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No. 57821-9-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BIANCA FAUST, individually and as guardian of
GARY C. FAUST, a minor, and
BIANCA CELESTINE MELE, BRYAN MELE,
BEVERLY MELE, and ALBERT MELE,

Respondents/Cross-Appellants,

v.

BELLINGHAM LODGE #493, LOYAL
ORDER OF MOOSE, INC., ALEXIS CHAPMAN,
JOHN DOES (1-10) (fictitious names
of unknown individuals and/or entities) and
ABC CORPORATION (1-10) (fictitious
names of unknown individuals and/or entities),

Appellants,

and

MOOSE INTERNATIONAL, INC.,

Cross-Respondent,

and

MARK ALBERTSON, as Personal Administrator
for the ESTATE OF HAWKEYE KINKAID, deceased,

Defendant.

REPLY BRIEF OF RESPONDENTS/
CROSS-APPELLANTS

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A. INTRODUCTION

As is true throughout their reply brief, the Moose defendants ignore the argument and authorities proffered in the Fausts' brief and create their own straw man arguments to which they respond. The Moose defendants' argument on interest is yet another example of that phenomenon. Nothing in the Moose defendants' reply brief on the interest issue, reply br. at 26-30, should dissuade this Court from declaring RCW 4.56.110(3) unconstitutional.

B. ARGUMENT

(1) Procedural Arguments by the Moose Defendants

The Moose defendants argue that the Fausts waived any claim that RCW 4.56.110(3) is unconstitutional, and RAP 2.5(a)(3) does not permit the Fausts to present this constitutional issue for the first time on appeal. The Moose defendants are wrong on these procedural arguments.

First, the Fausts presented the judgment on the verdict of the jury with the post-judgment interest rate *mandated* by RCW 4.56.110(3). They complied with this unconstitutional statute because it was extraordinarily unlikely the trial court would have entered a judgment with anything other than the statutory post-judgment interest rate. The doctrine of invited error prohibits a party from benefiting from an error the party caused at trial, but the benefit must be precisely attuned to the party's conduct. In

State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), *reversed on other grounds*, *Washington v. Recuenco*, 126 S. Ct. 2546 (2006), the Supreme Court held that a defendant who proposed a special verdict form was not barred by the doctrine of invited error from raising an issue as to a missing element of the crime even though the special verdict form lacked the opportunity for the jury to make a finding on the element of the crime. Similarly, the Fausts did not commit invited error by offering the judgment on the jury's verdict with the statutory rate of judgment interest.

As to raising the issue for the first time on appeal, RAP 2.5(a)(3) permits the Fausts to do so. Moreover, this case is a perfect example of why the statute is unconstitutional. The large judgment in this case is a tempting reason for the Moose defendants offer a weak appeal, hoping to delay paying the judgment. The Fausts were injured nearly *seven years ago* and the Moose defendants have delayed any payment for their negligence to the Fausts. An interest rate of 6% is an incentive to the Moose defendants to delay payment of the judgment against them.

The Moose defendants also misstate the law of RAP 2.5(a)(3). A manifest constitutional error may be raised for the first time on appeal even if the error "did not affect plaintiffs' trial rights," contrary to the Moose defendants' argument. Reply br. at 27. The case law cited by the Moose defendants entirely *contradicts* this argument. In *State v. WWJ*

Corp., 138 Wn.2d 595, 980 P.2d 1257 (1999), the issue was whether a fine was disproportionate to the gravity of the offense and therefore violated the Eighth and Fourteenth Amendments. This is hardly a “trial right,” to use the Moose defendants’ terminology. No Washington case confines the reach of RAP 2.5(a)(3) to “trial rights,” a concept never defined by the Moose defendants in their reply brief, but presumably meaning something to do with the conduct of the trial. See *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005) (defendant could raise constitutionality of “to convict” instruction that failed to instruct jury on each element of the crime); *State v. Sanchez*, 146 Wn.2d 339, 46 P.3d 774 (2002) (defendants could raise trial court’s failure to sentence them according to the plea agreement). *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) cited by the Moose defendants stands only for the proposition that the constitutional error must be manifest, that is, it must be of constitutional magnitude, and it must actually affect a party’s rights.

WWJ Corp. makes clear that RAP 2.5(a)(3) applies to civil and criminal cases. 138 Wn.2d at 602. In addition to the requirements articulated by the *McFarland* court, the record from the trial court must be sufficient to determine the merits of the constitutional claim. *Id.*

Here, the Fausts meet the requirements of RAP 2.5(a)(3), as interpreted by Washington’s courts. They raise a legitimate issue of

constitutional dimension, and that issue plainly affects their rights. The difference between interest of 6% per annum and 12% per annum on a \$14 million judgment is not negligible. The Moose defendants have an incentive to appeal offered by the difference in rates – they can earn 6% on the \$14 million they do not pay while the appeal is pending.

Finally, this is largely a legal issue. The record in the trial court is sufficient to enable this Court to review the issue.

This Court should consider the issue of the constitutionality of RCW 4.56.110(3).

(2) RCW 4.56.110(3) Is Unconstitutional¹

The Moose defendants agree with the Fausts on the applicable standards for a constitutional challenge to a statute on equal protection grounds, reply br. at 28, but offer no rational basis for judgments of most other judgment creditors accruing interest at 12% while those of tort judgment creditors only earning about half that figure. Reply br. at 28-29.

Their best shot at an analysis is to state:

The legislature focused on tort creditors, who generally receive more, even millions more, than child support and

¹ The Moose defendants offer another odd procedural argument that the Fausts did not preserve their federal equal protection argument. Reply br. at 27-28. The Fourteenth Amendment and article I § 12 of the Washington Constitution are interpreted identically except in cases involving undue favoritism to a minority class. *Andersen v. King County*, 158 Wn.2d 1, 16, 138 P.3d 963 (2006). The authorities cited by the Fausts in their brief reflect both the state and federal constitutional equal protection provisions. See, e.g., *State v. Harner*, 153 Wn.2d 228, 103 P.2d 738 (2004).

contract creditors. Because of the huge sums involved in tort judgments, an interest rate not keyed to the economic conditions would effectively deprive losing parties of their appeal rights By contrast, fixing the child support rate at 12% aids minors in receiving prompt payment from parents. Contract creditors continue to receive interest at rates agreed in advance. The classifications are neither irrational nor arbitrary.

Id. at 29. Their argument that tort creditors “generally receive more, even millions more, than child support and contract creditors” *id.*, is, of course, not supported *anywhere* in the legislative history of HB 2485 (2004). The House Bill Report attached to the Moose defendants’ reply brief contains the actual, and more revealing, rationale of the legislation’s proponents:

The current default of 12 percent interest is unreasonably high. The interest on judgments should reflect to some degree economic reality at the time a judgment is entered. The current rate makes considerations of interest charges alone drive decisions on whether to appeal a case. Interest charges on a judgment against a local government can grow to hundreds of thousands of dollars while a case is being appealed. The bill will let appeal decisions be made more on the merits of the case itself. The federal government has adopted an interest rate on judgments tied to the T-bill rate, and the state should do so as well.

House Bill Report at 3.² The bill was designed to facilitate appeals by businesses, local governments and their insurers in tort cases.

² HB 2485’s opponents were correct:

The current interest rate system is and should be something of a deterrent to appeals which may otherwise be used just to prolong the period before a plaintiff receives payment.

House Bill Report at 3.

There is no rational relationship between RCW 4.56.110(3) and the rationale for the bill offered by its legislative proponents. There is seemingly little justice for an injured tort victim receiving half the judgment interest that a business can earn on a judgment to collect a debt, particularly when the tort judgment creditor cannot collect prejudgment interest while the collection creditor usually can because the amount at issue is likely liquidated. *See, e.g., Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968).³ The judgment debtor in a collection matter, contract case, or antitrust case should not be deterred in filing a meritorious appeal by judgment at 12%.

The Moose defendants make no effort to distinguish cases like those cited in the Fausts' brief at 53, *because they cannot do so*.

HB 2485 is merely punitive. It is designed to allow tort judgment debtors and their insurers to freely appeal tort victims' judgments. Tort judgment creditors are treated differently than all other judgment creditors only to enable those defendants and their insurers to save dollars at the expense of tort victims. The Legislature offered no *rational* basis for the distinction between tort judgment creditors and all other judgment

³ Washington is only one of eight states not permitting prejudgment interest on tort claims. House Bill Report at 3.

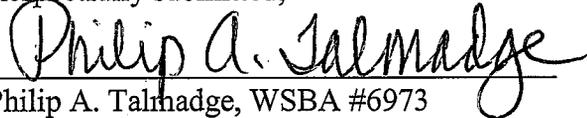
creditors. RCW 4.56.110(3) violates state and federal equal protection constitutional principles and is, therefore, void.

C. CONCLUSION

RCW 4.56.110(3) is unconstitutional under state and federal protection principles. This Court should direct the trial court to revise the judgment against the Moose defendants to bear interest at 12% per annum.

DATED this 22d day of March, 2007.

Respectfully submitted,



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

DATED: March 23, 2007, at Tukwila, Washington.

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