is permissible, "the determinative factor should not be the items for which damages are sought, such as repair costs." *Id.* at 420. The ultimate question was whether the builder-vendor was under an independent tort duty to avoid the condominium owners' injury, and we concluded not.

The economic loss rule in Washington was heavily influenced by the United

States Supreme Court opinion in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), and that case also rests on the proposition that an injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. In *East River*, the plaintiff ship-chartering companies alleged that the defendant shipbuilder sold them oil supertankers with defective turbines, and they sought to recover under a strict liability theory of tort, with damages for the cost of repairs as well as the revenues lost when the tankers were not working. *Id.* at 861. The defendant argued that the plaintiffs were limited to their contract damages. Under products liability, the manufacturer is strictly liable “where a product ‘reasonably certain to place life and limb in peril,’ distributed without reinspection, causes bodily injury.” *Id.* at 866 (quoting *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050 (1916)). The court noted a manufacturer is liable in tort for product defects “because ‘public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.’” *Id.* (quoting *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P.2d 436 (1944) (Traynor, J., concurring)). “For similar reasons of safety, the manufacturer’s duty of care was broadened to include protection against property damage.” *Id.* at 867. The question

arose “whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, *independent of any contractual obligation.*” *Id.* (emphasis added).

The court deemed the plaintiffs’ loss an economic loss because “the injury suffered--the failure of the product to function properly--is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.” *Id.* at 868.

But the court did not simplistically rest its holding on its finding that the plaintiffs’ losses were economic losses. Although the law of contracts applied, the court also inquired whether there was a tort duty independent of any contractual terms. As a policy matter, the court preferred warranty law’s “built-in limitation on liability” and sought to protect a manufacturer from worrying about “the expectations of persons downstream who may encounter its product.” *Id.* at 874. Based on these considerations, the court “h[eld] that a manufacturer in a commercial relationship has no duty under either a negligence or a strict products-liability theory to prevent a product from injuring itself.” *Id.* at 871.

In sum, the economic loss rule does not bar recovery in tort when the defendant’s alleged misconduct implicates a tort duty that arises independently of the terms of the contract.³ In some circumstances, a plaintiff’s alleged harm is

nothing more than a contractual breach or a difference in the profits, revenue, or costs that the plaintiff had expected from a business enterprise. In other circumstances, however, the harm is simultaneously the result of the defendant breaching an independent and concurrent tort duty. Thus, while the harm can be described as an economic loss, it is more than that: it is an injury remediable in tort.⁴ The test is not simply whether an injury is an economic loss arising from a breach of contract, but rather whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract. The court defines the duty of care and the risks of harm falling within the duty's scope. *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).

Other states use the same approach. *See, e.g., Tommy L. Griffith Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85, 88 (1995) (“A breach of a duty arising independently of any contract duties between

³Of course, we do not disturb “[t]he general rule . . . that a party to a contract can limit liability for damages resulting from negligence.” *Am. Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 230, 797 P.2d 477 (1990). “Exculpatory clauses are strictly construed and must be clear if the exemption from liability is to be enforced.” *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992). An “inconspicuous” exculpatory clause is unenforceable. *Id.* at 492.

⁴Conceiving of harm as potentially both an economic loss resulting from a contract breach and an injury resulting from a tort is akin to concluding, for example, that a citizen's injury is the result of the government's breaching both a statutory obligation and a constitutional provision. When a court says, “the economic loss rule applies,” the court is simply articulating a conclusion that, in a particular set of circumstances, the law of contracts is the only source of a defendant's obligations and no tort duty exists.

the parties . . . may support a tort action.”); *Congregation of Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill. 2d 137, 636 N.E.2d 503, 514, 201 Ill. Dec. 71 (1994) (“Where a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the negligent breach of that duty.”); *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 551, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992) (“A legal duty independent of contractual obligations may be imposed by law as an incident to the parties’ relationship.”). In fact, we agree with the Supreme Court of Colorado’s belief “that a more accurate designation of what is commonly termed the ‘economic loss rule’ would be the ‘independent duty rule.’” *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1262 n.8 (Col. 2000).

Although we find clarity in thinking of the problem in terms of an independent duty, we see potential difficulty, when a defendant has obligations under both the contract terms and an independent tort duty, in distinguishing between a harm that implicates only the contract and a harm that implicates the independent duty as well. It is a factual question of proximate causation. As a matter of law, the court defines the duty of care and the risks of harm falling within the duty’s scope. *Sheikh*, 156 Wn.2d at 448. As a matter of fact, the jury decides whether the plaintiff’s injury was within the scope of the risks of harm, which the court has held the defendant owed a duty of care to avoid. *Rikstad v. Holmberg*, 76 Wn.2d 265, 270, 456 P.2d 355

(1969).

In deciding whether a reasonable juror could find causation, an analytical tool that a court can use is the risk-of-harm approach utilized in *Stuart* and our product liability cases. In *Stuart*, we concluded that a condominium builder did not owe a duty to avoid a risk of economic loss, which we defined as a mere defect in the bargained-for quality. 109 Wn.2d at 420. But we implied that the builder had an independent duty to avoid unreasonable risks of harm to persons and other property. *Id.* at 420-21. To decide whether the plaintiffs' injury fell outside the scope of risks covered by the tort duty, we analyzed "interrelated factors such as [1] the nature of the defect, [2] the type of risk, and [3] the manner in which the injury arose." *Id.* at 421. Applying this risk-of-harm test, we concluded, "The nature of the defect here was that the decks and walkways were not of the quality desired by the buyers. The 'injury' or damage suffered was that the decks themselves deteriorated, not through accident or violent occurrence, but through exposure to the weather." *Id.* Thus, there was no factual question whether the injury was caused by a breach of the duty to avoid risks of physical harm to persons or other property.

Under the Washington product liability act (WPLA), chapter 7.72 RCW, a product manufacturer has a tort duty to avoid product designs and construction that are unreasonably dangerous. RCW 7.72.030. But the WPLA's definition of

“[h]arm” excludes “direct or consequential economic loss,” RCW 7.72.010(6), leaving the law of sales contracts as the sole source of a plaintiff’s remedy for economic loss. To differentiate a harm that is an “economic loss” from a harm for which damages are recoverable in tort, the risk-of-harm test determines whether the harm can reasonably be traced back to the tort duty. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 351, 831 P.2d 724 (1992); *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 866, 774 P.2d 1199, 779 P.2d 697 (1989). When a product defect results in a personal injury or damage to other property, the cause can plainly be a breach of the tort duty. When a product defect results in injury only to the product itself, however, the risk of harm must be carefully analyzed. The WPLA tort duties are implicated if a hazardous product exposes a person or property to an unreasonable risk of harm such that the safety interests of the WPLA are implicated. *Touchet Valley*, 119 Wn.2d at 353-54. For example, the sudden collapse of a grain storage building creates “a real, nonspeculative threat to persons and property” and is therefore not a mere economic loss. *Id.* at 353. Thus, the availability of a tort remedy depends on the nature of the risk that created the harm.

3. *The lack of utility in relying only on strict categories to define economic loss*

The alternative to the careful, case-by-case analysis of the independent duty would be a bright-line rule relying strictly on the three categories of injuries we have described before: (1) economic losses, (2) personal injury, and (3) property damage. *See, e.g., Alexandre*, 159 Wn.2d at 684. Although these categories can be helpful, they are derived from product liability cases. They can be confusing when removed from their original context. Further, it can be unclear where economic loss ends and property damage begins, and this case provides a good example of that. Eastwood claims harm to real property. But we have held there was an economic loss in cases where the plaintiff complained of a defective septic tank, *Alexandre*, 159 Wn.2d at 685; a condominium's construction defects, *Atherton*, 115 Wn.2d at 512-13; and deteriorated walkways and decks in a condominium complex, *Stuart*, 109 Wn.2d at 421. All of these involve fixtures and therefore real property.

However, the concurrence written by Chief Justice Madsen argues that a close look at *Alexandre*, *Atherton*, and *Stuart* will reveal the line between economic loss and property damage. The concurrence states that “[i]n these cases, the damages sought were economic—consisting of the costs of repairs to correct the defects and to compensate for additional injury to the property itself caused by the defective conditions.” Concurrence (Madsen, C.J.) at 4 (citation omitted). The Madsen concurrence elaborates on its definition of economic loss as the failure to

“obtain the benefit of the bargain” and observes that in *Alejandre, Atherton*, and *Stuart* “the purchased item failed to meet the buyer’s economic expectations because of the defects.” *Id.*

But it was for these same reasons that the Court of Appeals concluded Eastwood’s losses are nothing more than economic losses. There was a contract in the form of a lease, and several provisions defined Eastwood’s contractual expectations. In the lease, Horse Harbor pledged to “keep and maintain the leased premises and appurtenances in good and sanitary condition and repair during the term of this lease.” Ex. 101, at 2. Eastwood assumed responsibility for “[m]ajor maintenance and repair of the leased premises, not due to Lessee’s misuse, waste, or neglect or that of his employee, family, agent, or visitor.” *Id.* Eastwood was obligated to repair any part of the leasehold “partially damaged by fire or other casualty,” unless the cause was Horse Harbor’s “negligence or willful act.” *Id.* Under the surrender covenant, if Horse Harbor did not exercise a purchase option, Horse Harbor promised to “quit and surrender the premises . . . in as good [a] state and condition as they were at the commencement of this lease, reasonable use and wear thereof and damages by the elements excepted.” *Id.* at 3. These contractual terms indicate Eastwood’s expected benefit of the bargain: Horse Harbor would be responsible for most maintenance, and Eastwood would have the leasehold returned

to her in good condition. In fact, because Horse Harbor promised to maintain the farm at its own expense, Eastwood agreed to a monthly rent amount that was one-third less than the fair market value. The measure of Eastwood's losses was the cost of repairing the horse farm. Because Eastwood failed to obtain the benefit of her contractual bargain with Horse Harbor and because she sought damages in the form of the cost of repairs, Eastwood's injury was an economic loss by the Madsen concurrence's own definition. Its arguments underscore the difficulties of drawing a line between economic loss and property damage and applying product liability categories to new settings.

4. *The duty to not cause waste is a duty that arises independently of the lease covenants*

Having described what we now will call the independent duty doctrine, we next must decide whether the duty to not cause waste arises independently of the contract. An early American authority described the duty to not cause waste as an obligation the tenant owes even if the lease covenants say nothing about the issue: "Independently of any express agreement, the law imposes upon every tenant, whether for life or for years, an obligation to treat the premises in such a manner, that no substantial injury shall be done to them." John N. Taylor, *A Treatise on the American Law of Landlord and Tenant* § 343, at 261 (6th ed. 1873) (emphasis

added). This duty not to cause waste has long been recognized in Washington. See *McLeod v. Ellis*, 2 Wash. 117, 120, 26 P. 76 (1891).

Still, Warren and the Dalings argue that it is novel for a landlord to recover damages under theories of both breach of lease and the tort of waste. But in Washington, we have already allowed a plaintiff landlord to recover under both theories. See, e.g., *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 726 P.2d 8 (1986). In *Fisher Properties*, the lease included a covenant where the lessee promised to, “at its own expense, make and do all repairs of all kinds, both inside and outside the demised premises . . . and keep the same in good order and repair.” *Id.* at 829 (quoting lease at ¶ 8). This same covenant also mentioned waste expressly: “The Lessee agrees that it will not permit or suffer any waste, damage or injury to the said building or premises.” *Id.* (quoting lease at ¶ 8). Still, we permitted the plaintiff lessor to recover for both breach of the lease and waste. *Id.* at 854-55. We hold the duty to not cause waste is a tort duty that arises independently of a lease agreement and an aggrieved lessor may pursue damages concurrently under theories of tort and breach of lease. *Accord Vollertsen v. Lamb*, 302 Or. 489, 508, 732 P.2d 486 (1987). Eastwood thus had a right of action to recover tort damages under RCW 64.12.020.⁵

⁵The concurrence written by Chief Justice Madsen posits that our analysis to this point is unnecessary and that we need not say more than: “the economic loss doctrine cannot be applied to

Because we conclude there existed both a contractual obligation under the lease terms and an independent tort duty, an issue arises whether Eastwood's alleged harm was traceable, as a factual matter, to the independent tort duty. Once the independent duty is held to exist as a matter of law, the connection between the breach and the plaintiff's injury becomes a factual question of proximate cause. After the bench trial in this case, the trial court found that Warren and the Dalings breached their tort duty not to cause waste and that this tortious conduct was the proximate cause of some of the damage to the horse farm. CP at 133 ("This gross negligence resulted in waste and damage to plaintiff's farm and they are liable for the damage it proximately caused."). We think there was ample evidence in the record from which the trial court could reasonably find proximate causation.

bar a statutory cause of action." Concurrence (Madsen, C.J.) at 3. The Madsen concurrence is correct that we cannot use a common law doctrine to abolish a statutory cause of action. But this view accounts for only half of the equation in this case. RCW 64.12.020, by its terms, gives a remedy for waste, not other sorts of injuries. Thus, when a plaintiff brings an action under RCW 64.12.020, an issue is whether the plaintiff's injury is waste within the meaning of the statute. Eastwood claims her damages are for waste, whereas Warren and the Dalings, following the Court of Appeals' analysis, insist that Eastwood's injury is merely an economic loss in the sense that she lost the benefit of a contractual bargain. As in all cases involving the economic loss rule, we cannot resolve these competing claims without looking to the legal duties breached by Horse Harbor, Warren, and the Dalings. Further, RCW 64.12.020 simply provides a right of action for an aggrieved plaintiff. The plaintiff's substantive right, however, is one defined at common law.

B. Are employees of a lessee liable for the waste they cause?

Because Eastwood's claim for waste is not barred, the question arises whether Warren can be individually liable for the waste he caused within the scope of his employment as Horse Harbor's manager. The law is well settled that "an employee who tortiously causes injury to a third person may be held personally liable to that person regardless of whether he or she committed the tort while acting within the scope of employment." 27 Am. Jur. 2d *Employment Relationship* § 409 (2004); accord *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 754, 600 P.2d 1272 (1979) (stating that a principal and an agent "are jointly and severally liable for all damages suffered by a plaintiff who has been injured as a result of the agent's negligence"). The trial court found Warren was liable for his gross negligence in permitting waste, and the independent duty doctrine does not bar Eastwood's claim for waste. Warren may be held individually liable.

C. Does RCW 4.24.264 insulate the directors of a lessee nonprofit corporation from liability for permitting waste that rises to the level of gross negligence?

RCW 4.24.264(1) provides that "a member of the board of directors or an officer of any nonprofit corporation is not individually liable for any discretionary decision or failure to make a discretionary decision within his or her official capacity as director or officer unless the decision or failure to decide constitutes

gross negligence.” The question is whether the actions or omissions of the Dalings, acting as directors of the Horse Harbor nonprofit corporation, “constitute[d] gross negligence” within the meaning of RCW 4.24.264(1).⁶ The Court of Appeals held RCW 4.24.264 is a complete limitation on individual directors’ liability for a nonprofit corporation’s breach of contract, and only torts could meet the “gross negligence” exception. *Eastwood*, 2008 WL 1801332, at *2. According to the Court of Appeals, the trial court erred by holding the Dalings liable, because the trial court made a nonprofit corporate director “individually liable where a breach of contract rose to gross negligence.” *Id.* But the trial court imposed liability on the Dalings only for gross negligence in permitting waste, not for breach of contract:

The degree of neglect, its persistence and visibility, supports a finding that the care exercised by Kay and Michael Daling lack [sic] was substantially and appreciably greater than ordinary negligence. This gross negligence resulted in *waste* and damage to plaintiff’s farm and they are liable for the damage it proximately caused.

CP at 133 (emphasis added). Because gross negligence for a tort falls squarely within the exception enumerated in RCW 4.24.264, the Dalings are individually liable for their gross negligence in permitting waste.⁷

⁶Neither side contends that the Dalings’ actions or omissions were not a “decision or failure to decide” within the meaning of the statute, and so we accept that their actions and omissions fall within the scope of the statute.

⁷Because the Dalings’ liability flows from their gross negligence in permitting waste, a tort, we do not reach the issue of whether a nonprofit corporate director could ever be individually liable for the corporation’s breach of contract.

D. Is Eastwood entitled to attorney fees?

Eastwood seeks attorney fees. The lease agreement provided that Horse Harbor would pay Eastwood reasonable attorney fees if Eastwood were to sue Horse Harbor to enforce her rights. Ex. 101, at 3 (“Lessee shall pay all reasonable attorneys’ fees necessary to enforce Lessor’s rights.”). The waste statute also provides for an award of reasonable attorney fees. RCW 64.12.020. We grant Eastwood’s request. *See* RAP 18.1; RCW 4.84.330; *Boyd v. Davis*, 127 Wn.2d 256, 264-65, 897 P.2d 1239 (1995).

IV. CONCLUSION

An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract. Because the term “economic loss rule” inadequately captures this principle, we adopt the more apt term “independent duty doctrine.” The existence of an independent duty is a question of law for courts to decide. We hold the duty to not cause waste is an obligation that arises independently of the terms of a lease covenant, and sufficient evidence supported the trial court’s findings of a causal connection between Eastwood’s losses and a breach of this independent duty. Thus, the Court of Appeals was mistaken to hold Eastwood could not recover tort damages for waste. Warren is individually liable

for the waste he permitted, even if within the scope of his employment. RCW 4.24.264 does not protect the Dalings from individual liability in this case. We grant Eastwood’s request for attorney fees.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Susan Owens

Justice James M. Johnson

RCW 62A.2-311

Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of RCW 62A.2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1)(c) and (3) of RCW 62A.2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

[1965 ex.s. c 157 § 2-311.]

RCW 39.08.030

**Conditions of bond — Notice of claim —
Action on bond — Attorney's fees.
(Effective until June 30, 2016.)**

(1) The bond mentioned in RCW 39.08.010 shall be in an amount equal to the full contract price agreed to be paid for such work or improvement, except under subsections (2) and (3) of this section, and shall be to the state of Washington, except as otherwise provided in RCW 39.08.100, and except in cases of cities and towns, in which cases such municipalities may by general ordinance fix and determine the amount of such bond and to whom such bond shall run: PROVIDED, The same shall not be for a less amount than twenty-five percent of the contract price of any such improvement, and may designate that the same shall be payable to such city, and not to the state of Washington, and all such persons mentioned in RCW 39.08.010 shall have a right of action in his, her, or their own name or names on such bond for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements: PROVIDED, That such persons shall not have any right of action on such bond for any sum whatever, unless within thirty days from and after the completion of the contract with an acceptance of the work by the affirmative action of the board, council, commission, trustees, officer, or body acting for the state, county or municipality, or other public body, city, town or district, the laborer, mechanic or subcontractor, or material supplier, or person claiming to have supplied materials, provisions or goods for the prosecution of such work, or the making of such improvement, shall present to and file with such board, council, commission, trustees or body acting for the state, county or municipality, or other public body, city, town or district, a notice in writing in substance as follows:

To (here insert the name of the state,
county or municipality or other public body,
city, town or district):

Notice is hereby given that the
undersigned (here insert the name of the
laborer, mechanic or subcontractor, or
material supplier, or person claiming to have
furnished labor, materials or provisions for or
upon such contract or work) has a claim in
the sum of dollars (here insert the
amount) against the bond taken from
(here insert the name of the principal and
surety or sureties upon such bond) for the
work of (here insert a brief mention or
description of the work concerning which said
bond was taken).

(here to be
signed)

Such notice shall be signed by the person or corporation making the claim or giving the notice, and said

notice, after being presented and filed, shall be a public record open to inspection by any person, and in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items hereinbefore specified, the claimant shall be entitled to recover in addition to all other costs, attorney's fees in such sum as the court shall adjudge reasonable: PROVIDED, HOWEVER, That no attorney's fees shall be allowed in any suit or action brought or instituted before the expiration of thirty days following the date of filing of the notice hereinbefore mentioned: PROVIDED FURTHER, That any city may avail itself of the provisions of RCW 39.08.010 through 39.08.030, notwithstanding any charter provisions in conflict herewith: AND PROVIDED FURTHER, That any city or town may impose any other or further conditions and obligations in such bond as may be deemed necessary for its proper protection in the fulfillment of the terms of the contract secured thereby, and not in conflict herewith.

(2) Under the job order contracting procedure described in RCW 39.10.420, bonds will be in an amount not less than the dollar value of all open work orders.

(3)(a) On highway construction contracts administered by the department of transportation with an estimated contract price of two hundred fifty million dollars or more, the department may authorize bonds in an amount less than the full contract price of the project. If a bond less than the full contract price is authorized by the department, the bond must be in the form of a performance bond and a separate payment bond. The department shall fix the amount of the performance bond on a contract-by-contract basis to adequately protect one hundred percent of the state's exposure to loss. The amount of the performance bond must not be less than two hundred fifty million dollars. The payment bond must be in an amount fixed by the department but must not be less than the amount of the performance bond. The secretary of transportation must approve each performance bond and payment bond authorized to be less than the full contract price of a project. Before the secretary may approve any bond authorized to be less than the full contract price of a project, the office of financial management shall review and approve the analysis supporting the amount of the bond set by the department to ensure that one hundred percent of the state's exposure to loss is adequately protected. All the requirements of this chapter apply respectively to the individual performance and payment bonds. The performance bond is solely for the protection of the department. The payment bond is solely for the protection of laborers, mechanics, subcontractors, and suppliers mentioned in RCW 39.08.010.

(b) The department shall develop risk assessment guidelines and gain approval of these guidelines from the office of financial management before implementing (a) of this subsection. The guidelines must include a clear process for how the department measures the state's exposure to loss and how the performance bond amount, determined under (a) of this subsection, adequately protects one hundred percent of the state's exposure to loss.

(c) The department shall report to the house of representatives and senate transportation committees by December 1, 2012: Each project where the department authorized bonds that were less than the full contract price; the difference between the project amount and the bond requirements; the number of bidders on the project; and other information that documents the effects of the reduced bond amounts on the project.

[2009 c 473 § 1; 2007 c 218 § 89; 2003 c 301 § 4; 1989 c 58 § 1; 1977 ex.s. c 166 § 4; 1915 c 28 § 2; 1909 c 207 § 3; RRS § 1161. Prior: 1899 c 105 § 1; 1888 p 16 § 3. Formerly RCW 39.08.030 through 39.08.060.]

Notes:

Expiration date -- 2009 c 473: "This act expires June 30, 2016." [2009 c 473 § 3.]

Intent -- Finding -- 2007 c 218: See note following RCW 1.08.130.

Severability -- 1977 ex.s. c 166: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to the other persons or circumstances is not affected." [1977 ex.s. c 166 § 9.]

RCW 4.56.110

Interest on judgments.

Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3)(a) Judgments founded on the tortious conduct of a "public agency" as defined in RCW 42.30.020 shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(b) Except as provided in (a) of this subsection, judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate, as published by the board of governors of the federal reserve system on the first business day of the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

[2010 c 149 § 1; 2004 c 185 § 2; 1989 c 360 § 19; 1983 c 147 § 1; 1982 c 198 § 1; 1980 c 94 § 5; 1969 c 46 § 1; 1899 c 80 § 6; 1895 c 136 § 4; RRS § 457.]

Notes:

Application -- Interest accrual -- 2004 c 185: See note following RCW 4.56.115.

Application -- 1983 c 147: "The 1983 amendments of RCW 4.56.110 and 4.56.115 apply only to judgments entered after July 24, 1983." [1983 c 147 § 3.]

Effective date -- 1980 c 94: See note following RCW 4.84.250.

RCW 39.04.250

Payments received on account of work performed by subcontractor — Disputed amounts — Remedies.

(1) When payment is received by a contractor or subcontractor for work performed on a public work, the contractor or subcontractor shall pay to any subcontractor not later than ten days after the receipt of the payment, amounts allowed the contractor on account of the work performed by the subcontractor, to the extent of each subcontractor's interest therein.

(2) In the event of a good faith dispute over all or any portion of the amount due on a payment from the state or a municipality to the prime contractor, or from the prime contractor or subcontractor to a subcontractor, then the state or the municipality, or the prime contractor or subcontractor, may withhold no more than one hundred fifty percent of the disputed amount. Those not a party to a dispute are entitled to full and prompt payment of their portion of a draw, progress payment, final payment, or released retainage.

(3) In addition to all other remedies, any person from whom funds have been withheld in violation of this section shall be entitled to receive from the person wrongfully withholding the funds, for every month and portion thereof that payment including retainage is not made, interest at the highest rate allowed under RCW 19.52.025. In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to costs of suit and reasonable attorneys' fees.

[1992 c 223 § 5.]

Notes:

Effective date -- 1992 c 223: See note following RCW 39.76.011.

Waiver of rights, construction -- Application -- 1992 c 223: See RCW 39.04.900 and 39.04.901.

RCW 60.28.030

Foreclosure of lien — Limitation of action — Release of funds.

Any person, firm, or corporation filing a claim against the reserve fund shall have four months from the time of the filing thereof in which to bring an action to foreclose the lien. The lien shall be enforced by action in the superior court of the county where filed, and shall be governed by the laws regulating the proceedings in civil actions touching the mode and manner of trial and the proceedings and laws to secure property so as to hold it for the satisfaction of any lien against it: PROVIDED, That the public body shall not be required to make any detailed answer to any complaint or other pleading but need only certify to the court the name of the contractor; the work contracted to be done; the date of the contract; the date of completion and final acceptance of the work; the amount retained; the amount of taxes certified due or to become due to the state; and all claims filed with it showing respectively the dates of filing, the names of claimants, and amounts claimed. Such certification shall operate to arrest payment of so much of the funds retained as is required to discharge the taxes certified due or to become due and the claims filed in accordance with this chapter. In any action brought to enforce the lien, the claimant, if he prevails, is entitled to recover, in addition to all other costs, attorney fees in such sum as the court finds reasonable. If a claimant fails to bring action to foreclose his lien within the four months period, the reserve fund shall be discharged from the lien of his claim and the funds shall be paid to the contractor. The four months limitation shall not, however, be construed as a limitation upon the right to sue the contractor or his surety where no right of foreclosure is sought against the fund.

[1979 ex.s. c 38 § 1; 1955 c 236 § 3; 1927 c 241 § 1; 1921 c 166 § 3; RRS § 10322.]