

**NO. 50276-3-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

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**DAVID B. CATLIN,**

**Respondent,**

**vs.**

**ESTATE OF HEIDI M. CATLIN,  
Raeann Phillips, Personal Representative,**

**Appellant.**

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

	Page
A. TABLE OF AUTHORITIES .....	iii
B. ARGUMENT .....	1
I. THE TRIAL COURT ERRED IN ADMITTED AND CONSIDERING HEARSAY EVIDENCE ON THE VALUATION OF DAMAGES .....	1
II. THE TRIAL COURT ERRED WHEN IT ABATED POST-JUDGMENT INTEREST ON APPELLANT’S PRIOR DIVORCE AWARD FROM A PREVIOUS ACTION <i>SUA SPONTE</i> BECAUSE THE ISSUE WAS NOT PROPERLY BEFORE THE COURT AND THE ABATEMENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE .....	4
III. ALL OF MR. CATLIN’S ASSIGNMENTS OF ERROR ON CROSS- APPEAL ARE PROCEDURALLY DEFICIENT .....	5
IV. THE TRIAL COURT DID NOT ERR IN CLASSIFYING MUCH OF THE DAMAGE AS PERMISSIVE WASTE .....	7
V. THE TRIAL COURT DID NOT ERR IN FAILING TO AWARD MR. CATLIN DAMAGES FOR THE RENTAL VALUE OF HIS HOME WHILE IT WAS UNINHABITABLE .....	8
VI. THE TRIAL COURT DID NOT ERR IN SETTING THE INTEREST RATE ON MR. CATLIN’S JUDGMENT AT 5.7 PERCENT .....	9
C. CONCLUSION .....	11
D. AFFIRMATION OF SERVICE	

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Davidson v. Municipality of Metropolitan Seattle</i> , 43 Wn. App. 569, 719 P.2d 569 (1986) .....	2
<i>Holmquist v. King County</i> , 192 Wn. App. 551, 368 P.3d 234 (2016) .....	9
<i>Matter of Estate of Lint</i> , 135 Wn.2d 518, 957 P.2d 755 (1998), <i>as amended</i> (July 9, 1998) .....	7, 10
<i>Mut. of Enumclaw Ins. Co. v. Myong Suk Day</i> , 197 Wn. App. 753, 393 P.3d 786 (2017), <i>review denied sub nom. Mut. of Enumclaw v. Myong Suk Day</i> , 188 Wn.2d 1016, 396 P.3d 348 (2017) .....	7, 8
<i>State v. Roggenkamp</i> , 115 Wn. App. 927, 64 P.3d 92 (2003), <i>aff'd</i> , 153 Wn.2d 614, 106 P.3d 196 (2005) .....	6
<i>State v. Wineberg</i> , 74 Wn.2d 372, 444 P.2d 787 (1968) .....	1, 2
<i>Veit v. Burlington N. Santa Fe Corp.</i> , 150 Wn. App. 369, 3207 P.3d 1282 (2009), <i>aff'd sub nom. Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.</i> , 171 Wn.2d 88, 249 P.3d 607 (2011) .....	2
<i>Woo v. Fireman's Fund Ins. Co.</i> , 150 Wn. App. 158, 208 P.3d 557 (2009) .....	10
 <b>Statutes and Court Rules</b>	
ER 904 .....	3
RAP 10.3(g) .....	5, 6
RCW 4.56.110(3)(b) .....	10

The Estate of Heidi Catlin, Appellant, submits this reply in support of its opening brief and in response to the issues raised on cross-appeal by the Respondent, Mr. Catlin.

**I. THE TRIAL COURT ERRED IN ADMITTED AND CONSIDERING HEARSAY EVIDENCE ON THE VALUATION OF DAMAGES**

Appellant takes the position that the trial court erred in admitting receipts and invoices offered by Mr. Catlin (Exhibits 6.17 to 6.97 and 6.99 to 6.118) as well as Mr. Catlin's damages spreadsheet (Exhibit 17) because those documents are pure hearsay. In his response brief, Mr. Catlin does not challenge the contention that any of these documents are hearsay. Instead, he argues that the documents were properly admitted despite being hearsay.

Mr. Catlin contends that the trial court properly admitted Exhibit 17 because it was offered to show the basis of Mr. Catlin's opinion on the value of the repairs he performed. Mr. Catlin cites *State v. Wineberg*, 74 Wn.2d 372, 382, 444 P.2d 787 (1968) in support of this position. While *Wineberg* does stand for the proposition that a trial court may "allow the expert to state [hearsay] facts for the purpose of showing the basis for his opinion," the decision also makes clear that "an expert witness will not

be allowed to testify to a valuation opinion which is not the product of his independent judgment, but is merely another person's hearsay opinion which the witness has accepted as his own[.]” *Id.* at 382-84. The trial court went too far in this case by allowing Mr. Catlin to introduce Exhibit 17 and testify about it because it was not the product of his independent judgment – it was an amalgamation of many different hearsay statements from subcontractors that Mr. Catlin collected and then reprinted in spreadsheet form. Without a witness to authenticate or independently verify the subcontractor figures included in the Exhibit 17 spreadsheet at trial,<sup>1</sup> they were pure speculation and not appropriate for consideration by the finder-of-fact. *Veit v. Burlington N. Santa Fe Corp.*, 150 Wn. App. 369, 387, 207 P.3d 1282 (2009), *aff'd sub nom. Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 249 P.3d 607 (2011); *Wineberg*, 74 Wn.2d at 383-84; *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 575-78, 719 P.2d 569 (1986). It

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<sup>1</sup> As discussed earlier in this brief, Mr. Catlin and his witness, general contractor Aaron Craig, were incapable of estimating the cost of any individual repairs (such as drywall or plumbing), as both admitted this would be outside their area of expertise. RP 70, 167-168, 171-172, 445. Appraiser Scott Hamilton (also a witness for Mr. Catlin) did not attempt to come up with his own estimates either. RP 278–279.

was therefore an abuse of discretion for the trial court to admit Exhibit 17 and to rely upon it in calculating Mr. Catlin's damages.

Mr. Catlin incorrectly contends that the trial court properly admitted the receipts as invoices because (1) he initially offered them as part of an ER 904 notice and were "admitted pursuant to ER 904"; and (2) because "Washington has long recognized that receipts are evidence of payment." (Resp. Br. 12-13.) These arguments fail.

First, the receipts and invoices were not admitted pursuant to ER 904. Mr. Catlin included the receipts and invoices as part of an ER 904 submission prior to trial and Appellant objected to their admission on hearsay grounds. RP 29-31.<sup>2</sup> The trial court ruled that a proper objection had been made and that the receipts and invoices would not come in under ER 904. RP 40. The trial court allowed the documents to come in **later** in the trial over Appellant's continued hearsay objections. RP 400-401. Even if the receipts and invoices had been admitted pursuant to ER 904, it is not clear how this could avoid assigning error to the trial court's decision to admit them.

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<sup>2</sup> The record on appeal includes seven volumes of verbatim reports. Six of them contain continuously numbered pages and one (from a hearing on March 31, 2017) does not. The continuously-numbered reports are referred to herein as "RP." The report from the March 31, 2017, proceedings is referred to as "RP 3/31/17."

Also, even if it is true that “Washington has long recognized that receipts are evidence of payment” as Mr. Catlin claims (see Resp. Br. 13-14), Mr. Catlin was not offering them as evidence of payment, he was offering them as evidence of the reasonable cost of repairs (and treated by the trial court as such). RP 399. Also, just because receipts may be considered evidence of payment does not mean they are exempt from the hearsay rule. Just because something is evidence does not mean it is admissible. As discussed in Appellant’s initial brief, many courts have long recognized a general rule that receipts are hearsay and not ordinarily competent evidence. Accordingly, the trial court abused its discretion in admitting them.

**II. THE TRIAL COURT ERRED WHEN IT ABATED POST-JUDGMENT INTEREST ON APPELLANT’S PRIOR DIVORCE AWARD FROM A PREVIOUS ACTION *SUA SPONTE* BECAUSE THE ISSUE WAS NOT PROPERLY BEFORE THE COURT AND THE ABATEMENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE**

The trial court’s decision to abate all the interest accruing on Heidi Catlin’s divorce judgment against Mr. Catlin from the time the judgment was entered on December 13, 2013 until September 16, 2018 was an abuse of discretion because neither party in this case asked the court to modify that judgment and there are no facts in the record justifying the modification. Mr. Catlin claims (conclusorily and without citation to the

record) that “the trial court concluded the decedent severely damaged the real property that secured her judgment” and it would be “inequitable” to allow her to collect interest on her judgment based on this fact. (Resp. Br. 20.) This is a false characterization of the record. The trial court did not make these findings.

As Appellant pointed out in her initial brief, the reason the trial court abated the interest is because the property “couldn’t be sold because of the damage that had been done to the place which was done by Heidi Catlin.” RP 702–705. However, neither party offered any evidence at trial showing or even suggesting that the property was unsellable. The home could have been sold at any time, as could the two other parcels that were awarded to Mr. Catlin in the divorce. For this and the other reasons stated in Appellant’s initial brief, the trial court’s decision to abate all of the interest on Heidi Catlin’s 2013 divorce judgment was error.

### **III. ALL OF MR. CATLIN’S ASSIGNMENTS OF ERROR ON CROSS-APPEAL ARE PROCEDURALLY DEFICIENT**

Mr. Catlin assigns error to three separate issues on cross-appeal but fails to identify the specific findings of fact or conclusions of law that he wishes to challenge. This is a violation of RAP 10.3(g), which states:

Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included **with reference to each instruction or proposed instruction by number**. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

(Emphasis added.) A brief that “assigns error generally” to the trial court’s written findings and conclusions is insufficient and will cause the trial court’s findings to “become the established facts of the case.” The appellate court’s function is then “limited to determining whether the findings of fact support the court's conclusions of law and judgment.” *State v. Roggenkamp*, 115 Wn. App. 927, 943–44, 64 P.3d 92, 100 (2003), *aff'd*, 153 Wn.2d 614, 106 P.3d 196 (2005). Here, Mr. Catlin does not indicate whether the issues that he is presenting to the appellate court for review are based on challenges to findings of fact or conclusions of law (or both), although Appellant notes that the only standard of review cited in Mr. Catlin’s brief is the one applicable to findings of fact. (Resp. Br. 9.) In sum, there is simply not enough information in Mr. Catlin’s brief to satisfy the requirements of RAP 10.3(g).

#### **IV. THE TRIAL COURT DID NOT ERR IN CLASSIFYING MUCH OF THE DAMAGE AS PERMISSIVE WASTE**

This court should affirm the trial court's ruling regarding permissive waste because Mr. Catlin's attempt to assign error is procedurally defective and not supported by any record evidence. Mr. Catlin argues that the trial court should have determined that more of the damage caused by Heidi Catlin was commissive waste ("deliberate and voluntary") rather than permissive waste ("negligent"), but he does not cite to any evidence in the record that would support this finding. He simply states in conclusory fashion that the trial court should have found that pet urine, faulty wiring, and broken windows all constituted commissive waste. There is no discussion of how or when the damage occurred or what evidence suggested that it was caused by intentional acts rather than negligence. The appellate court is not required to sift through the entire record to find support for Mr. Catlin's argument. *See, e.g., Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755, 762 (1998), *as amended* (July 9, 1998) ("If we were to ignore the rule requiring counsel ... to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record

with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.”) Here, this court would have to look through the entire record for evidence supporting Mr. Catlin’s claim that the urine, wiring and windows were broken as a result of Heidi Catlin’s “deliberate and voluntary” acts rather than mere negligence. This is not the appellate court’s job. Accordingly, the trial court’s findings regarding permissive waste must stand.

**V. THE TRIAL COURT DID NOT ERR IN FAILING TO AWARD MR. CATLIN DAMAGES FOR THE RENTAL VALUE OF HIS HOME WHILE IT WAS UNINHABITABLE**

The appellate court should decline to address this argument because it is procedurally defective and Mr. Catlin does not provide this court with the basic information necessary to review it or to reach a different conclusion than the trial court. Procedurally, Mr. Catlin’s argument fails because it does not identify any specific finding of fact or conclusion of law that Mr. Catlin wishes to challenge. This is probably because Mr. Catlin never raised this issue at the trial court level. Mr. Catlin brought suit against the Estate of Heidi Catlin seeking to enforce a creditor’s claim for physical damage that Heidi caused to the property, not lost rents. “Failure to raise an issue before the trial court generally

precludes a party from raising it on appeal.” *Mut. of Enumclaw Ins. Co. v. Myong Suk Day*, 197 Wn. App. 753, 769, 393 P.3d 786, 795 (2017), review denied sub nom. *Mut. of Enumclaw v. Myong Suk Day*, 188 Wn.2d 1016, 396 P.3d 348 (2017) (declining to review appellant’s new damages argument on appeal).

Even if this court were to find that this issue were raised at the trial court level, Mr. Catlin has failed to identify evidence in the record suggesting that the trial court’s finding was erroneous. Mr. Catlin argues that the *Holmquist* decision stands for the proposition that “when a party’s breach causes the delay in the use of the property, an owner may recover damages based on the rental value of the property.” (Resp. Br. 23.) However, the trial court did not find that Heidi Catlin breached any agreement, nor did the trial court make a finding about what the fair rental value of the property was. Accordingly, Mr. Catlin’s argument fails.

**VI. THE TRIAL COURT DID NOT ERR IN SETTING THE INTEREST RATE ON MR. CATLIN’S JUDGMENT AT 5.7 PERCENT**

This court should affirm the trial court’s decision to award post-judgment interest to Mr. Catlin at a rate of 5.7 percent because Mr. Catlin does not explain in his brief why the trial court’s decision was erroneous as a matter of fact or law. He merely states in conclusory fashion that the

appropriate interest rate should be 5.75 percent (or possibly 6 percent or 12 percent). (Resp. Br. 23.) Again, the appellate court is not required to sift through the record for evidence supporting a party's position where the party has failed to adhere to "the rule requiring counsel ... to cite to relevant parts of the record as support for that argument...." *Estate of Lint*, 135 Wn.2d at 532.

In any event, the appellate court should not award post-judgment interest to Mr. Catlin at a rate of 12 percent because that rate is not applicable to judgments "founded on ... tortious conduct" pursuant to RCW 4.56.110(3)(b). Our Appellate and Supreme Courts have held that the phrase "founded on ... tortious conduct" means "having as a basis" and will look to the underlying nature of the claims to determine whether they have a basis in tort. *See, e.g., Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 168, 208 P.3d 557, 562 (2009). In this case, it is clear that all of Mr. Catlin's claims were based on the tortious conduct of Heidi Catlin. Specifically, Mr. Catlin alleged that she either negligently or intentionally damaged his property or allowed others to do so. So the applicable rate is "two percentage points above the prime rate," which the trial court calculated as 5.7 percent. RCW 4.56.110(3)(b).

## **CONCLUSION**

In conclusion, Appellant asks this court to deny all of the Respondent's requests for relief. Appellant also asks this court to grant its requests for the following relief:

(1) A finding that it was prejudicial error for the trial court to admit and rely upon the information contained in the subcontractor spreadsheet (Exhibit 17);

(2) A finding that it was prejudicial error for the trial court to admit and rely upon the information contained in the receipts and invoices admitted as part of Exhibit 6;

(3) A finding that the trial court's damages award was not supported by substantial evidence and an order remanding the case for entry of a new award consistent with the testimony of Nadyne Tauscher, Jeffrey Logan and Roger Fraidenburg regarding the reasonable costs of repair; and

(4) An order reversing the portion of the trial court's judgment abating the post-judgment interest on Heidi Catlin's 2013 divorce judgment.

DATED October 20, 2017.

Respectfully submitted,



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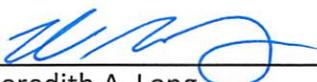
DAVID B. CATLIN,  vs.  ESTATE OF HEIDI M. CATLIN, Raeann Phillips, Personal Representative,  Appellant.	NO. 50276-3-II  AFFIRMATION OF SERVICE
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The undersigned states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Reply Brief of Appellant with this Affirmation of Service attached with postage paid to the indicated parties:

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Dated this 20th day of October, 2017, at Longview, WA.

  
\_\_\_\_\_  
Meredith A. Long

**LAW OFFICE OF MEREDITH A LONG PLLC**

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