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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

No. 52122-9-II

WILLIAM NEWCOMER,

Plaintiff and Respondent,

v.

MICHAEL COHEN and JULIE McBRIDE,

Defendants and Appellants.

**OPENING BRIEF OF APPELLANTS
MICHAEL COHEN AND JULIE McBRIDE**

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I. INTRODUCTION

Appellants/Defendants Michael Cohen and Julie McBride¹ (“Cohen”) respectfully request that this Court reverse the Superior Court’s application of a 12% post-judgment interest rate for judgments founded upon tortious conduct—violation of the Washington State Securities Act (“WSSA”)—instead of the correct post-judgment interest rate required by RCW 4.56.110(3)(b).

RCW 4.56.110(3)(b) mandates that the post-judgment interest for judgments founded upon “tortious conduct” shall accrue at a rate of two percentage points above the prime rate, rather than the catch-all 12% interest rate supplied by RCW 4.56.110(5). Although no Washington appellate court has addressed whether RCW 4.56.110(3)(b)—which went into effect in 2004—applies to WSSA-based judgments, Washington case law interpreting both RCW 4.56.110(3)(b) and WSSA makes clear that it does. Indeed, Washington courts have held that RCW 4.56.110(3) applies to judgments based on “tortious conduct” irrespective of whether they are based on common law or statutory torts. The Washington Supreme Court has held that WSSA violations constitute “tortious conduct” and that such violations are “statutory torts.” As such, the post-judgment interest rate

¹ Julie McBride was named as a defendant in this action solely because of the marital community property she allegedly shared with Mr. Cohen during part of the period relating to this lawsuit.

required by RCW 4.56.110(3)(b) applies to WSSA judgments, including the judgments entered in this case.

Specifically, Cohen seeks to correct the erroneous post-judgment interest rate used in the July 20, 2018 Judgment awarding attorneys' fees following Cohen's first appeal. He also seeks to correct the erroneous post-judgment interest rate used in the October 9, 2015 Judgment for WSSA violations, which the Superior Court refused to do when it denied Cohen's CR 60 motion to correct the previous error and, in doing so, allowed Plaintiff-Respondent William Newcomer ("Newcomer") a windfall of over \$760,000 in improper post-judgment interest.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it entered the July 20, 2018 judgment using a 12% post-judgment interest rate in violation of RCW 4.56.110(3)(b), even though the judgment is based on tortious conduct.

2. The Superior Court erred when it denied Cohen's CR 60 motion to correct the October 9, 2015 Judgment by refusing to apply the post-judgment rate required by RCW 4.56.110(3)(b) because the judgment is based on tortious conduct.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether RCW 4.56.110(3)(b) provides the post-judgment interest rate for a judgment based solely on violations of WSSA, which is a statutory tort.

2. Whether the Court should reverse the July 20, 2018 Judgment because the Superior Court erred as a matter of law when it applied a 12% post-judgment interest rate in violation of RCW 4.56.110(3)(b).

3. Whether the Court should vacate the clearly erroneous October 9, 2015 Judgment because it contains an incorrect post-judgment-interest rate and instruct the Superior Court that the replacement judgment to be entered in this case must comply with RCW 4.56.110(3)(b).

IV. STATEMENT OF THE CASE

A. The October 9, 2015 Judgment and Appeal Used the Wrong Interest Rate.

Following a jury trial conducted from September 1, 2015 through September 17, 2015, the jury returned a verdict in favor of Newcomer, awarding \$2,309,552.00 in damages for a violation of WSSA (RCW 21.20.010 and RCW 21.20.430). CP 1–3. The parties stipulated that the amount of pre-judgment interest was equal to \$1,534,614.21.

CP 32–34. The trial court awarded Newcomer \$216,821.25 in attorneys’ fees and costs. CP 44–51.

The proposed judgment presented by Newcomer and ultimately entered by the Superior Court included, without citation to legal authority, a post-judgment interest rate of 12%. CP 14–17. On October 9, 2015, the Superior Court entered Judgment in the total amount of \$4,060,987.46. CP 52–55. Neither the parties nor the trial court ever discussed, debated, or briefed the appropriate post-judgment interest rate, nor was the post-judgment interest rate addressed during the appeal, and no decision, action, or ruling had been made by this Court regarding the appropriate post-judgment interest rate in this matter. *See, e.g.*, CP 234–258.

B. The July 20, 2018 Judgment Awarding Attorney’s Fees and Denial of CR 60(a) Motion Used the Wrong Interest Rate.

Following the appeal to this Court and denial of review by the Washington Supreme Court, on June 25, 2018, this Court awarded Mr. Newcomer a total of \$125,115.69 in fees and costs related to the appeals. CP 271–73. This Court did not include a post-judgment-interest rate in its fee-award order. CP 272. On June 25, 2018, Newcomer moved for entry of a post-appeal judgment for the fees and costs awarded on appeal. CP 203–211. Newcomer’s proposed judgment again used—without citation or discussion—a 12% post-judgment-interest rate. CP 210.

On July 18, 2018, Cohen opposed entry of the fee-award judgment using the erroneous 12% rate because the Judgment is based on a violation of RCW 21.20.430, which is a statutory tort, and therefore the correct interest rate is mandated by RCW 4.56.110(3)(b).² CP 274–285. Cohen also moved for relief under CR 60, and explained that the Superior Court should correct the October 9, 2015 Judgment to reflect the proper post-judgment-interest rate of 5.25% because that rate is required by RCW 4.56.110(3)(b), and to ensure that the correct post-judgment interest rate is uniformly used in both Judgments. CP 378–90.

If the Superior Court had applied the correct post-judgment interest rate of 5.25% to the October 9, 2015 Judgment, the post-judgment interest—*i.e.*, what accrued during the first appeal—would be reduced by over \$760,000. CP 283, 361. In other words, Newcomer’s judgment is massively inflated based on a violation of the controlling post-judgment interest statute.

On July 20, 2018, the Superior Court denied Cohen’s motion for CR 60 relief and entered judgment on the attorney’s fee award, once again using the erroneous 12% post-judgment interest rate. CP 554–56.

² The post-judgment interest rate for torts is calculated as “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.” RCW 4.56.110(3)(b).

Although the Superior Court did not issue a written opinion explaining its denial of Cohen’s CR 60(a) motion, Judge Philip K. Sorenson explained during oral argument: “I am relatively convinced that adequate time to bring the motion has passed by a considerable margin, so I am denying the motion regarding CR 60.” RP 21:24–22:2. On July 20, 2018, Cohen filed a timely notice of appeal. CP 532–34.

V. ARGUMENT

The post-judgment interest rate used by the trial court is a matter of law subject to *de novo* review. *TJ Landco, LLC v. Harley C. Douglass, Inc.*, 186 Wn. App. 249, 256, 346 P.3d 777, 780 (2015) (“[A]wards of post-judgment interest are matters of law that are reviewed *de novo*.”). The primary issue that this Court must resolve as a matter of law—and as a matter of first impression—is whether RCW 4.56.110(3)(b) provides the post-judgment interest rate in a judgment based solely on a WSSA violation. If so, then, as a matter of law, the July 20, 2018 Judgment entered by the Superior Court, which applied a 12% post-judgment interest rate rather than the rate provided by RCW 4.56.110(3)(b), was clear reversible error.

The secondary issue for this Court to resolve is whether the Superior Court abused its discretion when it refused to correct—upon a timely motion brought pursuant to CR 60(a)—the October 9, 2015

Judgment, which used the wrong post-judgment-interest rate as a matter of law. Newcomer’s counsel inserted the rate in the proposed judgment without any discussion by the parties or the Superior Court. This clear legal error was timely brought to the Superior Court’s attention after the first appeal was resolved under CR 60.

A. The Superior Court Erred as a Matter of Law by Applying the Incorrect Post-Judgment Interest Rate to the July 20, 2018 Judgment.

The Judgments in this case are based solely on a WSSA violation. The Superior Court applied the wrong post-judgment-interest rate when it entered the July 20, 2018 Judgment (and similarly erred when it failed to correct the same error in the October 9, 2015 Judgment). The correct post-judgment-interest rate is determined by RCW 4.56.110, which provides for different rates based on the type of claim. For example, RCW 4.56.110(1) and (2) apply to judgments based on contract or for unpaid child support, respectively, while RCW 4.56.110(4) applies to judgments for unpaid student-loan debt. RCW 4.56.110(3)(b), in turn, applies to judgments based on “tortious conduct.” In contrast, RCW 4.56.110(5) is a catchall provision that applies to judgments that do not fit within any of the above specifically-enumerated categories. RCW 4.56.110(3)(b) and (5) provide:

(3)(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.

* * *

(5) Except as provided under subsections (1), (2), (3), and (4) 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.

The Judgments in this case are, as a matter of law, unquestionably “founded on the tortious conduct of [an] individual[.]” Both the October 9, 2015 Judgment and the July 20, 2018 Judgment are based on the jury’s verdict entered against Cohen for alleged misrepresentations and omissions that violated WSSA. *See* CP 2 (Special Verdict Form findings

that defendants made “material misrepresentation[s] or omission[s] . . . in violation of the Washington State Securities Act.”); *see also* CP 53 (“This judgment is based on a finding of violation of RCW 21.20.010 and RCW 21.20.430.”); CP 555 (“This judgment is for an award of attorneys fees and costs awarded on appeal following a finding of a violation of RCW 21.20.010 and RCW 21.20.430.”).

The Washington Supreme Court has expressly held that WSSA is a “statutory tort claim” and founded upon “tortious conduct.” *See Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 143, 744 P.2d 1032 (1987) (holding “statutory tort claim rights” under RCW 21.20.430 were not vested); *see also Haley v. Highland*, 142 Wn.2d 135, 12 P.3d 119 (2000).

In *Haley*, an arbitrator awarded the plaintiff \$2,500 to remedy defendant’s WSSA violations. 142 Wn.2d at 139. On appeal, the Washington Supreme Court characterized the issue as “whether the judgment against [defendant], a married person, for *tortious conduct* that occurred before his marriage may be enforced against his one-half interest in community personal property if his separate property is insufficient to satisfy the claim.” *Id.* at 142 (emphasis added). In fact, throughout the opinion, the court characterized the WSSA judgment against the defendant as one for “tortious conduct” and labeled the defendant a “tortfeasor.” *Id.*

at 148–49; *see also id.* at 143 (“In this case, [defendant’s] securities fraud violation is not a separate tort because of the nature of his conduct. Rather, it is separate because he was unmarried during the period when his tortious activity occurred.”).

In sum, the Washington Supreme Court’s decisions in *Haberman* and *Haley* make clear that WSSA violations constitute “tortious conduct” as a matter of law. RCW 4.56.110(3)(b) therefore provides the correct post-judgment interest rate that must apply to such judgments.

In his September 21, 2018 Reply in Support of Motion to Dismiss this appeal (“Newcomer Reply”), Newcomer argued that RCW 4.56.110(3)(b) does not apply to WSSA judgments because they are based on “statutory claims” and should fall within the catch-all set forth in RCW 4.56.110(5). *See* Newcomer Reply at 10. Newcomer’s argument lacks merit because Washington case law is clear that RCW 4.56.110(3)(b)—which applies to “judgments founded on the tortious conduct of individuals or other entities”—is not limited to common law torts, but also applies to statutory violations involving “tortious conduct,” which are also known as statutory torts.

The only case that Newcomer relied on for his argument that RCW 4.56.110(5) applies to all “statutory” violations—*Washington State Commc’n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 293

P.3d 413 (2013)—supports the *opposite* conclusion. In his Reply, Newcomer omits qualifying language from *Regal Cinemas* and quotes it to state: “judgments founded on a tort action bear interest at a different rate than those founded on a statutory claim” under RCW 4.56.110(5). Newcomer Reply at 10. But the sentence immediately following the snippet Newcomer cherry-picked makes clear that a statutory claim, such as the Washington Law Against Discrimination, may nevertheless be founded upon tortious conduct:

Generally, RCW 4.56.110[(5)]³ applies to judgments from statutorily based claims. Thus, under RCW 4.56.110(3)(b) and [(5)], judgments founded on a tort action bear interest at a different rate than those founded on a statutory claim. ***The question, then, is whether a judgment founded on a WLAD claim is in fact a judgment based on tortious conduct*** or, rather, one that is statutorily based.

Regal Cinemas, Inc., 173 Wn. App. at 224 (emphasis added).

The *Regal Cinemas* court then analyzed prior WLAD cases and concluded that WLAD judgments are indeed “founded upon tortious conduct” and that RCW 4.56.110(3)(b) supplies the correct post-judgment interest rate. *Id.* (“We hold that [a judgment founded on a WLAD claim] is a judgment founded upon tortious conduct.”). *See also Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147, 175, 225 P.3d 339 (2010)

³ As of June 7, 2018, the numbering of RCW 4.56.110(4) was amended to RCW 4.56.110(5).

(holding that “[t]he legislature exercised its prerogative to authorize attorney fees for statutory (WLAD) claims it considers to be tort-like, *i.e.*, arising out of tortious conduct. It then follows that judgments based upon such claims are ‘founded on the tortious conduct.’”) (quoting RCW 4.56.110(3)(b)).

In addition to WLAD claims, Washington courts have applied RCW 4.56.110(3)(b) to a variety of other statutory violations that are tortious in nature. *See Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 148, 144 P.3d 1185 (2006) (applying RCW 4.56.110(3)(b) to judgment based on liability under Model Toxics Control Act); *Woo v. Fireman’s Fund Ins. Co.*, 150 Wn. App. 158, 170, 208 P.3d 557 (2009) (applying RCW 4.56.110(3)(b) to insurance bad faith claim on grounds that “[i]nsurers have a duty to handle claims in good faith under RCW 48.01.030. A breach of this duty sounds in the tort of bad faith.”); *MKB Constructors v. Am. Zurich Ins. Co.*, 83 F. Supp. 3d 1078, 1083 (W.D. Wash. 2015) (applying RCW 4.56.110(3)(b) to a “mixed” judgment consisting of an award for both breach of contract and violation of Washington’s Insurance Fair Conduct Act (“IFCA”), because an IFCA claim was generally analogous to a common law tort claim and the mixed judgment was therefore “primarily based in tort.”); *see also* 16 Wash.

Prac., *Tort Law and Practice* § 7:1 (4th ed.) (explaining wrongful death claims “are entirely dependent upon statute”).

At the Superior Court level, Newcomer failed to cite any case law or any other authority disputing that RCW 4.56.110(3)(b) controls the proper post-judgment interest rate that applies to the October 9, 2015 Judgment and the July 20, 2018 Judgment awarding attorney’s fees. Newcomer also failed in his Motion to Dismiss this appeal to dispute that the Judgments in this case used erroneous post-judgment-interest rates. And in his Reply in support of his Motion to Dismiss, Newcomer cited only to the *Regal Cinemas* in support of his argument that RCW 4.56.110(3)(b) does not apply to statutory claims, even though *Regal Cinemas* expressly held that RCW 4.56.110(3)(b) applies to statutory claims based on tortious conduct. Newcomer Reply at 10. Because WSSA claims are undisputedly founded on tortious conduct, RCW 4.56.110(3)(b) provides the post-judgment-interest rate that must apply to the WSSA Judgments entered in this case. The Superior Court erred as a matter of law when it applied the wrong rate to the July 20, 2018 Judgment. As set forth below, the Superior Court also erred when it failed to correct the same plainly erroneous post-judgment interest rate entered in the October 9, 2015 Judgment.

B. The Superior Court Erred by Denying Cohen’s CR 60(a) Motion to Correct the Post-Judgment Interest Rate Applied to the October 9, 2015 Judgment.

Just before the Superior Court’s entry of the July 20, 2018 Judgment—which Cohen opposed because Newcomer’s proposed order included the incorrect post-judgment interest rate—Cohen moved under CR 60(a) to request that the trial court correct a patent oversight in the original October 9, 2015 Judgment prepared by Newcomer: the clearly erroneous 12% post-judgment-interest rate.⁴

Although the Superior Court did not issue a written opinion explaining its denial of Cohen’s CR 60(a) motion, Judge Sorenson stated during oral argument: “I am relatively convinced that adequate time to bring the motion has passed by a considerable margin, so I am denying the motion regarding CR 60.” RP 21:24–22:2. The Superior Court erred by denying the CR 60(a) motion on timeliness grounds because CR 60(a) provides the procedural vehicle authorizing the trial court to correct such oversights “at any time.”

⁴ In his Motion to Dismiss this appeal, Newcomer claimed that RAP 12.2 deprives the Superior Court of authority to correct mistakes following an appeal, but RAP 12.2 explicitly permits a trial court to make such corrections: “After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.” Because the post-judgment interest rate was never addressed or decided by this Court on the first appeal, the trial court had authority to correct the clearly erroneous post-judgment interest rate through CR 60(a).

Civil Rule 60(a) permits correction of “clerical mistakes” and “errors . . . arising from oversight or omission.” *Entranco Engineers v. Envirodyne, Inc.*, 34 Wn. App. 503, 507, 662 P.2d 73 (1983). CR 60(a) states, in relevant part: “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.” (Emphasis added.) CR 60(a) specifically allows the Court to correct such mistakes without restriction on the motion’s timing. *See In re Marriage of King*, 66 Wn. App. 134, 137, 831 P.2d 1094 (1992). The term “clerical mistake,” as used in CR 60(a), includes mistakes or oversights apparent on the record and that do not comport with the record. *Id.* (citing *Foster v. Knutson*, 10 Wn. App. 175, 177, 516 P.2d 786 (1973)).

Moreover, the Superior Court has authority to make such corrections to judgments under CR 60(b)(11): “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: . . . (11) Any other reason justifying relief from the operation of the judgment.” CR 60(b). “The United States Supreme Court has held that this rule ‘vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish

justice.”” *Flannagan v. Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) (citing *Klapprott v. United States*, 335 U.S. 601, 614, 69 S. Ct. 384, 390, 93 L. Ed. 266 (1949)).

In this case, using 12% as the rate of post judgment interest in the October 9, 2015 Judgment was an “oversight or omission” within the scope of CR 60(a) because the Superior Court had a ministerial duty to use the correct statutorily mandated interest rate and the ministerial error went unnoticed by both the Superior Court and the parties. Indeed, the 12% rate was never mentioned in any briefing or following the jury’s verdict leading up to entry of Judgment. Rather, the 12% rate was simply inserted by Newcomer’s counsel in the proposed judgment, which was then signed by the Superior Court on October 9, 2015.

Therefore, the trial court therefore had the authority—and duty—to correct the post-judgment interest rate used in the October 9, 2015 Judgment pursuant to CR 60. Indeed, the Court has made clear that a Superior Court has not only the authority, but also the duty, to ensure that a judgment is entered that sets forth the correct rate for post judgment interest. *In re Marriage of Knight*, 75 Wn. App. 721, 731, 880 P.2d 71 (1994) (“[I]t is the responsibility of the court to enter a judgment which complies with the statute [RCW 4.56.110].”) (citing *Safeco Ins. Co. of Am. v. JMG Restaurants, Inc.*, 37 Wn. App. 1, 23, 680 P.2d 409 (1984)).

“Failure to do so constitutes error meriting remand for correction of the judgment’s interest rate to the statutory rate.” *Id.*

In *Safeco*, the Court found that the Superior Court erred by refusing to correct an erroneous post judgment interest rate. The defendant in that case prevailed on a counterclaim against the plaintiff, but inadvertently requested an 8% post judgment interest rate in its proposed judgment, rather than the 10% rate it should have received under the then-existing version of the post judgment interest rate statute. *Id.* The Superior Court refused to correct the error, which the defendant challenged on appeal as an abuse of discretion. *Id.* The Court of Appeals held that “regardless of who prepared the form of judgment, it is the responsibility of the court to enter a judgment which complies with the statute.” *Id.* “It was the court’s duty to correct any provision of the judgment which was contrary to the terms of the statute [RCW 4.56.110].” *Id.* Thus, the Court of Appeals overturned the Superior Court’s failure to correct the rate of post judgment interest, holding “[t]he trial court committed error by not doing so.” *Id.*

Moreover, neither the previous appeal nor the passage of time prevented the Superior Court from correcting the clerical error, oversight, and/or omission of the incorrect post-judgment interest rate. That is because CR 60(a) provides that such errors: “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.” CR 60(a) (emphasis added). *See also ABC Holdings, Inc. v. Kittitas Cty.*, 187 Wn. App. 275, 287, 348 P.3d 1222, 1229 (2015) (“We reject this contention [that CR 60(a) motion was untimely] because under CR 60(a), ‘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.’ The court overlooked an issue raised by CSE in 2012. Two years later, and while litigation continued, CSE brought the omission to the court’s attention. This is reasonable under CR 60(a).”). In fact, trial courts may even be instructed on remand to correct mistakes or omissions pursuant to CR 60(a). *See, e.g., In re Silver*, 200 Wn. App. 1030, 2017 WL 3635622 at *10 (2017) (unpublished) (“We remand with instructions that the trial court, under CR 60(a), correct the court record.”).

Federal courts have likewise held that Federal Rule of Civil Procedure 60(a) allows a judgment to be corrected post-appeal. *See, e.g., Dura-Wood Treating Co., Div. of Roy O. Martin Lumber Co. v. Century Forest Indus., Inc.*, 694 F.2d 112, 115 (5th Cir. 1982) (Affirming trial court’s post-appeal correction to judgment amount, holding: “We do not doubt that the better practice would have been to request the correction earlier, even during the pendency of the appeal, as permitted by the terms

of Rule 60(a). Under the clear language of the rule, however, the court below could make the correction ‘at any time’ at which it retained jurisdiction of the case, as it did on remand.”). Similarly, the Fourth Circuit Court of Appeals has held that Rule 60(a) is the proper mechanism to correct a post-judgment interest rate where the issue was not raised in the first appeal:

The facts of this case demonstrate the ministerial nature of the court’s responsibility: both parties understood that interest had been awarded; both parties understood that West Virginia law set the rate of prejudgment interest at ten percent; and both parties understood the time frame for computation. The court’s only task was to do the calculation and make the amount official. We simply do not believe that by performing this function the court altered or amended the judgment. Rather, we are persuaded that the court, in undertaking such a task, merely supplies a figure to the judgment, the amount of which already had been fixed at the time of the entry of judgment. This omission is the type of error that is properly within the scope of Rule 60(a).

Kosnoski v. Howley, 33 F.3d 376, 379 (4th Cir. 1994).

Because the October 9, 2015 Judgment used an interest rate that that was clearly erroneous, and because the Superior Court had the authority and obligation to correct such a manifest error, the Superior Court’s failure to do so and the denial of Cohen’s CR 60(a) motion was an abuse of discretion and reversible error that must be corrected.

C. The Court Should Exercise Its Discretion to Correct the Post-Judgment Interest Rate Applied to the October 9, 2015 Judgment.

The post-judgment-interest rate required by RCW 4.56.110(3)(b) applied to the October 9, 2015 Judgment is 5.25%, not the 12%. Failing to correct the mistake will result in over a \$760,000 windfall to Newcomer in violation of the statute.⁵ In opposing this appeal, therefore, Newcomer is asking this Court to award him over \$760,000 in direct violation of the law. Indeed, in his August 30, 2018 Motion to Dismiss this appeal (“Newcomer Motion”), Newcomer essentially argued that—irrespective of whether the 12% post-judgment rate was correct—the fact that Superior Court applied the 12% rate to the October 9, 2015 Judgment meant that the same 12% rate should apply to the July 20, 2018 Judgment. Newcomer Motion at 9 (citing *Regal Cinemas* and arguing that “the post-judgment interest rate on an award of attorney’s fees by an appellate court should mirror the post-judgment interest rate on the underlying trial court judgment.”).

⁵ The post judgment interest rate for torts is calculated as “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.” RCW 4.56.110(3)(b). On October 1, 2015 (the first business day of the month preceding the October 9, 2015 Judgment on Verdict), the federal reserve system had a published prime rate of 3.25%. CP 287. Adding “two percentage points above the prime rate,” as required by RCW 4.56.110(3)(b), results in a post judgment interest rate of 5.25%.

In other words, Newcomer argues that the Superior Court should compound its legal error solely for the sake of judgment consistency. What Newcomer omitted, however, is that the Court of Appeals in *Regal Cinemas* made clear that it needed to first determine the *correct* post-judgment interest rate before applying it to both the attorney’s fee award following appeal of the underlying judgment and the underlying judgment itself. *See Regal Cinemas*, 173 Wn. App. at 222 (“At issue is what rate of interest under RCW 4.56.110 should be applied *to the two awards.*”) (emphasis added). Nothing in *Regal Cinemas* suggests that it is proper for courts to compound clear legal errors at different stages of the proceeding solely for the sake of consistency.

The *Regal Cinemas* decision is especially instructive because, like this case, the parties failed to brief the issue—either at the trial court level or in the first appeal—of the proper post-judgment interest rate that should be applied to both the underlying judgment and the post-appeal fee award. *See Regal Cinemas*, 173 Wn. App. at 222 (“Neither WashCAP nor Regal sought clarification of what specific rate of interest should be applied to the judgment after the trial court’s ruling. Nor did either party brief this issue on appeal.”). Nevertheless, the Court of Appeals performed its ministerial duty to ensure that the *correct* post-judgment rate was applied

to both judgments. *Id.* (“At issue is what rate of interest under RCW 4.56.110 should be applied to the two awards.”).

In other words, *Regal Cinemas* does not stand for the proposition that an incorrect interest rate used in an underlying judgment must then be applied to the attorney’s fee award following appeal. Rather, it makes clear that the Court should determine the correct rate and then apply it to both awards. *See id.* at 225 (holding that for a WLAD statutory tort claim, the proper interest rate “both on the judgment and on the fees on appeal” is the two-interest-points-above-prime rate of RCW 4.56.110(3)(b)). That is precisely the relief that Cohen seeks on appeal.

Moreover, RAP 2.5 explicitly authorizes the Court to review and correct errors of the trial court that are properly before the Court, even if a *similar* decision by the trial court was not disputed in an earlier review of the same case. RAP 2.5(c)(1) (“If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.”); *see also State v. Kilgore*, 167 Wn. 2d 28, 38–39, 216 P.3d 393 (2009) (“We have interpreted RAP 2.5(c)(1) to allow trial courts, as well as appellate courts, discretion to revisit an issue on remand that was not the subject of the earlier appeal. This is consistent with RAP 12.2,

which allows trial courts to entertain post-judgment motions authorized by statute or court rules, as long as the motions do not challenge issues already decided on appeal.”).

Here, the issue of the erroneous post-judgment interest rate was brought to the Superior Court’s attention after the first appeal with respect to the July 20, 2018 Judgment for attorneys’ fees and costs. The Superior Court’s failure to apply the correct post-judgment interest rate to the July 20, 2018 Judgment is plainly reviewable by this Court and, pursuant to RAP 2.5(c)(1), the Court should therefore also correct the post-judgment interest rate applied to the October 9, 2015 Judgment.

VI. CONCLUSION

For the reasons set forth herein, Cohen respectfully requests that the Court reverse the Superior Court and vacate the October 9, 2015 Judgment and the July 20, 2018 Judgment with an instruction to the Superior Court to use the correct post-judgment-interest rate required by RCW 4.56.110(3)(b) for the replacement judgments.

Respectfully submitted this 3rd day of December, 2018.

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CERTIFICATE OF SERVICE

I declare that on December 3, 2018 I caused a true and correct copy of the foregoing the **Cohen Defendants’ Opening Brief** to be served on the following in the manner indicated:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 3rd day of December, 2018.

s/ Rachel Evans
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