

**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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**BRIEF OF APPELLANT**

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## **ASSIGNMENT OF ERROR**

### ***Assignment of Error***

1. The trial court erred when it allowed Respondent to introduce inadmissible hearsay evidence on the valuation of damages over Appellant's repeated, timely objections.

2. The trial court erred when it entered Conclusion of Law "A" and Finding of Fact "Y" because they are unsupported by substantial, admissible evidence.

3. 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.

***Issues Pertaining to Assignment of Error***

1. Does a trial court err if it allows a party to introduce inadmissible hearsay evidence on the valuation of damages over repeated, timely objections?

2. Does a trial court err if it enters and relies upon findings of fact unsupported by substantial, admissible evidence?

3. Does a trial court err if it calculates a damage award based upon inadmissible hearsay evidence to which a timely objection was made?

4. Does a trial court err if, *sua sponte*, it subsequently abates interest that has accrued on an award entered in a prior divorce action from which neither party appealed?

5. Does a trial court err if it abates the interest that has accrued on an award entered in a prior divorce action if the reason given by the court in support of the abatement is not supported by substantial evidence?

## STATEMENT OF THE CASE

NB: This brief refers to some individuals by their first names for ease of reference and clarity; no disrespect is intended.

David “Brad” Catlin and Heidi Catlin married in 1991. RP 45.<sup>1</sup> In 2007, Heidi inherited some property on Smokey Valley Road in Toledo, Washington. RP 48. Around this time, she developed a serious addiction to prescription painkillers. RP 52. In 2010, the Catlins moved into a house located on one of the parcels that Heidi inherited. RP 49. Mr. Catlin separated from Heidi in June 2012. RP 58.

In 2013, Heidi filed for divorce in Lewis County Superior Court. Ex. 1. The court (Lawler, J.) entered a final divorce decree (the “Decree”) in December 2013. Id. The assets awarded in the Decree included the Smokey Valley Road property, which was comprised of three parcels with a combined fair market value of \$516,000, subject to a mortgage of \$177,000 held by Red Canoe Credit Union. Ex. 23 at 2-3. The Decree awarded the parcels to Mr. Catlin “to allow [him] to sell the property.” Ex. 1 at 5. The Decree stated that the proceeds of the sale

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<sup>1</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.”

shall be applied first to the indebtedness owed to Red Canoe Credit Union that is secured by part of the real estate awarded to [Mr. Catlin]. To equalize the division of property, [Heidi] is awarded judgment against [Mr. Catlin] in the amount of \$220,402.00 to be paid to [Heidi] at the time of the sale of the real property. [Mr. Catlin] will thereafter be reimbursed for any costs for labor and materials expended to make repairs upon the property to facilitate a sale. Any remaining balance of sale proceeds will be divided equally between the parties.

Id. The court entered a money judgment of \$220,402.00 in favor of Heidi that was to “bear interest at \_\_\_\_% per annum.” Ex. 1, p.1. (The trial court did not fill in the blank.) The Decree stated that Heidi was to vacate the property by February 28, 2014. Ex. 1 at 3, 5. Neither of the Catlins appealed the Decree or moved to modify it.

Heidi did not vacate the house by the given deadline and Mr. Catlin took no legal action to evict her.<sup>2</sup> CP 2. Heidi died on October 9, 2014. RP 83. When Mr. Catlin returned to the house on October 21, 2014, he found significant damage. RP 84. In March 2015, he filed a creditor’s claim for \$180,353.06 against Heidi’s estate as compensation for the damage.<sup>3</sup> Ex. 3. Raeann Phillips, the estate’s personal

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<sup>2</sup> At trial, Mr. Catlin testified he “attempted” to evict Heidi but was not successful. RP 83.

<sup>3</sup> Mr. Catlin also submitted a second creditor’s claim for \$9,412.00. That claim is not at issue on appeal.

representative, denied the claim. RP 500. In response, Mr. Catlin filed a Complaint for Money Damages against the estate for permissive and commissive waste. CP 1-3. The estate filed an Answer and Counterclaims for breach of the divorce decree and for filing a frivolous suit. CP 13-17. A bench trial was held March 6–9, 2017, before Judge James Lawler. CP 312.

At trial, five witnesses gave opinions about the value of Mr. Catlin's damages: (1) Mr. Catlin; (2) general contractor Aaron Craig; (3) appraiser Scott Hamilton; (4) appraiser Nadyne Tauscher; and (5) insurance adjuster Jeffrey Logan.

The first witness, Mr. Catlin, testified that the cost to repair the damage was just over \$160,000. RP 429. In support of this figure, Mr. Catlin offered a spreadsheet he prepared breaking down the total repair figure into components such as drywall, painting, etc. RP 422–426, 428–429. Mr. Catlin claimed the component figures were taken directly from subcontractor quotes he solicited. RP 426. Those subcontractor quotes were excluded from evidence on hearsay grounds. RP 397–399.

Mr. Catlin works as a general contractor and prepares this type of "estimate" document on a regular basis. RP 422-423. According to him, the process of preparing an estimate involves:

breaking down a project, making your materials [list], sending them out for quotes, make a sub list and sending it out for quotes, contacting all your subcontractors and then you bring it all together and put it together, a math problem.

RP 69-70.

At trial, Mr. Catlin did not provide the court with independent testimony or evidence establishing the basis for the subcontractor quotes nor did he provide his own opinion on what the individual repairs (such as drywall) should cost. When asked to provide estimates for individual repairs without the spreadsheet in front of him, he admitted he “would be guessing” because he could not remember the dollar amounts listed for the work on the contractor quotes. RP 434.<sup>4</sup>

The trial court admitted the subcontractor spreadsheet into evidence as Exhibit 17 over three objections: (1) the spreadsheet itself was hearsay; (2) the spreadsheet was comprised entirely of figures from subcontractor quotes that the court had already excluded as hearsay; and (3) the spreadsheet had no evidentiary value because it was not Mr.

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<sup>4</sup> When asked about the cost of specific repairs, such as painting, Mr. Catlin testified he would be “guessing” or “speculating” and would have to refer to the non-admitted quotes. Interior painting cost: “I believe it’s – and I would be speculating but I believe it’s probably around \$9,000, 8 to \$9,000 to paint the interior.” RP 445. Carpet cost: “I think that’s probably around \$3,500, something like that, I believe. I don’t have a – I didn’t get a breakdown of room to room for the carpet so I have one total carpet quote....” RP 412.

Catlin's opinion but merely a document where he had "cut and pasted" information from the non-admitted subcontractor quotes that he did independently verify. RP 426–428. The trial court ruled that the entire spreadsheet was admissible under ER 703 – including the figures allegedly taken from the non-admitted subcontractor quotes. RP 428. Ultimately, the court relied on many of the figures included in the spreadsheet in calculating Mr. Catlin's damages, including the figures for flooring (\$33,528), exterior paint (\$8,500), shop electrical work (\$448), overhead doors for shop (\$2,685), exterior doors for shop (\$875), shop roof (\$349), and water pump (\$500). RP 690-692.

Mr. Catlin also testified that consistent with his estimate, he personally spent \$60,000 in materials and \$100,000 on labor. RP 434. He did not hire any of the subcontractors who bid on the work — instead, he did the work himself with the assistance of friends and family who agreed to forego payment until the property sold.<sup>5</sup> RP 326.

In support of his claim that he spent \$60,000 in materials, Mr. Catlin submitted 100 invoices and receipts as Exhibits 6.17 to 6.97 and 6.99 to 6.118. RP 397. The trial court admitted these as evidence over

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<sup>5</sup> Mr. Catlin testified that he hired friends instead of "real" contractors because "didn't have money to write the checks." RP 325–326.

the repeated objection that they were hearsay. RP 21–22, 37–38, 399–401. The trial court relied exclusively on the invoices and receipts in awarding Mr. Catlin \$30,946.71 for materials. RP 689–690.

In support of his claim that he spent \$100,000 on labor, Mr. Catlin did not offer timesheets or other evidence breaking down the labor into specific categories or tasks. For instance, when asked about his own efforts, he estimated he spent “about 700 hours” cleaning and repairing the property at rate of \$45 per hour but did not specify how much time he spent doing any particular task. RP 408–409. He agreed to pay friend Mike McEwen \$57 per hour for “around 200 hours” of work, which included plumbing, yard maintenance, demolition work and painting.<sup>6</sup> RP 290–291. Mr. Catlin’s girlfriend Janelle Tiegs, an office administrator with no construction background, agreed to help out for \$52 per hour and spent “400 to 500 hours” picking up garbage, cleaning, doing demolition and painting. RP 183–195. Mr. Catlin hired carpenter Roger Fraidenburg to do demolition work repair sheetrock, siding, and roof damage for \$30 to \$32 per hour for a total of approximately \$13,000. RP 356–359. Mr.

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<sup>6</sup> During a remodel of the same home from 2007-2010, Mr. Catlin paid Mr. McEwen something “in the \$20-an-hour-range” for plumbing work. RP 293.

Catlin paid other friends between \$15 and \$30 an hour to pick up garbage, clean, paint, and do demolition work. RP 402–407.

The trial court awarded Mr. Catlin \$74,320 for labor, which was the sum total of all of the labor described above except for a downward adjustment of his girlfriend’s hourly rate from \$52 to \$30. RP 688–689.

The second witness, general contractor Aaron Craig, testified that Mr. Catlin’s estimate of \$160,000 seemed reasonable. RP 174. This was based on three things: his inspection of the property after Heidi died, his review of Exhibit 17, and his review the non-admitted subcontractor quotes which were first provided to him over a year after he inspected the property. RP 174–176. Mr. Craig admitted that he was not qualified to assess the cost to repair the damage included in the subcontractor quotes — for example drywall — because he was “not a professional” in any of those fields. RP 167–168, 171–172.

The third witness, appraiser Scott Hamilton, also testified that Mr. Catlin’s estimate of \$160,000 seemed reasonable. RP 263–265. His opinion was based on two things: his personal inspection of the property and a list of “necessary” repairs provided to him by Mr. Catlin. RP 263–264. Mr. Hamilton admitted that he did not do his own independent

valuation of the damage and did not review any of the repair estimates that Mr. Catlin collected from subcontractors. RP 278–279.

The fourth witness, Nadyne Tauscher, testified that the reasonable cost to repair all the damage was \$59,740. RP 608. Ms. Tauscher is a residential appraiser with more than 35 years of experience. RP 536. To arrive at her estimate, Ms. Tauscher took each category of damage alleged by Mr. Catlin (flooring, drywall, etc.) and calculated the reasonable cost of repair using data contained in a book called “Marshall & Swift” that is commonly used by appraisers to prepare estimates. RP 539–540. For example, to determine the reasonable cost to replace vinyl flooring in the utility room, she took the total square footage of the room (147 sq. ft.) and multiplied it by the average price per square foot for new vinyl flooring stated in the Marshall & Swift book (\$5.30) along with a “local multiplier” of 1.09 to adjust for the geographic location of the house and came up with \$849. RP 554–556. The figures provided in Marshall & Swift include material costs, labor costs, and entrepreneurial profit that a customer would normally pay a contractor. RP 560–561. So in the example given, Ms. Tauscher’s estimate of \$849 for vinyl would include the vinyl itself, the labor to install the vinyl, and a contractor mark-up.

At trial, Ms. Tauscher offered a written report detailing her calculations and it was entered into evidence as Exhibit 31 without objection. RP 552. The costs that Ms. Tauscher testified to (as stated in her report and contained in RP 552–575) are broken down as follows:

<b>Repair Category</b>	<b>Est. Cost</b>	<b>Citation</b>
Floor coverings	\$12,641.00	Ex. 31, p.3
Subflooring	\$ 655.59	Ex. 31, p.4
Doors	\$ 7,887.96	Ex. 31, p.5
Drywall	\$ 2,429.11	Ex. 31, p.6
Exterior paint	\$ 1,279.56	Ex. 31, p.7
Interior paint	\$ 4,744.67	Ex. 31, p.8
Gutters	\$ 1,259.60	Ex. 31, p.9
Appliances	\$ 6,485.50	Ex. 31, p.10
Cabinets	\$ 3,105.48	Ex. 31, p.11
<i>Repairs to shop</i>	\$ 2,000.00	Ex. 31, p.12
<i>Repairs to horse arena</i>	\$ 1,176.20	Ex. 31, p.12
<b>Demolition work</b>	<b>\$ 6,127.10</b>	<b>Ex. 31, p.13</b>
<i>Porch repair</i>	\$ 200.00	Ex. 31, p.13
<i>Broken windows</i>	\$ 854.00	Ex. 31, p.13
<b>Pellet stove repair</b>	<b>\$ 700.00</b>	<b>Ex. 31, p.13</b>
<b>Electrical</b>	<b>\$ 5,975.00</b>	<b>Ex. 31, p.13</b>
<i>Plumbing</i>	\$ 2,400.00	Ex. 31, p.13 <sup>7</sup>

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<sup>7</sup> Repair categories in italics are categories for which there was no Marshall & Swift data available and Ms. Tauscher had to provide an estimate based on her appraisal experience and her review of “before” and “after” photos of the property. RP 567–574. Ms. Tauscher was not qualified to give an opinion regarding repair costs for the categories in bold so she simply restated the figures for those items given in Exhibit 17. RP 573–575.

The only category of damages not touched upon by Ms. Tauscher in her testimony was the reasonable cost of cleaning garbage and debris out from the house, shop, arena and yard. The only testimony on this issue on this cost came from witness Roger Fraidenburg, who estimated it would take ten to twelve days for one person. RP 366.

The fifth witness, insurance adjuster Jeffrey Logan, gave an opinion regarding the cost of replacing the home's hardwood floors. Mr. Logan visited the home in December 2013 to provide a report regarding some water damage in the utility room, hallway, dining room and kitchen. RP 14–15; Exhibit 14. Mr. Logan estimated that the cost to replace 279 square feet of hardwood flooring in the kitchen, hallway and dining room was \$2,269.55 (\$2,331.73 before depreciation). Ex. 14 at 5, 6, 11.

On March 31, 2017, the trial court entered a judgment awarding Mr. Catlin \$165,847.71 in damages.<sup>8</sup> CP 277. The court also ordered Mr. Catlin to sell the Smokey Valley Road property by September 15, 2018 and further ordered

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<sup>8</sup> No findings of fact or conclusions of law were entered at this time.

Upon sale, the remaining mortgage shall be paid and the judgment herein paid. At that point, Defendant shall be reimbursed \$220,402. If net proceeds are insufficient, then this judgment entered in the Decree of Dissolution entered in Superior Court of Washington for the County of Lewis Cause Number 13-3-00080-3 shall abate. If net proceeds are sufficient, any remaining funds shall be disbursed equally between [Mr. Catlin] and Defendant as contemplated in Cause Number 13-3-00080-3.

CP 278. At the presentation hearing, Appellant argued that it was inappropriate for the trial court to enter a judgment that allowed Heidi's 2013 divorce judgment to abate and gave Mr. Catlin's judgment priority over hers. RP 3/31/17 23-27. Appellant also pointed out that the trial court had neglected to calculate the interest that had accrued on Heidi's judgment. *Id.* at 34. Opposing counsel argued that the interest should be abated. *Id.* at 34. In response, the trial court said, "Yeah. I'm not ruling on that. I don't know. I don't have that issue before me whether it's accruing interest or not." *Id.* at 34-35.

On April 5, 2017, Appellant filed a Motion to Alter or Amend Judgment or for Reconsideration ("Motion"). CP 280. The Motion argued, *inter alia*, that "[t]he question of whether the divorce judgment should abate was not before the Court and no findings were made supporting a modification of the divorce judgment" and the trial court was bound to enter a judgment consistent with the divorce decree. CP

282. Appellant also argued that it was not appropriate for the trial court to give Mr. Catlin's judgment lien priority over Heidi's. CP 285.

The trial court heard arguments on Appellant's Motion on April 14, 2017. RP 701. At the hearing, the court said it had gotten confused when rendering its initial decision and agreed that it was not appropriate to give Mr. Catlin's judgment priority over Heidi's since her judgment was entered first and had priority. RP 706–707. The court also made a ruling on the interest issue that it previously indicated it could not rule upon, confirming that it was abating all the interest on Heidi's judgment accrued to date and allowing for zero interest for a period set to end 18 months after the entry of the judgment in favor of Mr. Catlin. RP 701–705. In support of this decision, the court said the abatement was justified because “the house couldn't be sold ... because of the damage that had been done to the place which was done by Heidi Catlin.” RP 702–703. The trial court suggested that the house could not be sold because Mr. Catlin “[did]n't have the money in his pocket to buy the materials and do the work that need[ed] to be done to get the place ready to sell....” RP 704–705.

On May 19, 2017, the trial court entered an amended judgment as well as findings of fact and conclusions of law. CP 322–324 (Amended

Judgment); CP 312–321 (Findings and Conclusions). The Amended Judgment awarded Mr. Catlin \$165,847.71. CP 323. It also included the following additional language that Appellant is challenging:

4. [Mr. Catlin] shall have until September 15, 2018 to make all necessary repairs, and list the property. Beginning September 16, 2018 interest on the judgment entered in favor of Heidi Catlin in the amount of \$220,402.00 in Superior Court of Lewis County Case No. 13-3-00080-8 shall accrue at 12% per annum.

5. Upon sale, the remaining mortgage shall be paid. At that point, Defendant shall be reimbursed \$220,402.00, plus any accrued interest as specified above. Any remaining funds shall be disbursed equally between [Mr. Catlin] and Defendant. [Mr. Catlin] shall then be paid his judgment herein.

Id.

In support of the damages award, the trial court entered two findings of fact that Appellant disputes: Conclusion of Law “A” and Finding of Fact “Y.”

#### CONCLUSION OF LAW “A”

The decedent caused damage to [Mr. Catlin] in the sum of \$165,874.71. This is calculated as follows:

1. \$74,320.00 in labor charges (including those of Brad Catlin);
2. \$30,946.71 for costs incurred by [Mr. Catlin] as shown by the portions of exhibit 6 admitted into evidence;
3. \$58,381 for the estimated costs of work to be done;

4. Reduced by \$1,100 for the commissive waste committed. The Court concludes that the shop stove damage of \$300 and fixing two doors of \$800 was commissive waste, and these should be trebled.
5. This equals \$162,547.71 in permissive waste.
6. Add back in \$3,300 for the commissive waste.

CP 330.

FINDING OF FACT "Y"

Some of the damage caused by or attributable to Ms. Catlin has been satisfactorily repaired. At the time of trial, the repair work that still needed to be performed (and the cost attributable to the Estate of Heidi Catlin as damages) is as follows:

- a. Replace 1,049 square feet of carpeting: \$12,000
- b. Replace tile: \$3,460
- c. Replace hardwood floors: \$22,000
- d. Replace missing interior and exterior doors: \$7,877
- e. Fix broken gutters: \$1,170
- f. Repaint exterior of home \$4,814
- g. Repair electrical wiring issues in shop: \$500
- h. Replace two doors to the shop: \$450
- i. Paint the shop: \$1,500
  - i. This amount of \$1,500 represents one half of the cost to paint the shop. The other half is allocated to Mr. Catlin.
- j. Repair damage to shop roof and siding: \$300
- k. Replace pump: \$500
- l. Repair barn roof and replace hardware missing from barn: \$1,300
- m. Replace missing gravel: \$2,500

CP 329-330.

**I. THE TRIAL COURT ERRED WHEN IT ALLOWED RESPONDENT TO INTRODUCE INADMISSIBLE HEARSAY EVIDENCE ON THE VALUATION OF DAMAGES OVER APPELLANT'S REPEATED, TIMELY OBJECTIONS**

"The standard of review for evidentiary rulings made by the trial court is abuse of discretion." *Lang v. Hougan*, 136 Wn. App. 708, 719, 150 P.3d 622 (2007), *as amended on denial of reconsideration* (June 19, 2007). "A trial court abuses its discretion by issuing a manifestly unreasonable or untenable decision." *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004).

**(1) *The Trial Court Erred When It Admitted Respondent's Spreadsheet Because It Contained Inadmissible Hearsay under ER 702 and ER 802***

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and is not admissible absent an exception in our statutes, rules of evidence, or court rules. ER 801, 802.<sup>9</sup> ER 703 explains the relationship between hearsay and expert testimony:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon

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<sup>9</sup> The text of ER 801 and 802 is included in the Appendix to this brief.

the subject, the facts or data need not be admissible in evidence.

ER 703 allows for the admission of inadmissible facts for the **sole purpose** of showing the basis for an expert opinion; they cannot be treated as facts in support of a party's case. Under ER 703 "[a] trial court may allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of the expert's opinion.... The admission of these facts, however, is not proof of them." *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). "If an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question." *Id.*

It follows that expert valuations based entirely on ER 703 facts have no evidentiary value under ER 702 and are not admissible. ER 702 states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

The Washington Supreme Court has held 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[.]” *State v. Wineberg*, 74 Wn.2d 372, 383-84, 444 P.2d 787 (1968). *See also Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 575-78, 719 P.2d 569 (1986) (expert opinion based on ER 703 facts was speculative and “there is no value in an opinion where material supporting facts are not present”); *cf Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 275, 215 P.3d 990 (2009) (upholding trial court’s decision to admit testimony from damages expert who “did not merely adopt [hearsay] report as his own” but “followed standard procedures in independently verifying the data before relying on it”).

In this case, the trial court abused its discretion in admitting the subcontractor spreadsheet. The spreadsheet itself was hearsay because it was an out-of-court statement from Mr. Catlin offered for its truth. The data contained in the spreadsheet was also hearsay because it was all taken from subcontractor quotes that were properly excluded as

hearsay. RP 397–399, 426. While ER 703 might allow for the admission of this type of information for the limited purpose of illuminating the basis of an expert opinion, here there was no expert opinion being offered. All Mr. Catlin did was cut and paste information taken from the non-admitted quotes into a spreadsheet. RP 422–429. For him, it was simply “a math problem.” RP 69-70.

Neither Mr. Catlin nor any of his witnesses provided independent evidence or testimony supporting the subcontractor quotes. Mr. Catlin and Aaron Craig were incapable of giving such testimony, as both admitted it would be outside their area of expertise and Mr. Catlin was unable to provide estimates for any damages without referring to the subcontractor quotes. RP 70, 167–168, 171–172, 445. Scott Hamilton was similarly unable to vouch for the accuracy of the quotes since he never reviewed them and did not do his own analysis of the damage. RP 278–279. Accordingly, the subcontractor quote figures were speculation, not fact, and so was the spreadsheet as a whole. As such, it was manifestly unreasonable for the trial court to admit the spreadsheet into evidence.

**(2) The Trial Court Erred When It Admitted Receipts and Invoices Which Constituted Inadmissible Hearsay under ER 802**

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted” and is not admissible absent an exception stated in our statutes, rules of evidence, or court rules. ER 801, 802.

It appears that neither our state supreme court nor our appellate court has published an opinion addressing the specific question of whether receipts and invoices are hearsay under Washington law. However, the state supreme courts in Oregon and California have done so and their decisions may be helpful to this Court. In *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.*, 69 Cal.2d 33, 42-43, 442 P.2d 641 (1986), the Supreme Court of California held that “invoices, bills, and receipts for repairs are hearsay” and in a lawsuit for property damage they “are inadmissible independently to prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable.” In *Caro v. Wollenberg*, 83 Or. 311, 323-24, 163 P. 94 (1917), the Supreme Court of Oregon stated “it is well settled that receipts of

third parties constitute hearsay and are not to be received in evidence.”

The court continued:

The doctrine governing that matter is that the receipt of one not occupying any official relation to the transaction is, in the first place, a declaration not under the sanction of an oath, and, second, that the person making it is not presented for cross-examination by the adverse party. Receipts required by law, as for public taxes and the like, constitute a manifest exception to the rule. Under these principles, therefore, the defendant failed to prove his charges for plumbing performed by the deceased Carroll.

*Id.* See also Sidney Suher, Annotation, Admissibility in Evidence of Receipt of Third Person, 80 A.L.R.2d 915 (1961) (“Receipts of third persons have been offered in evidence for a number of reasons, for example, to prove an amount of damages by showing the amount paid for repairs, or to show the purchase of and payment for property. In a number of cases involving such offers the courts have recognized a general rule that receipts of third persons are not ordinarily competent evidence, but are merely a hearsay declaration of the person who signed them, made without opportunity for cross-examination and independent of the sanction of his oath.”)

In this case, the trial court erred in admitting the receipts and invoices offered by Mr. Catlin as Exhibits 6.17 to 6.97 and 6.99 to 6.118 over the Appellant’s repeated, timely hearsay objections. The Appellant

argued that in addition to being classic hearsay, the documents were inadmissible because there was no witness to authenticate them and the information within them went “to the very heart of this case [because] Mr. Catlin [was] attempting to introduce them in order to show how much he has spent attempting to repair the damages allegedly caused or attributable to Heidi Catlin.” RP 399. Compounding this problem was the fact that some of the invoices included handwritten “PAID” notations of unknown origin. RP 399–400. Mr. Catlin’s counsel admitted that the documents were hearsay, RP 400, but the trial court admitted them, reasoning, “[t]hese are documents that evidence what was paid by Mr. Catlin. He’s testified to that that all of these were done at the time that he was buying these things. So this is not the type of thing that is going to be hearsay.” RP 400. Even if it were true that Mr. Catlin had testified that all the receipts and invoices were created at the time of purchase (which he did not testify to), they would still be hearsay. They are out-of-court, unsworn statements from third-party vendors that were offered to prove what Mr. Catlin purchased and what he paid. Accordingly, the trial court’s decision to admit them (and its decision to rely upon them in calculating Mr. Catlin’s “reasonable” damages) was unreasonable and an abuse of discretion.

**II. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSION OF LAW “A” AND FINDING OF FACT “Y” BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL, ADMISSIBLE EVIDENCE**

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Substantial evidence is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Scott’s Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 341-42, 308 P.3d 791, 796 (2013). Put another way, “[e]vidence sufficiently proves damages when it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture.” *Harmony at Madrona Park Owners Assoc. v. Madison Harmony Development, Inc.*, 160 Wn. App. 728, 737, 253 P.3d 101 (2011) (internal quotation marks omitted); *see also Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 663, 266 P.3d 229 (2011) (“Evidence of damage is sufficient if it is the best evidence available and affords a reasonable basis for estimating the loss.”)

Damage awards are treated as a finding of fact and reviewed for substantial evidence. *See J.E. Work, Inc. v. Lovell*, 72 Wn.2d 516, 519-20, 433 P.2d 896 (1967). Findings of fact that are mislabeled as conclusions of law will be reviewed for substantial evidence. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 556, 557 n.12, 132 P.3d 789 (2006), *aff'd*, 162 Wn.2d 340, 172 P.3d 688 (2007).

Appellant disputes the underlined portions of the following findings:

#### CONCLUSION OF LAW "A"

The decedent caused damage to [Mr. Catlin] in the sum of \$165,874.71. This is calculated as follows:

1. \$74,320.00 in labor charges (including those of Brad Catlin);
2. \$30,946.71 for costs incurred by [Mr. Catlin] as shown by the portions of exhibit 6 admitted into evidence;
3. \$58,381 for the estimated costs of work to be done;
4. Reduced by \$1,100 for the commissive waste committed. The Court concludes that the shop stove damage of \$300 and fixing two doors of \$800 was commissive waste, and these should be trebled.
5. This equals \$162,547.71 in permissive waste.
6. Add back in \$3,300 for the commissive waste.<sup>10</sup>

CP 330.

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<sup>10</sup> Appellant does not dispute the trial court's findings regarding commissive waste in Paragraphs 4 and 6 of Conclusion of Law "A". The Appellant disputes the court's finding in Paragraph 5 to the extent damage figure of \$162,547.71 is calculated based on errors in Paragraphs 1 through 3.

#### FINDING OF FACT "Y"

Some of the damage caused by or attributable to Ms. Catlin has been satisfactorily repaired. At the time of trial, the repair work that still needed to be performed (and the cost attributable to the Estate of Heidi Catlin as damages) is as follows:

- a. Replace 1,049 square feet of carpeting: \$12,000
- b. Replace tile: \$3,460
- c. Replace hardwood floors: \$22,000
- d. Replace missing interior and exterior doors: \$7,877
- e. Fix broken gutters: \$1,170
- f. Repaint exterior of home \$4,814
- g. Repair electrical wiring issues in shop: \$500
- h. Replace two doors to the shop: \$450
- i. Paint the shop: \$1,500
  - i. This amount of \$1,500 represents one half of the cost to paint the shop. The other half is allocated to Mr. Catlin.
- j. Repair damage to shop roof and siding: \$300
- k. Replace pump: \$500
- l. Repair barn roof and replace hardware missing from barn: \$1,300
- m. Replace missing gravel: \$2,500

CP 329-330.

None of the damage awards underlined above were based on "substantial evidence."

The award of \$74,320 for labor was not supported by substantial evidence. As discussed above, the evidence the trial court relied upon in calculating this figure was testimony from Mr. Catlin and his friends estimating the total number of hours they worked to clean up the

property multiplying that by the hourly rate Mr. Catlin agreed to pay them. RP 688–689. Without any evidence supporting the reasonableness of these costs, however, they could not be an appropriate basis for an award. Where the measure of damages is the cost to repair or replace, “[p]roof of mere expenditure does not establish that the expenditure was reasonably necessary or reasonable in amount.” *Hellbaum v. Burwell and Morford*, 1 Wn. App. 694, 704, 463 P.2d 225 (1969). Opinion testimony is necessary to establish the reasonable value of damages that cannot be determined by mere “mathematical computation.” *Id.* at 703-04. Mr. Catlin did not offer any competent opinion testimony or other evidence showing that the labor costs he incurred were reasonable given the type and quantity of work performed. The fact that some people were paid \$15 per hour while others were paid \$30 or even \$45 per hour for performing the exact same sort of work (picking up garbage, cleaning, demolition) certainly indicates that some of the labor charges were unjustified. The fact that Mr. Catlin agreed to pay Mr. McEwen \$20 per hour in 2010 and \$57 per hour in 2014 for doing the same work on the same house also suggests that the labor rates were unreasonable. RP 293.

The trial court's award of \$30,946.71 for materials was likewise not supported by substantial evidence. No one opined that this amount was reasonable. The award was based entirely on information contained in the receipts and invoices that the court should have excluded as hearsay. CP 330.

Mr. Catlin might have been able to establish the reasonableness of his labor and material costs if the figures included in his subcontractor spreadsheet (Exhibit 17) had been properly admitted. However, all of the subcontractor quotes and figures in the spreadsheet were hearsay and without a witness to authenticate or independently verify the figures at trial,<sup>11</sup> they were pure speculation and not appropriate for consideration by the finder-of-fact. *Veit*, 150 Wn. App. at 387; *Wineberg*, 74 Wn.2d at 383-84; *Davidson*, 43 Wn. App. at 575-78.

The only competent evidence as to the reasonable cost of Mr. Catlin's repairs came from Nadyne Tauscher, Jeffrey Logan and, to a very minor extent, Roger Fraidenburg. Ms. Tauscher's repair estimate (\$59,740) was based on widely-used data from Marshall & Swift and her

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<sup>11</sup> As discussed earlier in this brief, Mr. Catlin and Aaron Craig were incapable of estimating the cost of repairs, as both admitted this would be outside their area of expertise and neither made any attempt to do so. RP 70, 167-168, 171-172, 445. Scott Hamilton did not attempt to come up with his own estimates either. RP 278-279.

35 years of experience as a residential appraiser.<sup>12</sup> RP 567–575, 591. Mr. Logan’s estimate for the cost to replace the hardwood flooring (\$2,269.55) was based on his personal inspection of the property and his thirteen years of experience as an insurance adjuster. RP 15, 22, 23. Mr. Fraidenburg, one of the individuals that helped clean up the property in 2014, estimated it would take ten to twelve days for one person to clean the house, shop, arena and yard. RP 366. The aforementioned evidence is the only evidence that could possibly meet the test for “substantial evidence” on review because it is the only evidence that “affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture.” *Harmony*, 160 Wn. App. at 737.

The trial court erred in holding that Mr. Catlin’s receipts and invoices and his workers’ self-serving testimony about how much they worked was “better evidence” of his damages than Ms. Tauscher’s estimates. RP 689. The *Hellbaum* case makes that clear. 1 Wn. App. at 704. A defendant should not be required to reimburse a plaintiff for

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<sup>12</sup> There were a few repair costs that Ms. Tauscher was not qualified to estimate and therefore there is no competent evidence in the record establishing reasonable costs. Specifically, Ms. Tauscher was not qualified to give an estimate for the cost to perform demolition work, the pellet stove repair or the electrical repair work. RP 573–575. The only evidence in the record purporting to establish the reasonable cost of these repairs was the hearsay subcontractor quotes referenced in Exhibit 17.

whatever amounts he spent (or claims to have spent) repairing property damage, especially where there is other testimony suggesting that plaintiff's charges were outrageously high and not at all reasonable. To hold otherwise would be to give plaintiffs like Mr. Catlin the ability to recover radically-inflated damages through self-serving testimony, especially in a case like this where the most of the labor costs remain unpaid and the laborers were plaintiff's friends and family.

Appellant disputes the trial court's decision to award \$58,381 for repairs not completed at the time of trial. This is the total cost of all the individual repairs set forth in Finding of Fact "Y." The costs that the trial court assigned to some of those individual repairs were not supported by substantial evidence because the trial court calculated them using the data from the improperly admitted subcontractor spreadsheet. RP 690-692. It was manifestly unreasonable for the trial court to admit Exhibit 17 and to rely upon the data contained therein to formulate repair calculations.

c. Replace hardwood floors: \$22,000

Mr. Catlin did not provide his own estimate for the cost of replacing the hardwood floors. Instead, he said he could not recall what

was in the non-admitted contractor quote, but he thought it was “around \$22,000.”<sup>13</sup> RP 412.

Ms. Tauscher offered evidence that the reasonable cost of repairing the hardwood floors was \$3,065. Ex. 31 at 3. According to her calculations, Mr. Catlin needed to replace 180 square feet of flooring in the kitchen at a cost of \$14.60 per square foot (with a regional multiplier of 1.09), for a total of \$2,865. Id. There was also a paint spot on the wood floor in the entry living area that she estimated would cost \$200 to clean. Id.; RP 557. She testified that she saw the hardwood floors in the rest of the house and they “looked very good” and did not need to be replaced. RP 557.

Jeffrey Logan estimated that the reasonable cost of repairing the hardwood floors in the kitchen and dining room was \$2,269.55. Ex. 14 at 5-6, 11.

The trial court felt that Mr. Catlin’s figure was the “best estimate” and awarded Brad \$22,000. RP 691; CP 329. This was error. Mr. Catlin’s estimate was pure speculation based on hearsay from Exhibit 17. Ms.

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<sup>13</sup> Appellant did not need to object to this testimony as hearsay in order to preserve the issue on appeal because the trial court had already ruled that Mr. Catlin was permitted to testify about the non-admitted contractor quotes pursuant to ER 703. RP 428.

Tauscher and Mr. Logan provided the only competent estimates and the trial court should have entered a finding consistent with them.

f. Repaint exterior of home \$4,814

The trial court awarded \$4,814 for exterior painting, which it described as the “midpoint” between Ms. Tauscher’s estimate of \$1,279.56 (Ex. 31, p. 7) and the subcontractor figure from Exhibit 17, \$8,495. RP 691. This award was error. For the reasons stated above, it was not reasonable for the court to rely on the data contained in Exhibit 17 in calculating Mr. Catlin’s damages. The trial court should have awarded \$1,279.56 as the reasonable cost for exterior painting.

g. Repair electrical wiring issues in shop: \$500

h. Replace two doors to the shop: \$450

i. Paint the shop: \$1,500

i. This amount of \$1,500 represents one half of the cost to paint the shop. The other half is allocated to Mr. Catlin.

k. Replace pump: \$500

m. Replace missing gravel: \$2,500

The damages awarded for the above items were not supported by substantial evidence because neither party offered any admissible evidence as to the reasonable cost of the repairs. Ms. Tauscher did not provide an estimate for electrical work, nor did she provide one for the

shop doors or shop paint or for the reasonable cost of replacing the pump or the missing gravel. Mr. Catlin did not offer any evidence establishing the reasonable costs of these items either, or if he did, it was based on Exhibit 17 and/or the receipts and invoices that should have been excluded. Since the record is devoid of competent evidence regarding the value of these repairs, and opinion testimony is necessary to establish the reasonable value of damages that cannot be determined by mere mathematical computation, *Hellbaum*, 1 Wn. App. at 703-04, Mr. Catlin failed to meet his burden of proof and the trial court should have awarded \$0 for these repairs.

**III. 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**

A trial court's decision regarding post-judgment interest is reviewed for abuse of discretion. *In re Marriage of Davison*, 112 Wn. App. 251, 259, 48 P.3d 358 (2002). That is assuming, however, that the trial court had the authority to address the issue in the first place.

The issue of whether interest on Heidi's judgment should abate was not properly before the court. *See, e.g., Bour v. Johnson*, 80 Wn. App. 643, 649, 910 P.2d 548, 551 (1996) (a judgment rendered upon a

complaint that does not state a cause of action is erroneous); *Baylor v. Municipality of Metro. Seattle, King Cty.*, 75 Wn.2d 710, 713-14, 453 P.2d 829 (1969) (rejecting argument that trial court lacked authority to order specific performance where appellants' pleadings put the issue before the court). Neither party in this case asked the court to modify that judgment. In fact, Mr. Catlin admitted in his pleadings that the Estate was entitled to enforce the terms of the Divorce Decree. CP 26. According to the findings of fact and conclusions of law entered in the case at bar, the only issues submitted to the trial court for decision were as follows:

1. Whether the Plaintiff was entitled to recover on a creditor's claim filed by Plaintiff in the Estate of HIEIDI M. CATLIN for Superior Court of Washington for Lewis County ... for damages sustained on the real property and improvements located at 168 Smokey Valley Road, Toledo, Washington, as a result of Decedent's actions or that of her guests and invitees.
2. Whether damages sustained amounted to waste as defined by RCW 64.12.020.
3. Whether the Plaintiff breached his obligations pursuant to a decree of dissolution causing the Defendant damage.
4. Whether the Plaintiff filed a frivolous action.

CP 312. There was no evidence or argument regarding the issue of abatement at any point prior to trial or during the presentation of evidence. When the trial court entered a judgment abating the interest

on Heidi's judgment, Appellant immediately filed a Motion to Alter/Amend the Judgment challenging the court's authority to do so. CP 280. The trial court's decision to reject this argument was error.

Even if the issue had been properly submitted to the trial court, the court should have refused to abate the interest because no conditions justified a modification. "A trial court does not have the authority to modify even its own decree in the absence of conditions justifying the reopening of the judgment." *Kern v. Kern*, 28 Wn.2d 617, 619, 183 P.2d 811 (1947); *see also* RCW 26.09.170(1) ("The provisions [of a divorce decree] as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.").

In addition, Superior Court Rules 59 and 60 place strict limits on the amount of time that can pass before a party loses its right to seek relief from a judgment and Rule 60 requires that a motion to reopen or modify be made "within a reasonable time."<sup>14</sup>

In this case, the interest rate applicable to Heidi's judgment was twelve percent. The divorce decree that was entered in the Catlins'

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<sup>14</sup> The text of Washington Superior Court Rules 59 and 60 is included in the Appendix to this brief.

divorce did not indicate what post-judgment interest rate would apply to Heidi's money judgment, but the statutory rate applicable to such judgments by default is twelve percent. Ex. 1 at 1; RCW 4.56.110 and 19.52.020.<sup>15</sup>

The trial court made no finding that there were conditions justifying the reopening of the divorce judgment under state law or that a challenge to the interest award was brought forth within a reasonable time. The trial court also made no supportable finding that there was a reasonable basis for abating the interest. "[I]n exercising its discretion in a dissolution case a court may 'reduce the rate or eliminate interest entirely on deferred payments which are part of the adjudication of property rights.'" *In re Marriage of Davison*, 112 Wn. App. at 259 (quoting *Berol v. Berol*, 37 Wn.2d 380, 383, 223 P.2d 1055 (1950)). However, "[i]n setting a lower rate, there must be some apparent reason for allowing one party the use of the other's money at less than the statutory rate" and that reason must be supported by findings based on "competent evidence." See *id.* (internal quotation marks omitted); *In re Marriage of Cheng*, No. 47937-1-II, 2016 WL 6876514, \*8, 196 Wn. App. 1069 (Nov. 22, 2016, unpublished opinion) ("the trial court must provide

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<sup>15</sup> The text of these statutes is included in the Appendix to this brief.

adequate reasons for imposing an interest rate lower than the statutory rate”). The trial court made no such findings in the divorce action.

In support of its decision to abate the interest in the case at bar, the trial court indicated it would be unfair to charge Mr. Catlin post-judgment interest on the divorce award because the house “couldn’t be sold because of the damage that had been done to the place which was done by Heidi Catlin” and Mr. Catlin didn’t have “money in his pocket” to repair the damage. RP 702–705. However, no witness testified that the home was unsellable during this period or that there had been any unsuccessful attempts to market it following the entry of the divorce decree. While it is logical to conclude that the damage sustained by the home sometime in 2013 or 2014 would have decreased its sales price, there is nothing in the record to indicate that the home was unsellable. RP 702–705. Also, the court awarded Mr. Catlin two other pieces of property in the 2013 divorce proceedings worth a combined \$96,000. Ex. 23 at 2. The trial court did not find that these were unsellable. Indeed, Mr. Catlin could have sold them at any time and paid off a portion of Heidi’s judgment.

Respondent will argue that the trial court made the right decision because it would not be fair to “punish” Mr. Catlin for the fact that Heidi

stayed in the house past her move-out date and damaged the property. Our Supreme Court has made clear, however, that a judgment debtor is not entitled to an abatement of post-judgment interest where he has the ability to satisfy the judgment but fails to do so, even where the delay is reasonable and caused by the other party. In *Rufer v. Abbott Laboratories*, the Supreme Court was asked to review an appellate decision abating post-judgment interest on a judgment entered against the defendant at the trial court level. 154 Wn.2d 530, 551-53, 114 P.3d 1182 (2005). The appellate court abated the interest on the defendant's judgment obligations during a period of appellate delay attributable to the plaintiffs' unsuccessful appellate motions. *Id.* at 551. The Court held that the abatement was inappropriate because the appellant "could have paid its financial obligation and still appealed the judgment [but] chose not to...." *Id.* at 553. In so holding, the Court stated: "The postjudgment interest statute, RCW 4.56.110(3), is clear. It mandates that interest accrue from the date of entry of the judgment. It provides no exception for delays, unreasonable or otherwise." *Id.*

Given the holding in *Rufer* and the fact that no evidence in the record (competent or otherwise) supported a finding that Mr. Catlin's house was unsellable, the trial court abused its discretion in abating the

interest on Heidi's judgment until September 16, 2018. Accordingly, appellant respectfully requests that the appellate court reverse this portion of the trial court's judgment.

## **V. CONCLUSION**

In conclusion, Appellant seeks 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);

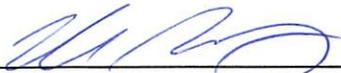
(2) A finding that it was prejudicial error for the trial court to admit and rely upon the information contained in the receipts and invoices admitted as part of Exhibit 6;

(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 August 21, 2017.

Respectfully submitted,

  
\_\_\_\_\_  
MEREDITH A. LONG, No. 48961  
Attorney for Appellant

## **APPENDIX**

1. CR 59
2. CR 60
3. ER 702
4. ER 703
5. ER 801
6. ER 802
7. RCW 4.56.110
8. RCW 19.52.020
9. RCW 26.09.170(1)

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## Superior Court Civil Rules

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CR 59  
NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) Time of Hearing. Whether the motion shall be heard before the entry of judgment;

(2) Consolidation of Hearings. Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) Nature of Hearing. Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made without leave of the court

first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005; April 28, 2015.]

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## Superior Court Civil Rules

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CR 60  
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (5) The judgment is void;
- (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
- (7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;
- (8) Death of one of the parties before the judgment in the action;
- (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
- (10) Error in judgment shown by a minor, within 12 months after arriving at full age; or
- (11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

[Amended effective September 26, 1972; January 1, 1977; April 28, 2015.]

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## Rules of Evidence

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**RULE ER 702  
TESTIMONY BY EXPERTS**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[Adopted effective April 2, 1979.]

Comment 702

[Deleted effective September 1, 2006.]

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## Rules of Evidence

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RULE ER 703  
BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[Amended effective September 1, 1992.]

Comment 703

[Deleted effective September 1, 2006.]

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## Rules of Evidence

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### RULE ER 801 DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

[Amended effective September 1, 1992.]

Comment 801

[Deleted effective September 1, 2006.]

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**Rules of Evidence**

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**RULE ER 802  
HEARSAY RULE**

Hearsay is not admissible except as provided by these rules,  
by other court rules, or by statute.

[Adopted effective April 2, 1979.]

**Comment 802**

[Deleted effective September 1, 2006.]

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## **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 19.52.020

### Highest rate permissible—Setup charges.

(1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four 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 later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action.

(2)(a) In any loan of money in which the funds advanced do not exceed the sum of five hundred dollars, a setup charge may be charged and collected by the lender, and such setup charge shall not be considered interest hereunder.

(b) The setup charge shall not exceed four percent of the amount of funds advanced, or fifteen dollars, whichever is the lesser, except that on loans of under one hundred dollars a minimum not exceeding four dollars may be so charged.

(3) Any loan made pursuant to a commitment to lend at an interest rate permitted at the time the commitment is made shall not be usurious. Credit extended pursuant to an open-end credit agreement upon which interest is computed on the basis of a balance or balances outstanding during a billing cycle shall not be usurious if on any one day during the billing cycle the rate at which interest is charged for the billing cycle is not usurious.

[ 1989 c 14 § 3; 1985 c 224 § 1; 1981 c 78 § 1; 1967 ex.s. c 23 § 4; 1899 c 80 § 2; RRS § 7300. Prior: 1895 c 136 § 2; 1893 c 20 § 3; Code 1881 § 2369; 1863 p 433 § 2; 1854 p 380 § 2.]

### NOTES:

**Effective date—1985 c 224:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1985." [ 1985 c 224 § 2.]

**Severability—1981 c 78:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ 1981 c 78 § 7.]

**Severability—Savings—1967 ex.s. c 23:** See notes following RCW 19.52.005.

*Interest on judgments: RCW 4.56.110.*

## **RCW 26.09.170**

### **Modification of decree for maintenance or support, property disposition—Termination of maintenance obligation and child support—Grounds.**

(1) Except as otherwise provided in RCW 26.09.070(7), the provisions of any decree respecting maintenance or support may be modified: (a) Only as to installments accruing subsequent to the petition for modification or motion for adjustment except motions to compel court-ordered adjustments, which shall be effective as of the first date specified in the decree for implementing the adjustment; and, (b) except as otherwise provided in this section, only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(2) Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance or registration of a new domestic partnership of the party receiving maintenance.

(3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child.

(4) Unless expressly provided by an order of the superior court or a court of comparable jurisdiction, provisions for the support of a child are terminated upon the marriage or registration of a domestic partnership to each other of parties to a paternity order, or upon the remarriage or registration of a domestic partnership to each other of parties to a decree of dissolution. The remaining provisions of the order, including provisions establishing paternity, remain in effect.

(5)(a) A party to an order of child support may petition for a modification based upon a showing of substantially changed circumstances at any time.

(b) An obligor's voluntary unemployment or voluntary underemployment, by itself, is not a substantial change of circumstances.

(6) An order of child support may be modified one year or more after it has been entered without a showing of substantially changed circumstances:

(a) If the order in practice works a severe economic hardship on either party or the child;

(b) If a party requests an adjustment in an order for child support which was based on guidelines which determined the amount of support according to the child's age, and the child is no longer in the age category on which the current support amount was based;

(c) If a child is still in high school, upon a finding that there is a need to extend support beyond the eighteenth birthday to complete high school; or

(d) To add an automatic adjustment of support provision consistent with RCW 26.09.100.

(7)(a) If twenty-four months have passed from the date of the entry of the order or the last adjustment or modification, whichever is later, the order may be adjusted without a showing of substantially changed circumstances based upon:

(i) Changes in the income of the parents; or

(ii) Changes in the economic table or standards in chapter 26.19 RCW.

(b) Either party may initiate the adjustment by filing a motion and child support worksheets.

(c) If the court adjusts or modifies a child support obligation pursuant to this subsection by more than thirty percent and the change would cause significant hardship, the court may implement the change in two equal increments, one at the time of the entry of the order and the second six months from the entry of the order. Twenty-four months must pass following the second change before a motion for another adjustment under this subsection may be filed.

(8)(a) The department of social and health services may file an action to modify or adjust an order of child support if public assistance money is being paid to or for the benefit of the child and the child support order is at least twenty-five percent above or below the appropriate child support amount set

forth in the standard calculation as defined in RCW 26.19.011 and reasons for the deviation are not set forth in the findings of fact or order.

(b) The department of social and health services may file an action to modify or adjust an order of child support in a nonassistance case if:

(i) The child support order is at least twenty-five percent above or below the appropriate child support amount set forth in the standard calculation as defined in RCW 26.19.011;

(ii) The department has determined the case meets the department's review criteria; and

(iii) A party to the order or another state or jurisdiction has requested a review.

(c) The determination of twenty-five percent or more shall be based on the current income of the parties and the department shall not be required to show a substantial change of circumstances if the reasons for the deviations were not set forth in the findings of fact or order.

(9) The department of social and health services may file an action to modify or adjust an order of child support under subsections (5) through (7) of this section if:

(a) Public assistance money is being paid to or for the benefit of the child;

(b) A party to the order in a nonassistance case has requested a review; or

(c) Another state or jurisdiction has requested a modification of the order.

(10) If testimony other than affidavit is required in any proceeding under this section, a court of this state shall permit a party or witness to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means, unless good cause is shown.

[ 2010 c 279 § 1; 2008 c 6 § 1017; 2002 c 199 § 1; 1997 c 58 § 910; 1992 c 229 § 2; 1991 sp.s. c 28 § 2; 1990 1st ex.s. c 2 § 2; 1989 c 416 § 3; 1988 c 275 § 17; 1987 c 430 § 1; 1973 1st ex.s. c 157 § 17.]

#### **NOTES:**

**Part headings not law—Severability—2008 c 6:** See RCW 26.60.900 and 26.60.901.

**Short title—Part headings, captions, table of contents not law—Exemptions and waivers from federal law—Conflict with federal requirements—Severability—1997 c 58:** See RCW 74.08A.900 through 74.08A.904.

**Severability—Effective date—Captions not law—1991 sp.s. c 28:** See notes following RCW 26.09.100.

**Effective dates—Severability—1990 1st ex.s. c 2:** See notes following RCW 26.09.100.

**Effective dates—Severability—1988 c 275:** See notes following RCW 26.19.001.

**Severability—1987 c 430:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [ 1987 c 430 § 4.]

COURT OF APPEALS OF WASHINGTON, DIVISION II

DAVID B. CATLIN, Respondent,	NO. 50276-3-II
vs.	AFFIRMATION OF SERVICE
ESTATE OF HEIDI M. CATLIN, Raeann Phillips, Personal Representative, Appellant.	

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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 Brief of Appellant with this Affirmation of Service attached with postage paid to the indicated parties:

1. Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402
2. Michael Claxton  
Walstead Mertsching PS  
P.O. Box 1549  
Longview, WA 98632

Dated this 21st day of August, 2017, at Longview, WA.

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

**LAW OFFICE OF MEREDITH A LONG PLLC**

**August 21, 2017 - 12:06 PM**

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**Appellate Court Case Number:** 50276-3  
**Appellate Court Case Title:** David B. Catlin, Res/Cross-Appellant v. Raeann Phillips, P.R., App./Cross-Respondent  
**Superior Court Case Number:** 15-2-00967-1

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