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52122-9-II

IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

WILLIAM NEWCOMER,
Respondent,

v.

MICHAEL COHEN,
Appellant.

RESPONDENT WILLIAM NEWCOMER'S BRIEF

SMITH ALLING, P.S.
Douglas V. Alling, WSBA #1896
Russell A. Knight, WSBA #40614
Matthew C. Niemela, WSBA 49610
Attorneys for Respondent
1501 Dock Street
Tacoma, Washington 98402
Tacoma: (253) 627-1091
alling@smithalling.com
rknight@smithalling.com
mattn@smithalling.com

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR 3

III. STATEMENT OF THE CASE..... 3

IV. ARGUMENT 7

 A. Appellate courts review a trial court’s order on a CR 60 motion for abuse of discretion. 7

 B. A party may not use a CR 60 motion to attempt to correct perceived errors of law. 8

 C. Cohen’s reliance on CR 60(a) fails because the interest rate on the face of the judgment is not a “clerical mistake.”..... 10

 D. To the extent Cohen seeks to rely on CR 60(b), his motion is objectively untimely..... 11

 E. Judgments for violations of WSSA apply a 12% percent post-judgment interest rate. 12

 F. Cohen’s analogy to discrimination claims is misplaced because a WSSA claim necessarily requires a contractual relationship where a claim for discrimination can arise without a contract. 16

 G. The statutory measure of damages dictated by RCW 21.20.430 is directly tied to the contract between the parties and differs from the broad measure of damages allowed for tort claims, including claims under WLAD. 19

 H. The trial court correctly applied a 12% post-judgment interest rate to July 20, 2018 judgment for attorney’s fees and costs awarded on appeal. 22

 I. Newcomer seeks an award of attorney’s fees for responding to Cohen’s Second Appeal. 23

V. CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases

<i>Adams v. King Cty.</i> , 164 Wn.2d 640, 653, 192 P.3d 891 (2008).....	14
<i>Anderson v. Pantages Theater Co.</i> , 114 Wash. 2d, 27, 194 P. 813, 814 (1921).....	17, 18
<i>Bjurstrom v. Campbell</i> , 27 Wn. App. 449, 450, 618 P.2d 533 (1980).....	9
<i>Blair v. Washington State Univ.</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987).....	17
<i>Ellingson v. Spokane Mortgage Co.</i> , 19 Wn. App. 48, 58, 573 P.2d 389, 394–95 (1978).....	20
<i>Frias v. Asset Foreclosure Servs., Inc.</i> , 181 Wn.2d 412, 422, 334 P.3d 529 (2014).....	13, 14
<i>Haley v. Highland</i> , 142 Wn.2d 135, 156, 12 P.3d 119 (2000).....	8
<i>Helenius v. Chelius</i> , 131 Wn. App. 421, 120 P.3d 954 (2005).....	16
<i>In re Ellern</i> , 23 Wn.2d 219, 222, 160 P.2d 639 (1945).....	8
<i>In re Marriage of Stern</i> , 68 Wn. App. 922, 927, 846 P.2d 1387 (1993).....	10
<i>Kittilson v. Ford</i> , 23 Wn. App. 402, 405, 595 P.2d 944 (1979).....	20, 21
<i>Newcomer v. Cohen</i> , 199 Wn. App. 1003, 2017 WL 2154358 (2017) (unpublished).....	5

<i>Presidential Estates Apartment Associates v. Barrett</i> , 129 Wn.2d 320, 917 P.2d 100 (1996).....	7, 10, 11
<i>Shaw v. City of Des Moines</i> , 109 Wn. App. 896, 899, 37 P.3d 1255 (2002).....	8
<i>Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.</i> , 160 Wn. App. 912, 926, 250 P.3d 121 (2011).....	13
<i>Union Bank, N.A. v. Vanderhoek Associates, LLC</i> , 191 Wn. App. 836, 842, 365 P.3d 223 (2015).....	8
<i>Washington State Commc'n Access Project v. Regal Cinemas, Inc.</i> , 173 Wn. App. 174, 224, 293 P.3d 413 (2013).....	13, 17, 22

Statutes

RCW 4.56.110	passim
RCW 4.56.110(3)(b).....	9, 22
RCW 4.56.110(5).....	2, 13, 21, 22
RCW 19.52.020	12
RCW 21.20.010	19
RCW 21.20.430	passim
RCW 21.20.430(1).....	14, 15, 20
RCW 21.20.430(2).....	14
RCW 21.20.430(3).....	21
RCW 49.60 <i>et seq.</i>	passim
Former RCW 4.56.110(4) (2011)	13

Other Authorities

CR 50 4

CR 59 4

CR 60 passim

RAP 18.1..... 23

I. INTRODUCTION

Appellant Michael Cohen (“Cohen”) has already appealed the October 9, 2015 judgment to this Court. This Court affirmed the trial court, and our Supreme Court denied Cohen’s petition for review.

In an attempt to delay paying the affirmed judgment, Cohen brought a CR 60 motion alleging – for the first time – that the interest rate that appears on the face of the affirmed judgment is wrong. The trial court properly denied Cohen’s motion.

Cohen’s CR 60 motion was procedurally flawed. First, it is improper to allege a substantive legal error under a CR 60 motion. Cohen’s opportunity to allege a legal error was in a motion for reconsideration to the trial court or an appeal to this Court. Cohen did both, but did not assign error to the interest rate on the face of the judgment through either process. Second, even if a legal error could be raised in a CR 60 motion, Cohen’s motion was objectively late. The CR 60 motion that is the subject of this appeal was filed two years and nine months after entry of the judgment, and after Cohen had already filed two previous CR 60 motions, which did not raise the issue of the interest rate on the face of the judgment.

More importantly, Cohen’s CR 60 motion was legally wrong. A judgment for a violation of the Washington State Securities Act, RCW

21.20.430 (“WSSA”), follows the general rule of application of a post-judgment interest rate at 12% under RCW 4.56.110(5).

Cohen’s request that this Court apply a post-judgment interest rate applicable only to tort claims to this judgment for a violation of WSSA is a request to change the law. There is not a single case in Washington in which a court applied the tort interest rate to a WSSA claim. Cohen’s analogy to discrimination claims unpersuasive. If Cohen desires to change the law, the proper place to make the request is the legislature.

On July 20, 2018, the trial court entered judgment for the attorney’s fees and costs awarded by this Court and our Supreme Court. That judgment also provides for post-judgment interest at the rate of 12%. Cohen’s arguments that this judgment should accrue interest at a lower rate are similarly unpersuasive. In addition, the post-judgment interest rate on an attorney’s fees award must match the post-judgment interest rate on the underlying judgment.

Respondent William Newcomer (“Newcomer”) respectfully asks this Court to affirm the trial court’s denial of Cohen’s CR 60 motion and affirm the trial court’s entry of judgment for attorney’s fees and costs awarded on appeal with a post-judgment interest rate of 12%.

II. COUNTERSTATEMENT OF ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion when it denied Cohen's CR 60 motion where the motion argued an error of law was present on the face of the October 9, 2015 judgment affirmed by this Court and the motion was brought two years and nine months after entry of the judgment?

2. Did the trial court err by imposing the general rule of a 12% post-judgment interest rate on the July 20, 2018 judgment for attorney's fees and costs incurred in successfully defending Cohen's appeal of the October 9, 2015 judgment for violations of the WSSA, which also imposed a post-judgment interest rate of 12%?

III. STATEMENT OF THE CASE

From September 1-17, 2015, the trial court presided over a jury trial concerning Newcomer's allegation that Cohen violated the WSSA in connection with the sale of securities from Cohen to Newcomer.

On September 21, 2015, the jury returned a verdict in favor of Newcomer, finding that Cohen violated the WSSA in connection with four separate sales of securities. CP 2.

On September 24, 2015, Newcomer moved to reduce the jury verdict to judgment. Newcomer's motion for entry of judgment attached a proposed judgment to the motion as Exhibit 1. The proposed judgment

stated, “This judgment shall bear interest at the rate of 12% per annum.” CP 15.

On October 6, 2015, Cohen responded in opposition to Newcomer’s motion for entry of judgment. Although Cohen opposed certain aspects of the proposed judgment, he did not oppose the proposed post-judgment interest rate. CP 38-40.

On October 9, 2015, the trial court entered judgment in a form substantially similar to Exhibit 1 to Newcomer’s motion for entry of judgment. Relevant here, the judgment contained the same post-judgment interest provision, stating: “This judgment shall bear interest at the rate of 12% per annum.” CP 53.

On October 29, 2015, Cohen filed a motion for reconsideration, judgment as a matter of law, or new trial citing CR 50, CR 59 and CR 60 (the “First CR 60 Motion”). CP 561. Cohen did not assign error to the post-judgment interest rate.

On November 5, 2015, Cohen filed a notice of appeal. Cohen’s notice of appeal sought review of “the Judgment on Verdict entered on October 9, 2015.” CP 57. This Court heard the appeal under the Cause No. 48223-9-II (the “First Appeal”).

On November 6, 2015, the trial court denied Cohen’s First CR 60 Motion. CP 590.

On June 1, 2016, Cohen filed his opening brief in the First Appeal requesting this Court reverse the judgment *in toto*. Cohen did not specifically allege a mistake in the post-judgment interest rate.

On October 7, 2016, with the appeal pending, Cohen filed a motion to set aside the judgment pursuant to CR 60 (the “Second CR 60 Motion”). CP 593. Cohen’s Second CR 60 Motion sought relief on a litany of grounds, including “newly discovered evidence.” Despite raising issues unraised at the time of entry of the October 9, 2015 judgment, Cohen’s Second CR 60 Motion did not raise the issue of the post-judgment interest rate. On October 28, 2016, the trial court denied Cohen’s Second CR 60 Motion. CP 612.

On May 16, 2017, this Court issued an unpublished opinion in the First Appeal affirming the trial court and the October 9, 2015 judgment. *Newcomer v. Cohen*, 199 Wn. App. 1003, 2017 WL 2154358 (2017) (unpublished). Cohen unsuccessfully moved for reconsideration of this Court’s opinion.

On August 28, 2017, Cohen petitioned our Supreme Court for review of this Court’s decision in the First Appeal. Cohen’s petition did not raise the issue of the post-judgment interest rate. Our Supreme Court denied Cohen’s petition.

On June 25, 2018, this Court entered its Mandate from the First Appeal. The Mandate instructed the trial court to enter judgment in favor of

Newcomer against Cohen for attorney's fees and costs awarded by this Court and our Supreme Court.

On June 25, 2018, Newcomer moved to reduce the award on appeal to judgment. CP 203.

On July 18, 2018, Cohen responded in opposition to Newcomer's motion to reduce the fees and costs awarded on appeal to judgment and filed another CR 60 motion (the "Third CR 60 Motion"). CP 378.

In the Third CR 60 Motion, which was filed two years and nine months after entry of the October 9, 2015 judgment, Cohen requested the trial court vacate the October 9, 2015 judgment and change the interest rate that appeared on the face of the judgment.

On July 20, 2018, the trial court denied Cohen's Third CR 60 Motion. CP 548. In denying Cohen's Third CR 60 Motion, the trial court explained:

I'm not at all convinced that a mistake was made with regard to the level of interest. It appears to me as though the level of interest rate that was imposed is the appropriate level of interest, both pre-judgment and post judgment, so I am going to allow that to stand.

Verbatim Report of Proceeding 5/20/18 ("5/20/18 VRP") at 22:11-16.

The trial court also entered judgment on the award of attorney's fees and costs listed in this Court's Mandate. The trial court's judgment for

attorney's fees and costs provides the same post-judgment interest rate as the affirmed judgment. CP 546.

The same day as the hearing, Cohen filed the notice of appeal (the "Second Notice of Appeal") seeking review of the order denying Cohen's Third CR 60 Motion as well as the entry of judgment for attorney's fees and costs. CP 532.

IV. ARGUMENT

This Court should affirm the trial court's denial of Cohen's Third CR 60 Motion and entry of judgment for attorney's fees awarded on appeal. The trial court properly exercised its discretion in denying Cohen's Third CR 60 Motion, which sought to correct a perceived error of law not raised on appeal and brought two years and nine months after entry of the judgment. In addition, the post-judgment interest rate of 12%, on both the underlying judgment and judgment for attorney's fees, is the correct interest rate for a judgment for a violation of the WSSA.

A. Appellate courts review a trial court's order on a CR 60 motion for abuse of discretion.

An appellate court reviews a trial court's order on a CR 60 motion under an abuse of discretion standard. *Presidential Estates Apartment Associates v. Barrett*, 129 Wn.2d 320, 325-26, 917 P.2d 100 (1996) (stating "Court of Appeals was correct when it concluded the trial court abused its

discretion in amending the judgment” pursuant to CR 60(a)); *see also Shaw v. City of Des Moines*, 109 Wn. App. 896, 899, 37 P.3d 1255 (2002) (“A trial court’s decision whether to vacate a judgment or order under CR 60 is reviewed for an abuse of discretion.”); *Union Bank, N.A. v. Vanderhoek Associates, LLC*, 191 Wn. App. 836, 842, 365 P.3d 223 (2015) (in accord). “A trial court abuses its discretion if its decision is based on untenable grounds or is for untenable reasons.” *Union Bank, N.A.*, 191 Wn. App. at 842.

B. A party may not use a CR 60 motion to attempt to correct perceived errors of law.

A party cannot use CR 60 to correct a perceived error of law. “Errors of law cannot form the basis for a successful CR 60 motion; they must be raised on appeal.” *Union Bank, N.A.*, 191 Wn. App., 847; *see also Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000) (“Errors of law are not grounds for vacation under CR 60(b).”).

Our Supreme Court previously defined the term “error of law” to mean:

[W]hen the court, either upon motion of one of the parties or upon its own motion, makes some erroneous order or ruling on some question of law which is properly before it and within its jurisdiction to make.

In re Ellern, 23 Wn.2d 219, 222, 160 P.2d 639 (1945).

Division III of this Court rejected a nearly identical argument to the argument Cohen now raises in *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450, 618 P.2d 533 (1980). There, the trial court entered judgment against the Campbells. *Bjurstrom*, 27 Wn. App. at 450. The Campbells filed a CR 60(b)(1) motion to vacate alleging the trial court erred in its application of RCW 4.56.110 and when interest begins to accrue. *Bjurstrom*, 27 Wn. App. at 453 n. 5. The *Bjurstrom* court held the trial court properly denied the Campbells' CR 60 motion because neither CR 60(a) nor CR 60(b) allow a party to correct an "error of law." *Bjurstrom*, 27 Wn. App. at 453. Instead, the *Bjurstrom* court explained where "the judgment embodies that which the court intended... the proper procedure for relief is through appeal." *Bjurstrom*, 27 Wn. App. at 454.

The trial court correctly denied Cohen's CR 60 motion because Cohen inappropriately sought to use CR 60 to correct a perceived error in law. The applicable interest rate to a judgment for a violation of the WSSA clearly presents a question of law. In fact, Cohen's brief calls the issue presented here a question of law, stating: "The primary issue that this court must resolve as a matter of law... is whether RCW 4.56.110(3)(b) provides the post-judgment interest rate in a judgment based solely on a WSSA violation." Cohen Brief p. 6. Because "[e]rrors of law cannot form the basis for a successful CR 60 motion", the trial court correctly denied Cohen's

Third CR 60 Motion. In addition, because Cohen failed to timely appeal the post-judgment interest rate of the October 9, 2015 judgment to this Court, he no longer has an opportunity to do so.

C. **Cohen’s reliance on CR 60(a) fails because the interest rate on the face of the judgment is not a “clerical mistake.”**

Even if Cohen could use CR 60 to challenge questions of legal interpretation by styling his motion as one brought pursuant to CR 60(a), Cohen’s argument still fails.

Under CR 60(a), a trial court may correct “clerical errors” but may not correct “judicial errors.” *Presidential Estates Apartment Associates*, 129 Wn.2d at 326. “A clerical error is a mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney.” *In re Marriage of Stern*, 68 Wn. App. 922, 927, 846 P.2d 1387 (1993) (quotes omitted).

In *Presidential Estates Apartment Associates*, *supra*, our Supreme Court explained the difference between a clerical error, subject to CR 60(a), and judicial errors, outside the scope of CR 60:

In deciding whether an error is “judicial” or “clerical,” a reviewing court must ask itself whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial. *Marchel v. Bunger*, 13 Wash. App. 81, 84, 533 P.2d 406, *review denied*, 85 Wash.2d 1012 (1975). If the answer to that question is yes, it logically follows that the error is clerical in that the amended judgment merely corrects language that did not correctly convey the intention

of the court, or supplies language that was inadvertently omitted from the original judgment. If the answer to that question is no, however, the error is not clerical, and, therefore, must be judicial. Thus, even though a trial court has the power to enter a judgment that differs from its oral ruling, once it enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record.

Presidential Estates Apartment Associates, 129 Wn.2d at 326.

In this case, nothing in the record below evidences an intent by the trial court to apply a post-judgment interest rate less than 12% percent. To the contrary, in denying Cohen’s Third CR 60 Motion, the trial court stated: “I’m not at all convinced that a mistake was made with regard to the level of interest.” 5/20/18 VRP at 22:11. Based on the express intent of the trial court, evidenced from its own statements, the trial court correctly denied Cohen’s motion predicate upon CR 60(a).

In sum, the only intent expressed by the trial court indicates the trial court intentionally applied the 12% post-judgment interest rate. Cohen fails to show any contrary intent. Accordingly, the trial court correctly denied Cohen’s Third CR 60 Motion.

D. To the extent Cohen seeks to rely on CR 60(b), his motion is objectively untimely.

Although Cohen’s Third CR 60 Motion primarily relies on CR 60(a), he also cites CR 60(b) in a footnote. CP 381. Cohen’s motion under CR 60(b) was objectively untimely. To the extent Cohen alleges a “mistake”

under CR 60(b)(1), the motion “shall be made ... not more than 1 year after the judgment.” CR 60(b). Cohen’s motion was made two years and nine months after entry of the judgment.

To the extent Cohen moved under CR 60(b)(11)’s provision of “[a]ny other reason justifying relief from the operation of the judgment,” the motion must be made “within a reasonable time”. CR 60(b). Cohen’s Third CR 60 Motion was not made within a reasonable time because it could have been brought with either of his first two CR 60 Motions, the First Appeal or Cohen’s petition to our Supreme Court. It is clear that Cohen only brought the Third CR 60 Motion after losing on appeal in an attempt to delay paying the underlying judgment.

E. Judgments for violations of WSSA apply a 12% percent post-judgment interest rate.

RCW 4.56.110 governs interest on judgments. Subsections 1-4 detail interest on specific types of judgments: (1) judgments founded on contracts providing for the payment of interest; (2) judgments for unpaid child support; (3) judgments for torts; and (4) judgments for student loan debt.

Subsection 5 sets forth the general rule for the interest rate for all other judgments not specifically provided for in subsections 1-4. Subsection 5 refers to RCW 19.52.020, which sets the interest rate at 12% per annum.

Subsection 5 provides a catchall interest rate for all other judgments. *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 926, 250 P.3d 121 (2011) (calling Former RCW 4.56.110(4) (2011), which parallels RCW 4.56.110(5) a “‘catchall’ interest rate”).

This subsection also includes all judgments arising from a contract, except for contracts “providing for the payment of interest until paid at a specified rate,” such a promissory note, which bear interest at the rate provided for in the contract under subsection 1. For example, a judgment arising from a contract for the sale of a widget or a contract for the performance of labor falls under subsection 5.

In addition, a statutory claim falls under the catchall rule of subsection 5. “Judgments founded on a tort action bear interest at a different rate than those founded on a statutory claim.” *Washington State Comm'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 224, 293 P.3d 413 (2013).

WSSA is a statutory claim. “A statute can create a cause of action either expressly or by implication.” *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 422, 334 P.3d 529 (2014). In determining whether a statute creates a cause of action, a court considers whether the legislature intended to create a statutory cause of action. *Frias*, 181 Wn.2d at 422.

Even in the absence of an express declaration, courts will imply a statutory cause of action under a three-prong test: First, whether the plaintiff is within the class for whose “especial” benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

Adams v. King Cty., 164 Wn.2d 640, 653, 192 P.3d 891 (2008) (alteration and block quote removed).

In enacting WSSA, the legislature created a statutory claim. Although a WSSA claim must be based on a contract as the contractual sale of securities is necessary for a claim, and a WSSA claim has some elements of common law fraud to give rise to relief, a WSSA claim is distinctly unique from any common law cause of action.

First, the legislature specifically provides when a WSSA cause of action accrues. In the event of an unlawful sale, the aggrieved buyer may recover damages, and therefore bring a claim upon the “date of payment” for the offending security. RCW 21.20.430(1); *see also* RCW 21.20.430(2) (conferring cause of action upon “income received on the security”). This supports the intent of the legislature to create a statutory cause of action. *See e.g., Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 423, 334 P.3d 529 (2014) (noting statute’s failure to expressly state when “cause of action accrues” worked against finding statutory cause of action).

Second, a WSSA claim has a unique measure of damages not found in any other cause of action. A buyer may recover the:

[C]onsideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

RCW 21.20.430.

Third, a WSSA claim sets forth its own statute of limitations. RCW 21.20.430(4)(b). Fourth, a WSSA claim has a unique pre-judgment interest rate of 8% per annum not found in any common law tort claim. RCW 21.20.430(1).

Cohen cannot cite a single case where the court applied the tort post-judgment interest rate to a judgment for a violation of the WSSA. On the other hand, Washington courts regularly apply the general rule 12% post-judgment interest rate to WSSA judgments. While it appears the specific issue of the post-judgment interest rate has not been appealed, many WSSA judgments, which clearly state a post-judgment interest rate of 12% on the face of the judgments have been appealed on other grounds. This Court and our Supreme Court have not disturbed the interest rate of those judgments.

For example, in *Helenius v. Chelius*, King County Superior Court Cause No. 01-2-27468-6, the trial court entered judgment dated December 31, 2003, in favor of Helenius against multiple defendants for violations of RCW 21.20.430. The face of the judgment clearly states a post-judgment interest rate of 12% per annum. CP 524-525. Division I of this Court accepted review of the case on other grounds and issued a published opinion that did not disturb the post-judgment interest rate. *Helenius v. Chelius*, 131 Wn. App. 421, 120 P.3d 954 (2005). In the record below, Newcomer provided the trial court with other examples of trial court judgments for violations of WSSA, which provided a post-judgment interest rate of 12%. CP 507, CP 509. While trial court judgments are clearly not binding authority, the breadth of judgments applying a 12% post-judgment interest rate to WSSA violations demonstrates the universally understood rule that WSSA judgments are subject to the general rule of 12% post-judgment interest.

F. Cohen’s analogy to discrimination claims is misplaced because a WSSA claim necessarily requires a contractual relationship where a claim for discrimination can arise without a contract.

Because there are no cases which apply a tort interest rate to a judgment for a violation of the WSSA, Cohen invites this Court to change the law by making an analogy to Washington’s Law Against Discrimination, RCW 49.60 (“WLAD”) claims. This Court should reject

Cohen's invitation because a WSSA claim is inherently different than a discrimination claim.

In *Washington State Communication Access Project*, Division I recognized RCW 4.56.110 applied two different post-judgment standards – one applicable to tort claims, and the other applicable to statutory claims. *Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 224, 293 P.3d 413 (2013). (“Judgments founded on a tort action bear interest at a different rate than those founded on a statutory claim”). In reaching its conclusion that a tort interest rate applied to WLAD claims, Division I relied on, in part, our Supreme Court's decision in *Blair v. Washington State Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987). The *Blair* court, “characterized a discrimination action as a tort” based on its decision in *Anderson v. Pantages Theater Co.*, 114 Wash. 2d, 27, 194 P. 813, 814 (1921). *Blair*, 108 Wn.2d at 576.

In *Anderson*, our Supreme Court addressed WLAD's penal predecessor, Rem. Code § 2686, in a discrimination action brought by an African American denied access into a theater. *Anderson*, 114 Wash. at 27. Although the plaintiff bought a ticket for the performance, our Supreme Court rejected the defendant's attempt to characterize the plaintiff's claim of a breach of contract when the “gravamen” of the complaint focused on

the denial of the plaintiff's rights on the basis of race, irrespective of the purchase of the ticket.

Since the respondent was the lawful possessor of a ticket entitling him to a choice of the unoccupied seats in a certain part of the theater, and since the appellant refused him admission thereto when he applied for admission, the action has in it the element of breach of contract, but this is not the gravamen of the charge. The cause of complaint is that the appellant, contrary to the right of the respondent and contrary to the positive mandate of the statute, refused the respondent admission to its place of amusement solely for the reason that he belonged to a colored race. This was a tort, and an action founded thereon lies in tort. The wrong would have been the same had the respondent applied to purchase a ticket and had been refused; in other words, the respondent has a cause of action because he was denied a right which the law specially confers upon him, and which the appellant could not deny without the breach of a public duty the law enjoins upon it. The fact that the respondent had a ticket entitling him to admission does not change the cause of action from one in tort to one in contract.

Anderson, 114 Wash. at 30-31 (emphasis added).

Using the rationale in the *Anderson*, it was not material whether the plaintiff bought the ticket (entering into a contract with the theater), whether someone else bought the ticket for the plaintiff, or whether the theater show did not require a ticket at all. Either way, he was discriminated against on the basis of race when he was denied admission.

Conversely, WSSA's statutory causes of action necessarily relies upon a contractual relationship with the specific purchaser of securities.

Importantly, WSSA’s statutory remedies apply only to an aggrieved buyer or an aggrieved seller of a security.

The face of the October 9, 2015 judgment states, “This judgment is based on a finding of a violation of RCW 21.20.010 and RCW 21.20.430”. CP 53. That statute provides “Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010 ... is liable to the person buying the security from him or her.” RCW 21.20.430 (emphasis added). RCW 21.20.010 requires a misrepresentation “in connection with the offer, sale or purchase of any security.”

Because a claim under RCW 21.20.430 requires the purchase or the sale of a security, a WSSA claim is fundamentally different from a discrimination claim. For that reason, the general rule of a post-judgment interest rate of 12%, which applies to contract claims also applies to judgments for violations of WSSA. This Court should not change this law.

G. The statutory measure of damages dictated by RCW 21.20.430 is directly tied to the contract between the parties and differs from the broad measure of damages allowed for tort claims, including claims under WLAD.

An additional problem with Cohen’s analogy to WLAD is that unlike a claim under WSSA, a WLAD claim allows for a broad measure of damages, including general damages and damages for mental anguish, and emotional distress. WSSA damages are prescribed by statute and directly

tioned to the contract between the parties. For that reason, it makes sense that judgments for violations of the WSSA have a post-judgment interest rate of 12%, which applies to judgments arising from a contract.

Under a WLAD claim, “recovery of ‘actual damages’ under the law against discrimination, RCW 49.60, is not limited to merely pecuniary or out-of-pocket losses or ... to the wage compensation differential. Rather, the remedy and the recovery authorized by the statute encompasses all claims for compensatory damages for injury, in fact, as distinguished from exemplary, nominal or punitive damages.” *Ellingson v. Spokane Mortgage Co.*, 19 Wn. App. 48, 58, 573 P.2d 389, 394–95 (1978). WLAD damages include “damages for mental anguish and emotional distress.” *Id.* at 395.

In contrast, WSSA’s specific measure of damages is “the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security.” RCW 21.20.430(1). WSSA damages are directly and exclusively tied to the contract between the parties. There is no basis for general damages as there is in a tort claim.

In, *Kittilson v. Ford*, Division III of this Court discussed the difference between a statutory WSSA claim under RCW 21.20.430 and common law tort claims. *Kittilson v. Ford*, 23 Wn. App. 402, 405, 595 P.2d

944 (1979). In *Kittilson*, a plaintiff alleged causes of action under WSSA, the Consumer Protection Act, and general common law misrepresentation and fraud. *Kittilson*, 23 Wn. App. at 406. The defendant moved to dismiss the plaintiff's claims arguing WSSA preempted the other causes of action and plaintiff failed to timely file under RCW 21.20.430(3). *Kittilson*, 23 Wn. App. at 405. The Court of Appeals rejected the defendant's arguments, instead finding WSSA presented a distinct statutory claim:

The adoption by the trial court of the defendant's position is inconsistent with the liberal construction given the Act by the courts and does not square with the underlying protective purpose of that Act. Moreover, plaintiff's civil remedy for fraud under the Act is different, and, in some ways, more restrictive than her potential choice of remedies at common law. RCW 21.20.430 provides only for rescission of the transaction and the award of interest; or, if the purchaser no longer has the security, he may recover damages in the amount of the purchase price less its value on the date of the disposition, plus interest. The Act does not allow the purchaser to keep the security and recover damages as he may do in a common law action for fraud or misrepresentation. On the other hand, the court may award attorney fees under the Act; whereas, attorney fees generally would not be allowed in an action based upon common law fraud or misrepresentation.

Kittilson, 23 Wn. App. at 407-408 (citations omitted).

Here, because the measure of damages under a WSSA claim is tied to the contract, the post-judgment interest rate on the damages awarded is the general rule interest rate under RCW 4.56.110(5). Under a WLAD claim, where the measure of damages follows common law tort damages,

the post-judgment interest rate is the tort interest rate under RCW 4.56.110(3). Despite Cohen's attempt to characterize these statutes as the same, they are distinctly different. Here, the trial court applied the correct post-judgment interest rate to the WSSA judgment.

H. The trial court correctly applied a 12% post-judgment interest rate to July 20, 2018 judgment for attorney's fees and costs awarded on appeal.

As a matter of law, the post-judgment rate applicable to the underlying judgment likewise applies to the award of attorney's fees on that judgment. *Washington State Comm'n Access Project*, 173 Wn. App. at 222) ("At issue is what rate of interest under RCW 4.56.110 should be applied to the two awards. There is nothing to suggest the rate should be any different on appeal than it should be at trial.").

The trial court properly applied a 12% percent interest rate on the attorney's fees awarded on appeal by this Court and our Supreme Court. Explained above, RCW 4.56.110(5)'s 12% percent post-judgment rate applies to WSSA judgments. Second, the trial court initially applied a 12% percent post-judgment interest rate to the October 9, 2015 judgment, which was not disturbed on appeal. For that reason, the July 20, 2018 judgment for attorney's fees and costs should have the same post-judgment interest rate of 12%.

I. Newcomer seeks an award of attorney's fees for responding to Cohen's Second Appeal.

Cohen's appeal arises from the jury's determination that Cohen violated the WSSA, RCW 21.20 *et seq.* RCW 21.20.430 provides for an award of attorney's fees to a defrauded investor. The trial court, this Court and our Supreme Court all awarded Newcomer attorney's fees for prevailing in each of the respective courts.

Pursuant to RAP 18.1, Newcomer respectfully requests an award of attorney's fees and costs for responding to Cohen's Second Appeal in an amount to be proven by subsequent affidavit of attorney's fees.

V. CONCLUSION

For the above reasons, Newcomer respectfully requests this Court affirm the trial court's order denying Cohen's Third CR 60 Motion, as well as the trial court's July 20, 2018 judgment for attorney's fees and costs awarded by this Court and our Supreme Court in the First Appeal, including the 12% post-judgment interest rate. In addition, Newcomer asks for an award of attorney's fees and costs incurred in defending this appeal.

Respectfully submitted this 11th day of January, 2019.

SMITH ALLING, P.S.

By: /s/ Russell A. Knight
Russell A. Knight, WSBA # 40614
Attorneys for Respondent Newcomer

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2019, I served a true and correct copy of the foregoing document upon counsel of record, via email properly addressed as follows:

Andrew R. Escobar – Andrew.escobar@dlapiper.com
David L. Freeburg – David.freeburg@dlapiper.com
Joseph D. Davison – Joseph.davidson@dlapiper.com
Austin Rainwater – Austin.rainwater@dlapiper.com
Ragan Powers – raganpowers@dwt.com
Nathan Rouse – nathanrouse@dwt.com
R. Omar Riojas riojas@goldfarb-huck.com
Kit W. Roth – roth@goldfarb-huck.com

_____/s/ Lori A. Avery_____
Lori Avery
Lavery@Smithalling.com

SMITH ALLING, P.S.

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Address:
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