No. 91639-0

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 31992-0-III

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

(Consolidated with 322084-III)

TJ LANDCO, LLC, a Washington Limited Liability Company,
Plaintiff-Respondent,

v.

HARLEY C. DOUGLASS, INC., a Washington Corporation,
Defendant-Petitioner.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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A. Published Decision of the Court of Appeals Division III, filed

B. Order Denying Motion for Reconsideration, filed

I. IDENTITY OF PETITIONER & RESPONDENT

The Petitioner is Harley C. Douglass, Inc., the Appellant and Defendant below (hereinafter "HCDI"). This Answer is filed by the Respondent TJ Landco, LLC, the Plaintiff and Respondent below (hereinafter "TJ Landco").

II. CITATION TO COURT OF APPEALS DECISION

HCDI sought review of the Published Opinion of the Court of Appeals, Division III, filed on March 5, 2015 (hereinafter "Decision"). Both parties moved the court for reconsideration and both motions were addressed by an Order Denying Motion for Reconsideration, entered on March 31, 2015. A copy of the Decision is attached as **Appendix A.** A copy of the Order Denying Motion for Reconsideration is attached as **Appendix B.**

III. ISSUES PRESENTED FOR REVIEW

Petitioner HCDI presented two issues for review:

> Issue 1: ***Where contracting parties do not agree on an interest rate to be applied in the event of a default in payment, should the 12 percent rate be imposed under RCW 19.52.010(1)?***
>
> Issue 2: ***Where both parties agree that the prevailing party is entitled to attorney fees and costs under the contract and both parties request attorneys' fees and costs on appeal, is an award of attorney fees and costs proper under RAP 18.1(b)?***

IV. STATEMENT OF THE CASE

1. The Parties agreement and HCDI's breach.

TJ Landco, LLC is a single member LLC, owned and operated by Tod Lasley. After obtaining his real estate license, Mr. Lasley worked selling property for several years. (RT 101: 20 to 107: 4). TJ Landco was formed in 1993. (RT 107: 5-11).

In 2002/2003, TJ Landco acquired options to purchase various pieces of property across Highway 195 from Qualchan Golf Course that could be aggregated into a residential development. (RT 314: 3-22). However, late in the negotiation process, TJ Landco's primary financing source declined to participate any further in this project. (RT 565: 21 to 566: 10). At about the same time, HCDI's agent approached TJ Landco to inquire about buying the ground. (RT 131: 13-17).

HCDI is a Washington Corporation owned by Harley C. Douglass, an experienced developer with more than 20 years in the field and real property inventory valued in excess of $9,500,000. (RT 560: 21-23; 599:2 to 600:2). After Harley C. Douglass reviewed the proposed project, the parties entered into a Real Estate Purchase and Sale Agreement whereby HCDI agreed to pay $3.6 million for 94 acres of undeveloped property. (CP 44). The deal was subject to TJ Landco obtaining preliminary plat approval from the City of Spokane that was

acceptable to HCDI. (CP 49). The Agreement also contained a clause providing that the prevailing party in any litigation related to enforcement of the contract shall be entitled to reasonable attorneys' fees associated with the litigation. (CP 47). There was no provision for an interest rate in the event of default in HCDI's payment obligations. (CP 44-49).

Obtaining Preliminary Plat approval took substantial time and effort. During the course of obtaining Preliminary Plat approval, TJ Landco borrowed funds from HCDI. (CP 66).

In October 2006 the City of Spokane gave final approval of the Preliminary Plat for the project known as Meadow Point Landing. After reviewing the Preliminary Plat and the City's decision following an appeal of the hearing officer's approval, HCDI determined that the Meadow Point Landing Project was viable. (RT 642: 24 to 643: 25).

On December 22, 2006, HCDI prepared an Accounting which was signed by both parties and modified the financial terms of the agreement between them. In that document, the parties recognized that HCDI still owed $1,114,558.19 to TJ Landco. HCDI paid TJ Landco $114,558.19 on that day (CP 70) and the remaining amount of $1,000,000 was acknowledged as a valid debt to be paid in 5 equal, annual installments of $200,000 per year. (CP 68; RT 298: 4-24). There

was no discussion, negotiation or agreement related to an interest rate in the event of a default. (RT 578: 17-25; RT 574: 14-16). TJ Landco had fully performed its obligations by December 22, 2006.

HCDI delayed the first payment until March 8, 2008, which TJ Landco accepted. (CP 73). On December 22, 2008, HCDI failed to make the second $200,000 installment payment as required (CP 588). HCDI did not provide any explanation for its refusal to pay the installment as it came due. (CP 589)

On December 22, 2009 HCDI again failed to make the $200,000 installment on the due date. (CP 588) Harley C. Douglass refused to speak with Tod Lasley or to provide any explanation as to why he had not paid the installments. (CP 524; 589)

In February of 2010, TJ Landco filed an action against HCDI seeking to enforce the terms of the agreement. (CP 3-13) HCDI also failed to make the $200,000 installment payments that came due on December 22, 2010 and December 22, 2011. To date, HCDI has not paid anything toward the outstanding principal debt of $800,000. Such money continues to be wrongfully withheld from TJ Landco.

2. <u>Conclusion of Trial Court Proceedings.</u>

The court found that TJ Landco had fulfilled its obligations (CP 590) and that HCDI was contractually obligated to make $200,000

payments on December 22 in 2008, 2009, 2010 and 2011. (CP 588-589). It is undisputed that HCDI refused to make such payments and the court concluded that HCDI had breached the agreement. (CP 590, Conclusion 2).

The court further found that TJ Landco had been denied use of the $800,000 owed by HCDI from the date each installment became due and went unpaid. (CP 589; Finding of Fact 25). The court also found that Mr. Douglass's testimony at trial contradicted previously provided declarations, that his trial testimony was evasive, and that his actions during the course of this dispute "affected his credibility with regard to portions of his testimony in this particular case." (CP 589; Findings of Fact 27, 28, 29, 30 & 31).

Based on these Findings, the court awarded TJ Landco prejudgment interest, as follows:

> So the zero percent interest and the 6 percent interest are based upon a contract. And the contract called for certain payments to be made within a year's time. And the parties agreed first that it would be 6 percent. Then they changed it up a bit in the accounting, and for whatever reason there was an agreement that there would be no interest paid. But basically, **all bets are off: If you're not going to abide by the contract** and the Court finds breach of contract and I order the prejudgment interest, the **interest rate starts to accrue from the date the payment should have been made. I think it is <u>appropriate</u> to set it at 12 percent.**

(RT 891:1-11 Emphasis added).

3. Attorney Fee Award

Based on the contractual provision related to attorneys' fees, the trial court awarded TJ Landco its reasonable attorneys' fees to be determined at a subsequent hearing. (CP 586; 591).

On July 12, 2013 that court held a hearing on the issue of attorney's fees based on the application of TJ Landco which included the billing records for two firms involved in its representation at trial: Layman Law Firm, PLLP and the Law Offices of Wolff and Hislop. The attorney fee request included time for paralegals and legal interns. HCDI objected to TJ Landco's request for attorneys' fees on a variety of grounds. (CP 811-840). In opposing the calculation of the award, HCDI retained Mr. Steve Hassing (its current counsel on Appeal) to offer his opinion as to TJ Landco's attorney fee request. Mr. Hassing submitted a Declaration in support of HCDI's opposition to the attorney fee request. (CP 841-857). Mr. Hassing argued that TJ Landco was not entitled to a multiplier because the case appeared to be "an extremely easy case," and that there was "'no evidence' to support Defendant's defenses." (CP 841-857). Further, Hassing argued that TJ Landco had not met the *Absher* criteria to award fees for paralegals or legal interns. (CP 848)

On October 14, 2013 the trial court issued a memorandum decision on the attorney fee application. When addressing attorney fees

for time performed by non-lawyers, the court clearly stated that it considered the *Absher* criteria. The court disallowed the request for fees related to paralegals because, although the billing records reflected work that was legal in nature, there was "no indication as to the qualifications of the paralegals and paraprofessionals from either firm." (CP 926-927). As for the interns, the court concluded that they were properly supervised and their qualifications were properly established, "the fees for their services are allowable." (CP 926-927)

4. Procedure on Appeal.

HCDI appealed the Trial Court's findings of fact with regard to the award of interest and the Trial Court's award of legal intern fees as part of the attorney fees award. After considering the materials and hearing the argument of counsel on appeal, Division III of the Court of Appeals issued a published decision upholding the award of both pre and post judgment interest at twelve percent per annum. The Court of Appeals remanded the issue of the award for legal intern fees.

TJ Landco was awarded its attorney fees and costs on appeal related to the issue of pre and post judgment interest. An award of attorney fees and costs on the legal intern issue must await remand and further determination by the trial court. (*See generally* Decision).

HCDI filed a Petition for Review, seeking only review of the pre-judgment interest rate and the issue of attorneys' fees awarded on appeal. (*See* Appellant's Petition for Review)

V. SUMMARY OF LAW AND ARGUMENT

1. Prejudgment Interest

Petitioner HCDI incorrectly states the holding of the Decision from which review is sought and cites cases that are inapplicable to these facts. The Court of Appeals did not hold that RCW 19.52.010(1) requires contracting parties to agree upon two interest rates. Rather the Trial Court found that HCDI's and TJ Landco's agreement was to zero percent interest, so long as payments were current. Since the parties did not agree upon an interest rate in the event of default, the Court of Appeals applied the plain language of RCW 19.52.010(1) to the parties' agreement as properly determined by the trial court following full hearing.

A. The decision applies the plain language of RCW 19.52.010(1) to these facts.

RCW 19.52.010(1) provides in pertinent part that "every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing by the parties..."

HCDI mistakenly argues that the Court of Appeals interpreted the statute to require parties to agree upon two interest rates. (*See* Appellant's Petition for Review, p. 8) However, the Decision simply read the statute to require using an agreed upon interest rate in accordance with the parties agreement. (*See* Decision, p. 8)

The Court of Appeals correctly found and Petitioner does not contest the fact that HCDI and TJ Landco only agreed that the zero percent interest rate would apply "during the five year payment period set out in the modification...." (Decision, p. 8). "The modification did not include an agreement by Landco that it would accept zero percent interest on each outstanding $200,000 installment if it went unpaid when due." (Decision, p. 8). The parties did <u>not</u> have an agreement regarding the interest rate after the due dates. Given the absence of such an agreement, the plain language of RCW 19.52.010(1) mandates an interest rate of twelve percent per annum. The parties did not mutually agree that the zero percent interest rate would apply in perpetuity. Therefore, the Court of Appeals affirmance of the award of pre-judgment interest is proper.

B. The Decision is in accordance with the Supreme Court's holding in *Kahl v. Ablan*, and does not conflict with other cases from this court or any Washington appellate court.

It has been a long-standing rule in Washington State that a

new "forbearance of money" is created by a breach of contract caused by the failure to pay a liquidated sum. *Kahl v. Ablan*, 160 Wash. 201, 206, 294 P. 1010, 1012 (1931). Furthermore, RCW 19.52.010 and its precursor have been interpreted to require application of "the statutory interest rate to notes containing no stated rate of interest on default." *Mehlenbacher v. DeMont*, 103 Wash. App. 240, 251, 11 P.3d 871, 877 (2000) (discussing RCW 19.52.010; also discussing *Peoples Nat'l Bank of Washington v. Nat'l Bank of Commerce of Seattle,* 69 Wash.2d 682, 420 P.2d 208 (1966)). None of the cases relied upon by Petitioner conflict with the Decision.

(i). *Schrom v. Board for Volunteer Firefighters*

In *Schrom*, the Court imposed the statutory interest rate of twelve percent since there was no agreement between the parties on the specific situation creating the forbearance. *Schrom v. Bd. For Volunteer Fire Fighters*, 153 Wash. 2d 19, 36, 100 P.3d 814, 823 (2004). While Petitioner HCDI is correct that the Court did not mention a requirement for having two stated interest rates, the Petitioner neglects to mention that the text of *Schrom* also makes no reference to having only one stated rate. *See Id.* Petitioner mistakenly construes *Schrom* to mean that "only one" interest rate need be mentioned with regard to any matter between the parties in order to

preclude application of RCW 19.52.010 in any circumstance. (*See* Appellant's Petition for Review, p. 10) However, *Schrom* simply stands for the proposition that when there is not an agreed upon interest rate, then the statutory rate applies. *See Schrom*, 153 Wash. 2d at 36, 100 P.3d at 823 (discussing RCW 19.52.010).

In this matter, that is exactly what the trial judge found. The parties did not agree to an interest rate that would apply if HCDI arbitrarily chose not to make payments; therefore the statutory default rate of twelve percent applies following each applicable due date. The Decision does not conflict with any decision of this Court.

(ii). *Wright v. Dave Johnson*

In *Wright* the Court applied the statutory interest rate because "there [was] no evidence of any agreed interest rate." *Wright v. Dave Johnson Ins. Inc.*, 167 Wash. App. 758, 776, 275 P.3d 339, 350 (Div. 2, 2012). There was no discussion of only requiring one rate or two rates. *See Id.* Instead, the Court focused on the lack of agreement. *Id.*

The Decision does not conflict with the holding in *Wright*, since there is no evidence that either HCDI or TJ Landco agreed upon a rate in the event the installments were unpaid. The Court of Appeals correctly states in its Decision: "The modification did not include an agreement by Landco that it would accept zero percent interest on

each outstanding interest $200,000 installment if it went unpaid when due." (Decision, p. 8).

(iii). *McDowell v. The Austin Company*

In *McDowell* the parties expressly agreed to imposition of the statutory rate by specifically citing to the statute in their agreement. *McDowell v. The Austin Co.*, 39 Wash. App. 443, 446, 693 P.2d 744, 746 (Div. 1, 1985). Thus, without further specific agreement, when the statutory rate changed, the rate agreed by the parties also changed.

The Agreement between HCDI and TJ Landco did not contain a specific citation to the statute. Instead they agreed to modify the financial terms of the agreement between them. Following the hearing, the trial judge properly concluded that the new financial terms provided HCDI would pay $1,114,558.19 with TJ Landco carrying the principal balance at zero percent, so long as the payments were timely made.

C. The Washington State Constitution allows courts to apply and interpret statutes.

While legislative authority is granted to the legislature, Petitioner ignores the corollary that judicial authority is vested in the courts. Const., art. IV., § 1. Thus, the Courts have the power and obligation to apply and interpret the statutes in accordance with their

"ordinary or common meaning." *Yakima First Baptist Homes, Inc. v. Gray*, 82 Wash. 2d 295, 299, 510 P.2d 243, 245 (1973).

The Decision is an exercise of this judicial authority. As previously discussed, the plain language of RCW 19.52.010(1) provides in pertinent part that "every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing by the parties..." In this matter, the parties did not agree to a rate to govern the forbearances created by the wrongfully withheld payments. Therefore, the Decision does not conflict with the Washington State Constitution.

D. HCDI requests that the court construe the statute in a manner that undermines the purpose of RCW 19.52.010.

Without citation to any facts or authority, HCDI makes a bald assertion that the public interest would be harmed by the Decision. However, HCDI essentially asks the Court to revise the Parties' agreement to provide an interest rate of zero percent, forever. By its plain language, RCW 19.52.010 applies when parties do not agree upon an interest rate. The Trial Court and Court of Appeals correctly determined that the statutory interest rate governs, since HCDI and TJ Landco did not reach such an agreement, about the proper rate upon

default.

2. Attorney Fees on Appeal

Petitioner HCDI does not challenge TJ Landco's right to an award of attorney's fees on appeal as the prevailing party under either RCW 4.84.330 or the terms of the parties' contract. Instead HCDI argues that Landco is barred from receiving the award on procedural grounds, under RAP 18.1(b).

A. The plain language of RAP 18.1 simply requires a separate section for a request of attorneys' fees and costs.

RAP 18.1(b) states that in order to be awarded attorneys' fees on appeal: "The party must devote a section of its opening brief to the request for the fees or expenses." There is nothing in the rule that requires citation to legal authority or record to be contained in this separate section. *See Id.*

As acknowledged by Petitioner HCDI, TJ Landco had a specific section in its opening brief wherein it requested attorney fees, thereby complying with the plain language of RAP 18.1(b).

B. Washington Case Law does not require argument and citation to authority for attorney fees and costs to be contained in a separate section, when there is not an issue as to the right to be awarded fees and costs.

Petitioner HCDI correctly states the general rule that RAP 18.1 "requires more than a bald request for attorney fees on appeal." *Wilson*

Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wash. 2d 692, 710, 952 P.2d 590, 599, n. 4 (1998) (citing *Thweatt v. Hommel,* 67 Wash.App. 135, 148, 834 P.2d 1058, *review denied,* 120 Wash.2d 1016, 844 P.2d 436 (Div. I, 1992)). However, Petitioner ignores the rationale stated in *Thweatt*, which formed the basis for the Supreme Court's decision in *Wilson*. When the cases are read in their entirety, rather than selectively quoted, one can see that the general rule applies only "[w]here there is any issue... as to a party's entitlement to attorney fees...." *Thweatt,* 67 Wash. App. at 148, 834 P.2d at 1065. When such an issue exists, "the failure to argue the issue requires [the court] to deny the request, at least insofar as the appeal is concerned." *Id.*

In this matter, there was and still is no issue as to TJ Landco's right to be awarded attorney fees on appeal. In fact, the Petitioner HCDI in its opening brief stated: "The Landco-Douglass contract calls for recovery of fees by the prevailing party." (Appellant's Opening Brief, pp. 48-49 Emphasis added). In its opening brief, TJ Landco agreed with HCDI, and requested attorneys' fees on appeal stating: "The prevailing party is entitled to attorney fees on this appeal." (Respondent's Brief, p. 47). Earlier in its brief, TJ Landco cited the "contractual provision" as authority for such an award. (Respondent's Brief, p. 11).

As this case presents no issue on the prevailing party's right to attorney fees, the Court of Appeals properly awarded fees on appeal.

3. Attorney Fees Request under RAP 18.1

Respondent TJ Landco requests that it be awarded attorney fees and costs, in accordance with the terms of the parties' contract, RAP 18.1(j), and RCW 4.84.330; which all provide an award of fees and costs to the prevailing party.

Also, under RAP 18.1(j), if HCDI's Petition for Review is denied, Respondent TJ Landco is entitled to attorneys' fees and costs incurred in preparing this Answer because TJ Landco prevailed below and was awarded attorney fees and costs.

VI. CONCLUSION

The Court should deny review of the two issues for which HCDI seeks review; since with respect to those issues, the Decision is a clear application of the statutory plain language and existing case law. In addition to denying review, the Court should award TJ Landco its attorney fees and costs under RAP 18.1(j), since it received such an award as the prevailing party below.

If the Court grants review, it should affirm the Decision of the Court of Appeals as it relates to pre-judgment interest and an award of attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 29th day of May, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 2015, I served a true and correct copy of the foregoing RESPONDENT'S ANSWER TO PETITION FOR REVIEW by delivering the same to the following attorneys of record, by the method indicated below, addressed as follows:

[X]	U.S. Mail, postage prepaid	Steve J. Hassing 425 Calabria Court Roseville, CA 95747 Attorney for Appellant
[ ]	ABC Legal Messengers	
[ ]	Overnight Mail	
[ ]	Facsimile	

Laura Edmonston

LAURA K. EDMONSTON

EXHIBIT A

FILED
MAR 5, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

TJ LANDCO, LLC, a Washington Limited Liability Company, Respondent, v. HARLEY C. DOUGLASS, INC., a Washington Corporation; SECURE SELF STORAGE, LLC, a Washington Limited Liability Company; HARLEY C. DOUGLASS and JANE DOE DOUGLASS, husband and wife, and the marital community comprised thereof; and JOHN DOE PARTNERSHIP, Appellant.	)	No. 31992-0-III Consolidated with No. 32208-4-III PUBLISHED OPINION

KORSMO, J. — This appeal arises from the modification of the provisions of a contract governing payment and interest. Concluding that the trial court adopted a reasonable construction of the contract at the bench trial, we affirm the interest rate rulings and remand for an additional hearing of the question of the attorney fee award for work performed by law students.

FACTS

The subject of the contract was land near the southwest borders of the city of Spokane. Respondent TJ Landco LLC (Landco) agreed in February 2004, to sell the 94

acre parcel of land to appellant Harley C. Douglass, Inc. (Douglass) for $3.6 million. The seller was required to obtain preliminary plat approval from the city of Spokane and obtain the city's agreement to extend water and sewer by the end of 2005.

The parties used a standard real estate purchase and sale agreement form. An addendum to that form included the following language concerning the purchase price and interest:

> 1) Purchase price of 3.6 Million Dollars ($3,600,000.00) to be paid as follows:
> A) Two Million Dollars ($2,000,000.00) as down payment due at closing
> B) The balance of One Million Six Hundred Thousand Dollars will be paid in annual installments of $250,000.00 per year plus interest until paid in full.
> C) The unpaid balance will carry and [sic] interest rate of 6% per annum.
> D) The first annual payment will begin exactly 2 years from the date of closing.
> E) Purchaser and Seller agree that the interest rate for the first two years of this transaction will carry the minimum Federal Rate allowable. At the end of the first two years the interest rate will be 6% per annum until balance is paid in full.
> F) . . . .
> G) Deed releases will be prepared on a per acre basis on the remaining balance of land and executed according to the installment payment schedule noted above.

Clerk's Papers (CP) at 49.

Three of the provisions mentioned interest, and two of them gave competing commands concerning the rate to be charged. Subsequent developments were to make the situation more complicated.

The preliminary plat approval was received October 9, 2006, and the sale closed thereafter. Tod Lasley, the owner of Landco, met on December 22, 2006, with Harley Douglass, the owner of Douglass. The two men agreed that at that point Douglass owed Landco $1,114,558.19. Douglass paid $114,558.19 at that time. On a balance sheet accounting for payments made and balance owing on the land sale, the men added two separate handwritten notes. Each was dated December 22, 2006, and signed by both men. The first stated:

> 1,000,000.00 Balance,
> Payment of 200,000.00 per year for 5 years at zero interest.

The remaining note:

> #889
> Based on 371 Lots
> If less credit will be given out of 1,000,000.00

CP at 68.

The parties treated these writings as a modification of the original contract. Douglass made a single payment of $200,000 on March 4, 2008, but did not make any additional payments thereafter. He later contended that Landco had not fulfilled all of its obligations under the contract and that only 304 of the anticipated 371 lots would be approved. Douglass sold the land to his parents for $500,000 without developing it.

Landco filed suit in February 2010, contending that Douglass had breached the contract. Douglass defended on the basis that he was entitled to an offset due to the limited number of lots approved and, thus, no further moneys were owing. The case

proceeded to a four day bench trial in the Spokane County Superior Court. In addition to the questions of breach and offset, the parties hotly contested the interest rate governing any judgment as well as appropriate attorney fees.

The trial court concluded that Douglass had breached the contract and that he had failed on his counterclaim for an offset. The court awarded Landco the remaining $800,000 on the contract, plus prejudgment interest at 12 percent and postjudgment interest at 12 percent. Detailed findings in support of the bench verdict were entered. Douglass promptly appealed to this court.

After hearing, the trial court awarded Landco its attorney fees and costs, including $24,514.16 for work done by law student "legal interns." The court denied Landco's request for fees for work performed by paralegals. Douglass appealed from the fee award. This court consolidated the two appeals and subsequently heard oral argument.

ANALYSIS

Douglass challenges the prejudgment and postjudgment interest rates, as well as the fees awarded for the work performed by the law students. Both parties seek attorney fees on appeal under the contract. We initially address the two interest rate arguments as one issue before turning to the two attorney fee contentions.

Interest Rate

Douglass contends that the zero percent interest rate in the modification provision governs both the prejudgment and postjudgment interest rates, thus making the court's

judgment in error. Landco contends that the parties did not contract for a rate to govern in the event of a breach of the contract, requiring the court to apply the statutory provisions that currently provide for 12 percent interest. No party contends that the six percent rate initially provided by the contract is still in force.[1] Because the same operative facts control the outcome, we consider the two arguments together even though different statutes govern the two situations.

Prejudgment interest is governed by RCW 19.52.010.[2] As relevant here, the statute states in part:

> (1) Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties . . . .

The governing statute for postjudgment interest is found in RCW 4.56.110.[3] The relevant provisions relate:

> Interest on judgments shall accrue as follows:
>
> (1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.
> . . . .

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[1] Both parties agreed at oral argument that the six percent figure was inapplicable and neither side argued for it in their respective briefing.

[2] This statute had its genesis in the LAWS OF 1854, p. 380 § 1, but much of the current language was enacted by LAWS OF 1895, c. 136.

[3] This statute, too, draws much of its current language from the LAWS OF 1895, c. 136.

> (4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof.

RCW 4.56.110(1), (4). RCW 19.52.020(1) provides interest at the higher figure of either 12 percent or the average treasury bill rate plus four percent.

Appellate courts review awards of prejudgment interest for abuse of discretion. *Scoccolo Constr., Inc. v. Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). A party is entitled to prejudgment interest on liquidated claims[4] to compensate them for loss of use on money that is wrongfully withheld by another party. *Mall Tool Co. v. Far West Equip. Co.*, 45 Wn.2d 158, 169, 273 P.2d 652 (1954); *see also Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979) (discussing the purpose of prejudgment interest in applying the standard to a judgment against the State). Trial courts may exercise discretion in the amount of the award, but must give a reasonable explanation in equity for any deviance from the standard rate. *See Dave Johnson Ins. Inc. v. Wright*, 167 Wn. App. 758, 776 n.10, 275 P.3d 339 (2012).

Postjudgment interest is mandatory due to RCW 4.56.110. *Womack v. Von Rardon*, 133 Wn. App. 254, 264, 135 P.3d 542 (2006); *Rufer v. Abbott Lab.*, 154 Wn.2d 530, 551-53, 114 P.3d 1182 (2005). Consequently, awards of postjudgment interest are matters of law that are reviewed de novo. *Sintra, Inc. v. Seattle*, 96 Wn. App. 757, 980 P.2d 796 (1999).

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[4] There is no dispute here that the claims are liquidated.

When a party breaches an obligation to pay a liquidated debt, a new forbearance is created. *Kahl v. Ablan*, 160 Wash. 201, 206, 294 Pac. 1010 (1931) (citing cases). The creation of the new forbearance triggers application of the prejudgment interest statute. RCW 19.52.010(1) ("Every loan or forbearances of money . . . shall bear interest."). *Accord, Smith v. Olympic Bank*, 103 Wn.2d 418, 425, 693 P.2d 92 (1985) ("The rate of prejudgment interest is governed by RCW 19.52.010."); *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wn. App. 208, 216, 716 P.2d 911 (1986) ("RCW 19.52.010, governing prejudgment interest, provided for a rate.").[5] Thus, the trial court here correctly recognized that prejudgment interest was required when the payment obligation was breached. The only question was whether the statutory interest rate, or some contract rate, applied.

Douglass argues for the zero percent rate governing the payments expected over the five year period, while Landco contends that the statutory rate applies because the

[5] Some courts wrongly cite to the postjudgment interest statute, RCW 4.56.110, as the basis for an award of prejudgment interest due to dicta in *Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998) (*impliedly overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012)), where the court stated that prejudgment interest was allowed at the statutory judgment interest rate even while rejecting the claim for prejudgment interest. *See, e.g., Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 51, 169 P.3d 473 (2007); *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 250 P.3d 121 (2011); *Palermo at Lakeland, LLC v. Bonney Lake*, 147 Wn. App. 64, 87-89, 193 P.3d 168 (2008). Although in many instances the same interest rate will apply under either statute, we believe it is inaccurate to rely upon the postjudgment interest rate statute for calculation of prejudgment interest.

parties did not address the possibility of a new forbearance being created due to a breach of the modified payment schedule. The trial court agreed with Landco, and so do we.

Although Landco agreed to forego interest during the five year payment period set out in the modification, it also expected to receive $200,000 each December during that time frame. The modification did not include an agreement by Landco that it would accept zero percent interest on each outstanding $200,000 installment if it went unpaid when due. Instead, each missing installment created a new forbearance of $200,000. The contract did not address a new forbearance resulting from breach of the contract.[6] Accordingly, RCW 19.52.010(1) governs and mandates interest at 12 percent on each forbearance.[7]

In sum, we affirm the court's award of prejudgment interest calculated from the time each installment became due. Each missing payment created a new forbearance. In

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[6] It is not a new concept that parties can contractually account for interest in case of the possibility of breach. Chief Justice Taney long ago observed: "The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract." *Brewster v. Wakefield*, 63 U.S. 118, 127, 16 L. Ed. 301 (1859).

[7] Douglass additionally challenged the date from which prejudgment interest began. The trial court charged interest on each installment of $200,000 from the date on which the installment was due. Douglass asserts that the court should have charged interest on the entire sum from December 22, 2011, the date on which the balance was to have been paid in full. However, prejudgment interest is appropriate from the date upon which the liquidated claims were created. *See, e.g., Winkenwerder v. Knox*, 51 Wn.2d 582, 320 P.2d 304 (1958). The trial court concluded that a new debt became owing each time a payment was missed. The decision to begin interest at that time was correct.

the absence of a contract provision addressing a new forbearance, the statutory rate of 12 percent was appropriate. RCW 19.52.010(1).

Douglass also argues that the zero percent contract rate applies to postjudgment interest rather than the "default" 12 percent rate established by RCW 4.56.110(4) in conjunction with RCW 19.52.020. A contractual rate of interest was not available under the plain language of the statute.

As noted previously, the opening clause of RCW 4.56.110(1) states in part: "Judgments founded on written contracts, providing for the payment of interest *until paid* at a specified rate, shall bear interest at the rate specified in the contracts."[8] (emphasis added). The language "until paid" is a term of art. Our cases have long distinguished between agreements to pay interest at maturity and agreements to pay interest "until paid." *E.g.*, *Bank v. Doherty*, 42 Wash. 317, 329-30, 84 Pac. 872 (1906).[9] The quoted

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[8] The parties have not argued, and hence we do not address, whether an agreement to pay zero interest is in fact an agreement "providing for the payment of interest" under this statute. That question will await another day. We will assume for purposes of this opinion only that zero percent interest is a contract "providing for the payment of interest" under the statute.

[9] "If the parties had intended the note in question to draw interest at the rate of two per cent per month after maturity, it would have been an easy matter to have placed such intention beyond doubt by simply adding the words 'until paid' after the words 'two per cent per month.' They did not do so, and we must, therefore, conclude that the contract contained all of the agreement, and that the parties intended to let the law fix the rate of interest after maturity, if the note should not be paid when it became due." *Bank*, 42 Wash. at 330.

statutory language was enacted by the LAWS OF 1895, ch. 136 § 4, and has not varied from that time.

While the original agreement called for six percent interest "until paid," the modification did not. It called for zero percent interest over a five year period. Hence, the language of the statute precludes applying the zero percent contract rate to the judgment in this case.

Recognizing the problem, Douglass argues that the "until paid" language originally used in the contract still applied to the modified payment obligation. In other words, Douglass contends that zero percent language of the modification merely substituted in for the six percent language of the existing contract provision. For several reasons, we are not persuaded.

First, the parties both agreed at oral argument that the six percent provision was inapplicable. If that is correct, and we believe that it is, the modification must have supplanted the original payment terms or else the six percent provision would have revived after the five year zero interest period expired. More importantly, in light of the fact that the modified payment provision totally changed the amount of the outstanding debt and its repayment terms, and the second modification allowed for credit if fewer than expected lots were permitted, it would be impossible to read the 2006 changes to the contract in harmony with the original terms. Part of the consideration for the zero percent interest provision was the fact that Douglass advanced payments before it needed to in

order to assist Landco. If these actions were intended as only a temporary change to the contract, the parties could easily have said that all other payment-related provisions continued in force or would be revived in the event payments were not made. It did not.

The only fair reading of these terms is that they supplanted the existing payment and interest schedule. The total debt was reduced to $1,000,000 and a schedule implemented to pay that sum in five annual payments with no additional interest. At the end of the period the contract would be fulfilled. The parties did not contemplate that there would be need to revive any prior contract terms or further modify the agreement.

As modified, the contract did not provide "for the payment of interest until paid." RCW 4.56.110(1). Accordingly, there was no contractual interest rate that governed the judgment award. The trial court correctly applied the "default" 12 percent interest provided by RCW 4.56.110(4) and RCW 19.52.020(1).

The trial court correctly calculated both the prejudgment and postjudgment interest awards. There was no error.

Attorney Fees for Legal Interns

Douglass also appeals from the trial court's attorney fees award for the service of law student "legal interns." The record is insufficient to decide this issue and we remand for further hearing.

Attorney fee awards are reviewed for abuse of discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). Discretion is abused when it is

exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion also is abused if it is exercised contrary to law. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). We also note that trial courts, not appellate courts, find facts. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Accordingly, this court reviews the trial court's factual determinations for sufficiency rather than make our own credibility determinations. *Cherry Lane*, 153 Wn. App. at 717.

In *Absher Construction Co. v. Kent School District No. 415*, 79 Wn. App. 841, 905 P.2d 1229 (1995), this court set forth six criteria for determining whether services performed by nonlawyers was compensable under an attorney fee award. Those criteria:

> (1) the services performed by the nonlawyer personnel must be legal in nature;
> (2) the performance of these services must be supervised by an attorney;
> (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work;
> (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical;
> (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and
> (6) the amount charged must reflect reasonable community standards for charges by that category of personnel.

Id. at 845.

The trial court considered these criteria in awarding the fees for the law students' work and in denying the request for fees for the paralegal's work. The trial court ruled that the fees for "research, editing and other administrative functions" performed by "legal interns" "are allowable." CP at 927. Douglass argues that the first three criteria were not satisfied by the record submitted to the trial judge.

We disagree with Douglass as to the first two criteria. Landco submitted billing records to meet its *Absher* burden with respect to fees sought for the activities of its attorneys, paralegals, and law students. The records were detailed enough to allow Douglass to present substantial detailed argument, orally and in writing, in opposition to portions of the fee request for the attorneys. Douglass successfully used the information provided to convince the trial court to trim several areas of the fee requested by the attorneys because it was duplicative of other work or related to failed motions. Douglass also was able to use the records to convince the judge that the paralegal fee request was inadequate. Accordingly, we conclude that the billing records adequately conveyed that the law students were performing legal services.

The second *Absher* criterion is whether the nonlawyers were supervised by an attorney. The billing records adequately satisfied that criterion here, although a direct statement by the supervising attorney would have been more helpful. The record does reflect that the research performed by the law students was incorporated into memoranda

and other legal decision-making by the attorneys. This showed that the students were supervised.

However, we agree in part that the third *Absher* factor was not necessarily satisfied. That criterion requires proof that the nonlawyer was "qualified by virtue of education, training or work experience to perform substantive legal work." *Absher*, 79 Wn. App. at 845. Other than identifying the students as "legal interns" who were full-time students at the Gonzaga University School of Law, there is scant evidence concerning the qualifications of these students. Douglass quite properly points out that a student beginning her law school experience does not demonstrate requisite training and education just from the fact of full-time attendance at school.

The trial court did find, and Landco did argue, that the students were "legal interns." APR 9 sets forth a process by which law students, among others, can engage in a limited law practice as "Licensed Legal Interns" under the supervision of an experienced attorney. APR 9(a). A law student must demonstrate the requisite educational success to qualify as a licensed legal intern, typically by completing at least two years of law school. APR 9(b). An experienced attorney must supervise the intern, and the Washington State Bar Association is authorized to conduct background investigations similar to those required of applicants to the bar. APR 9(c), (d). We have no hesitation in holding that a licensed legal intern satisfies the third *Absher* criterion.

Landco did not put forth evidence that its students possessed an APR 9 license. However, for decades these students colloquially have been referred to as "Rule Nines" or "legal interns." If Landco and the trial court were using that same short-hand designation for these licensed legal interns, then the evidence did support the fee award. We thus remand this portion of the case to the trial court to make that determination.

We do not suggest that only licensed legal interns possess the requisite education or training to satisfy the third *Absher* criterion. There are multiple methods of proving that a non-licensed law student is qualified by education or experience. However, Landco put on no other proof on this point and now can sustain the trial court's ruling only if its "legal interns" were licensed legal interns per APR 9.

We remand for hearing on the status of the "legal interns" whom the trial court awarded attorney fees. If Landco presents evidence that they were licensed in accord with APR 9, the trial court should make such a finding and affirm its earlier award. If not, the trial court should strike the fee award.

Attorney Fees on Appeal

Both sides seek attorney fees on appeal in accordance with the contract. *See* RCW 4.84.330; *Hill v. Cox*, 110 Wn. App. 394, 411-12, 41 P.3d 495 (2002). Attorney fees are available on appeal where granted by applicable law. RAP 18.1. The prevailing party is awarded fees under the statute. RCW 4.84.330.

Landco prevailed in the original appeal from the judgment concerning the interest awards. It is entitled to its fees in that appeal provided that it timely complies with RAP 18.1(d). Our commissioner will consider a timely request. RAP 18.1(f).

The second appeal, concerning the attorney fee award, presents a muddled picture. Landco did not prevail in that action and is not entitled to its fees for that portion of this consolidated appeal. It is unclear at this time whether Douglass will prevail or not. If Douglass prevails on remand by obtaining any relief on the fee award related to the law students, then it is entitled to its fees on appeal related to this issue. We direct the trial judge to determine that request. RAP 18.1(i). Whichever party prevails on remand would be entitled to its fees for its efforts in the trial court.

Accordingly, the judgment is affirmed and the matter remanded for hearing on the award of attorney fees relating to the law students.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.

EXHIBIT B

FILED
MARCH 31, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

TJ LANDCO, LLC, a Washington Limited Liability Company, Respondent, v. HARLEY C. DOUGLASS, INC., a Washington Corporation; SECURE SELF STORAGE, LLC, a Washington Limited Liability Company; HARLEY C. DOUGLASS and JANE DOE DOUGLASS, husband and wife, and the marital community comprised thereof; and JOHN DOE PARTNERSHIP, Appellant.	No. 31992-0-III Consolidated with No. 32208-4-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration dated March 20, 2015 and respondent's motion for reconsideration dated March 25, 2015, and is of the opinion both motions should be denied. Therefore,

IT IS ORDERED, the motions for reconsideration of this court's decision of March 5, 2015 are hereby denied.

DATED: March 31, 2015

PANEL: Judges Korsmo, Siddoway, Fearing

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

OFFICE RECEPTIONIST, CLERK

To: Laura Edmonston
Cc: Tim Fennessy; Wendy Ahonen
Subject: RE: 91639-0 - TJ Landco, LLC v. Harley C. Douglass, Inc., et al

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Sir/Madam:

Attached for filing, please find the Respondent's Answer to Petition for Review.

If you have any questions or concerns, please let us know.

Thank you,

LAYMAN

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