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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.

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

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I. INTRODUCTION

Plaintiff-Respondent William Newcomer (“Newcomer”) attempts to ignore the primary issue before the court, which is Appellant-Defendant Michael Cohen’s (“Cohen”) direct and timely appeal of the July 20, 2018 Judgment that incorrectly applied a 12% post-judgment interest rate to a judgment founded upon tortious conduct—violation of the Washington State Securities Act (“WSSA”)—instead of the rate required by RCW 4.56.110(3)(b). Newcomer, by focusing his entire brief on the secondary issue of Cohen’s CR 60 motion to correct the prior October 9, 2015 Judgment (which also applied the incorrect 12% post-judgment interest rate), attempts to recast this appeal as discretionary in nature. It is not.

To be clear, Cohen has a direct right of appeal for the July 20, 2018 Judgment—irrespective of his ancillary appeal of the Superior Court’s refusal to also correct the October 9, 2015 Judgment—because, as the Commissioner noted in denying Newcomer’s Motion to Dismiss, “Cohen has never had an opportunity to appeal the post-judgment interest rate applied to the attorney fee award in July 2018.”¹ Moreover, the post-judgment interest rate that must be applied under RCW 4.56.110 is not discretionary and is reviewed de novo. *TJ Landco, LLC v. Harley C.*

¹ Commissioner’s Order, October 10, 2018.

Douglass, Inc., 186 Wn. App. 249, 256, 346 P.3d 777, 780 (2015) (“Postjudgment interest is mandatory due to RCW 4.56.110. Consequently, awards of postjudgment interest are matters of law that are reviewed de novo.”) (internal citations omitted).

The primary issue for this Court to decide—which appears to be a matter of first impression—is therefore whether the Superior Court applied the correct post-judgment interest rate to the July 20, 2018 Judgment. And because Washington law is clear that WSSA violations sound in tort, the Superior Court erred in refusing to apply the post-judgment interest rate supplied by RCW 4.56.110(3)(b).

Moreover, if this Court agrees that the Superior Court erred with respect to the July 20, 2018 Judgment, equity and justice compel that the similarly erroneous post-judgment rate applied to the October 9, 2015 Judgment be corrected as well. Cohen therefore respectfully requests that this Court reverse the Superior Court and instruct it to apply the correct post-judgment interest rate to both judgments.

II. ARGUMENT

A. WSSA Violations are Founded Upon Tortious Conduct.

In his opposition, Newcomer argues that WSSA violations cannot be tortious conduct because WSSA is a statute, and quotes *Washington State Comm’n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174,

293 P.3d 413 (2013) for the proposition that “judgments founded on a tort action bear interest at a different rate than those founded on a statutory claim.” Newcomer Brief at 13. As set forth in Cohen’s Opening Brief, however, *Regal Cinemas* actually stands for the proposition that even if a claim is created by statute, the rate supplied by RCW 4.56.110(3)(b) will nevertheless apply if the claim is founded upon tortious conduct:

Generally, RCW 4.56.110[(5)]² 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 [Washington Law Against Discrimination] 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).³ In other words, despite the fact that the claim at issue in *Regal Cinemas* was

² As of June 7, 2018, the numbering of RCW 4.56.110(4) was amended to RCW 4.56.110(5).

³ As noted in Cohen’s Opening Brief, Washington courts have applied RCW 4.56.110(3)(b) to a variety of other statutory claims where such claims are deemed to be founded on tortious conduct. *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.”).

statutory (WLAD), the Court of Appeals looked to the character of that statutory claim to determine if it is founded on “tortious conduct.”

Similar to *Regal Cinemas*, the question before this Court is whether WSSA claims are founded on tortious conduct. In *Regal Cinemas*, the Court of Appeals evaluated whether WLAD claims are based on tortious conduct by looking to how WLAD claims have been characterized in prior cases. *Id.* at 224–25 (citing *Blair v. Washington State University*, 108 Wn.2d 558, 576, 740 P.2d 1379 (1987), and holding that the Washington Supreme Court “has characterized a discrimination action as a tort.”).

WSSA claims are indisputably founded on tortious conduct. As an initial matter, the text of the statute explicitly refers to tortious conduct in the form of omissions and representations. *See, e.g.*, RCW 21.20.010 (“It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) To employ any device, scheme, or artifice to defraud; (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.”).

More to the point, however, the Washington Supreme Court has made clear that it considers WSSA claims to be “statutory tort claims” and “tortious conduct.” In *Haberman v. Washington Pub. Power Supply Sys.*, the Washington Supreme Court referenced tort law and principles throughout its opinion as part of its interpretation of WSSA. 109 Wn.2d 107, 744 P.2d 1032 (1987). For example, in adopting the “substantial factor-proximate cause” approach under WSSA, the Supreme Court noted that its interpretation of the statute was “in harmony with similar developments in general tort law.” *Id.* at 130–31; *see also id.* at 131–32 (citing Restatement (Second) of Torts §§ 432, 433 (1977) as support for the factors to be considered under the “substantial contributive factor” test for determining liability pursuant to RCW 21.20.430(1)); *id.* at 143 (holding the “statutory tort claim rights” under RCW 21.20.430 were not vested).

Similarly, in *Haley v. Highland*, the Washington Supreme Court expressly held that WSSA claims are founded on “tortious conduct.” 142 Wn.2d 135, 12 P.3d 119 (2000). In *Haley*, a jury found that Highland committed violations of RCW 21.20.430 and awarded \$2,500 to the plaintiff. *Id.* at 139. Subsequent to the judgment, Highland married, and the plaintiff sought to collect the judgment against Highland’s community property. *Id.* at 140. 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 other words, the only reason that Highland’s community property was within the reach of the judgment creditor was because his WSSA violation was deemed to be “tortious conduct” by the Washington Supreme Court. Indeed, the WSSA violation is repeatedly characterized as a tort and Highland as a “tortfeasor” throughout the opinion. *Id.* at 148–49; *see also id.* at 143.

Haberman and *Haley* are binding and 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, and its application is not discretionary.

B. Newcomer’s WSSA Claim Was Based on Allegations of Misrepresentations and Omissions, Not Breach of Contract, and Therefore Sounded in Tort.

Newcomer asserts that the 12% post-judgment supplied by RCW 4.56.110(5) should apply because “WSSA’s statutory causes of action necessarily relies upon a contractual relationship with the specific purchaser of securities.” Newcomer Brief at 18; *see also id.* at 19–22.

The fact that a WSSA violation presupposes the existence of a contract is irrelevant, however, because a WSSA violation—*i.e.*, misrepresentations or omissions regarding a contract to purchase or sell a security—sounds in tort. *See Haley*, 142 Wn.2d at 142; *Haberman*, 109 Wn.2d at 143.

The Washington Court of Appeals has considered and rejected the same argument advanced by Newcomer here, in the context of Washington’s insurance bad faith statute. *See Woo v. Fireman’s Fund Ins. Co.*, 150 Wn. App. 158, 208 P.3d 557 (2009). In *Fireman’s Fund*, a dentist (Woo) obtained a judgment against his insurer for breach of contract and bad faith under RCW 48.01.030.30. *Id.* at 170. Woo argued, similar to Newcomer, that “the judgment was not founded on tortious conduct within the meaning of RCW 4.56.110(3), but on the insurance contract with Fireman’s Fund. Thus, he contends that the ‘catch-all’ interest rate found in RCW 4.56.110[(5)] should apply.” *Id.* at 167. The Court of Appeals disagreed, holding that violation of the statute was nevertheless founded on tortious conduct. *See id.* at 170 (“Insurers have a duty to handle claims in good faith under RCW 48.01.030.30. A breach of this duty sounds in the tort of bad faith.”). In reaching this conclusion, the court noted that the cause of action “arises from the contract and the fiduciary relationship, and which sounds in tort.” *Id.* 169 (quoting *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 393–94, 823 P.2d 499 (1992)).

In other words, although an insurance bad faith claim may require the *existence* of an insurance contract, the claim itself—for bad faith refusal to honor that contract—is founded on tortious conduct.

Similar to a statutory claim of insurance bad faith (or a statutory employment discrimination claim), a WSSA violation may require the existence of a contract, but the violation itself is clearly founded upon tortious conduct. *See Haley*, 142 Wn.2d at 142; *Haberman*, 109 Wn.2d at 143. Here, 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; CP 555. The correct post-judgment interest rate for judgments under WSSA is therefore supplied by RCW 4.56.110(3)(b).

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

If the Court determines that the Superior Court erred as a matter of law by failing to apply the post-judgment interest rate supplied by RCW 4.56.110(3)(b) to the July 20, 2018 Judgment, the Court should find that the Superior Court also erred in refusing to correct the similarly

erroneous October 9, 2015 Judgment. The Superior Court erred by refusing to grant Cohen’s Civil Rule 60 motion and correct the interest rate of the October 9, 2015 Judgment, both because it was a “clerical mistake” under Civil Rule 60(a) and because such a correction will serve the interests of justice under Civil Rule 60(b)(11).

1. The Superior Court Had a Duty to Correct the October 9, 2015 Judgment When the Error Was Discovered.

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). By adopting the proposed judgment (using 12% as the rate of post judgment interest) prepared by Newcomer’s counsel in the October 9, 2015 Judgment, the Superior Court committed 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.

Indeed, Washington law is clear that the post-judgment interest is mandatory and a trial court has no discretion to apply any rate other than what RCW 4.56.110 provides. *See TJ Landco, LLC*, 186 Wn. App. at 256 (“Postjudgment interest is mandatory due to RCW 4.56.110.”); *see also 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.*

Here, the Superior Court’s ministerial error in the October 9, 2015 Judgment 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. Nevertheless, CR 60(a) allows that: “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.).⁴ The Superior Court, upon being notified that the incorrect post-judgment interest rate was applied to the October 9, 2015

⁴ 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.”).

Judgment, had a duty to correct that error of law, and abused its discretion in refusing to do so.

In *Safeco Ins. Co. of Am. v. JMG Restaurants, Inc.*, the Court of Appeals held that the trial court erred by refusing to correct an inadvertent error in the post-judgment interest rate applied to a judgment. 37 Wn. App. 1, 23, 680 P.2d 409 (1984). Specifically, the defendant 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 trial refused to correct the error, which the defendant challenged on appeal. *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.* The Court of Appeals further held that once the error was discovered, “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.* (Emphasis added.) The Court of Appeals reversed the trial court’s failure to correct the rate of post judgment interest, holding “[t]he trial court committed error by not doing so.” *Id.* Here, the Superior Court similarly had a duty to correct the October 9, 2015 Judgment when the

error was pointed out, and the Superior Court abused its discretion in refusing to do so. RP 22:6–16.

2. The Interests of Justice Compelled Correction of the October 9, 2015 Judgment.

In addition to being a clerical error, when the erroneous post-judgment interest rate in the October 9, 2015 Judgment was brought to the Superior Court’s attention, the interests of justice compelled that the Superior Court correct the error. CR 60(b)(11) gives the Superior Court authority to correct a judgment for “Any other reason justifying relief from the operation of the judgment.” 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) (quoting *Klapprott v. United States*, 335 U.S. 601, 614, 69 S. Ct. 384, 390 (1949)).

Here, where Cohen has a direct right to appeal the July 20, 2018 Judgment—and if the Court agrees that RCW 4.56.110(3)(b) provides the correct post-judgment interest rate—there is simply no reason why the post-judgment interest rate applied to the October 9, 2015 Judgment should not also be corrected.

The Court of Appeals’ decision in *Regal Cinemas* is both analogous and instructive here. In that 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 held that the correct post-judgment rate must be applied to **both** judgments, despite the fact that the issue could have been raised in the first appeal. *Id.* (“At issue is what rate of interest under RCW 4.56.110 should be applied to the two awards.”). *Regal Cinemas* therefore makes clear that the Court should determine the correct rate and then apply it to both judgments. *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.

Federal courts are in accord that Federal Rule of Civil Procedure 60 allows judgments 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, even where the issue was not raised in the first appeal. *See Kosnoski v. Howley*, 33 F.3d 376, 379 (4th Cir. 1994) (holding that correcting the amount of post-judgment interest “is the type of error that is properly within the scope of Rule 60(a).”).

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 motion was an abuse of discretion and reversible error that must be corrected.

III. CONCLUSION

For the reasons set forth herein, Cohen respectfully requests that the Court reverse the Superior Court’s errors 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 19th day of February, 2019.

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CERTIFICATE OF SERVICE

I declare that on February 19, 2019, I caused a true and correct copy of the foregoing **Reply Brief of Appellants Michael Cohen And Julie McBride** 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 19th day of February, 2019.

s/ Rachel Evans
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