No. 31992-0-III

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

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

v.

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

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Real estate developers are known for their negotiating skill and deal making ability. When strapped for cash or to keep good deals alive, they strike bargains they might not otherwise consider. After accepting performance by the other party, one is not usually allowed to simply disregard the agreement made in time of need. But, that is what happened in this case.

Here, both parties are seasoned developers, experienced in crafting arrangements beneficial to their own interests. Respondent, TJ Landco, LLC, being "stretched to the limit", negotiated away the right to receive interest in exchange for much needed cash. However, when litigation ensued Landco reneged on its agreement and asked the court to ignore its early receipt of $314,558 in consideration for reducing the rate of interest to zero.

Having bargained away its right to interest, Landco asked the court to "penalize" Appellant, Harley C. Douglass, Inc., by assessing 12 percent interest. Ignoring the contract and the two statutes which control interest awards, the trial court awarded Landco prejudgment interest totaling $289,705 and 12 percent interest on the judgment which will add another $224,588 by the end of this year. This appeal requires resolution of one overriding issue of first impression.

When contracting parties agree in writing to a specified rate of interest must they also agree on an additional default rate to avoid imputation of the 12% statutory rate in the event of breach?

II. ASSIGNMENTS OF ERROR & LEGAL ISSUES

Assignments of Error

1. The trial court erred when it included the words, "*on or about December 22, 2011*" in finding of fact number 18.

2. The trial court erred in refusing Douglass' proposed alternative finding 18 which would have eliminated, "*on or about December 22, 2011*".

3. The trial court erred when it awarded $144,000 in prejudgment interest on installments due December 22, 2008, 2009 and 2010.

4. The trial court erred by stating, in conclusion six, that prejudgment interest be calculated at 12 percent per annum.

5. The trial court erred in refusing Douglass' proposed conclusion that prejudgment interest be calculated at zero percent.

6. The trial court erred in awarding $289,709.60 in prejudgment interest at 12 percent instead of awarding nothing based upon the agreed upon rate of zero percent.

7. The trial court erred in stating, in conclusion seven, that interest on the judgment should accrue at 12 percent per annum.

8. The trial court erred in overruling Douglass' objection to conclusion seven which stated that interest accrue on the judgment at 12 percent.

9. The trial court erred in failing to accept Douglass' proposed alternative conclusion seven stating that the judgment should contain language providing that it accrue interest at zero percent.

10. The trial court erred in failing to include language in the judgment providing that interest was to accrue at zero percent.

11. The trial court erred in awarding Landco attorney's fees for services performed by legal interns absent findings that they were qualified, that the work performed was of a legal nature and that the work was supervised by an attorney.

Legal Issues Pertaining to The Assignments of Error

1. Is conclusion number six which states that Plaintiff is entitled to prejudgment interest at 12 percent per annum supported by the findings? (Errors 3, 4, 5 & 6).

2. Is that part of finding 18 which states, *"on or about December 22, 2011"* and which seems to imply a date for termination of the parties' agreement that the interest rate be zero, supported by substantial evidence? (Errors 1, 2, 4, 5 & 6).

3. Do the findings support the award of $144,000 in prejudgment interest on installments coming due prior to December 22, 2011? (Error 3).

4. When contracting parties agree in writing that a deferred balance shall accrue interest at a certain rate must they also specify an additional "default" rate in order to avoid imputation of the 12 percent statutory rate upon breach ? (Errors 2, 4, 5 & 6).

5. Was the Landco-Douglass contract sufficient to avoid imputation of the legal rate of 12% ? (Errors 2, 4, 5 & 6).

6. Where the parties to a written contract agree upon the rate of interest does the trial court abuse its discretion if it awards prejudgment interest at a different rate ? (Errors 2, 4, 5 & 6).

7. Is conclusion number seven which states that Plaintiff is entitled to interest on the judgment at the rate of 12 percent supported by the findings? (Errors 1, 2, 7, 8, 9 & 10).

8. Does the court abuse its discretion when it awards attorney fees for work performed by unlicensed legal interns without finding that they are qualified to perform substantive legal work, that the work performed was of a legal nature and that the work was supervised by an attorney? (Error #11).

III. STATEMENT OF THE CASE

Appellant is Harley C. Douglass, Inc., a Washington corporation. Douglass, the defendant below, is an experienced residential land developer and home builder. (RT 560; 6- 23).

Respondent is TJ Landco, LLC, a Washington limited liability company. Landco, the plaintiff below, is owned and operated by Tod Lasley, himself a seasoned residential real estate developer. Lasley obtained his real estate license in 1985 and not long after, formed his own development company. By 1993 Lasley had developed various projects, including a 350 acre 18 hold golf course community in Deer Park. (RT 101; 19- 106; 9).

In late 2002 or early 2003 Landco began assembling 94 acres of land in Spokane for residential development. (RT 66; 17 & 118- 22- 120; 6). In February of 2004 Landco and Douglass entered into a written contract with Douglass agreeing to buy the land once Landco obtained an acceptable preliminary plat. The purchase price was $3.6 million and required a $2 million down payment. The remaining $1.6 million was to be paid in annual installments beginning two years following closing. (Ex P-1) [1] (CP 49).

Prior to plat approval and before Douglass was obligated to pay any

[1] Ex P-1 is attached as Appendix A

money, Landco encountered financial difficulty and needed nearly $1.5 million in advances to enable it to honor contract obligations on its own purchase of the 94 acres. In exchange for Douglass' financial backing, Landco reduced the price to $3.1 million. (RT 148; 22; 155- 4).

Interest during the first two years following close of escrow was to equal the minimum federal rate. Since no interest was awarded for the first two years following the December 22, 2006 close of escrow, the federal rate is not at issue. After the first two years, interest was to accrue at six percent until the balance was paid in full. (Ex P-1) (CP 49).

In June of 2004, Landco unsuccessfully attempted to amend the contract to require Douglass to pay 12 percent "default" interest on late payments. (RT 150- 9; 151; 16) [2].

Landco obtained final preliminary plat approval on October 9, 2006. (Ex P-3) (CP 51- 53). By that time, Douglass had advanced cash or credit of around $2,485,442 of the $3.6 million original price. (Ex P-19) [3]. On December 22, 2006 the parties met and agreed that there remained owing a total of $1,114,558.19. (RT 572; 17- 19) [4]

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[2] Ex D-101 at page 2, (iii) & Ex D-102 at page 2, (iii)

[3] Ex P-19 is the parties' December 22, 2006 contract modification, attached as Appendix B

[4] also see CP 68 & 583 and Ex P-19

Under the original agreement Landco was not entitled to another payment for two years. (Ex P-1). But when the parties met in December of 2006 Landco was again in need of cash. In fact, just three months earlier, Landco, being "stretched to the limit", borrowed $31,000 from Douglass. (RT 155; 10- 156; 4)[5]. At the December meeting, Landco promised to reduce the interest rate from six percent to zero if Douglass would make an immediate payment of $114,558 and advance the due date on the initial installment a full year. (RT 331; 21- 332; 5). Douglass agreed, the parties executed a one page modification[6] and Douglass advanced Landco another $114,558. (RT 574; 3-5). The initial $200,000 installment was paid on March 4, 2008. (CP 583) [7]

By the time the December 22, 2008 installment came due Douglass had discovered what he considered to be significant problems with the plat which he believed would only allow for 304 of the 371 lots. (RT 851; 2-4) (578; 17- 579; 3). Believing entitlement to an offset exceeding the remaining $800,000 balance, Douglass made no further payments. (CP 588, 589; findings 20- 24). Douglass then sold the land without developing it. (RT 864;10- 14).

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[5] Ex P-19 shows that this $31,000 loan was made to Landco on September 6, 2006

[6] Contract modification in evidence as Ex P-19; see Appendix B

[7] Also see Issues Not Disputed 6 & 7

Landco filed suit on February 9, 2010. After a five day bench trial before the Honorable Maryann C. Moreno, it was determined that Landco was obligated to provide Douglass with credits if less than 371 lots could be achieved. However, Douglass's sale of the property prior to developing it precluded any setoff. The court explained;

> **Mr. Douglass claimed damages for an offset that he believed was owed. But I would have to speculate as to that, and I don't have any facts to even speculate with. It's impossible to assess what kind of damages, if any, he would incur. Whenever a court is determining damages, it has to be done with reasonable certainty. And that's impossible to do in this case.**

(RT 865; 4-10).

With no offset, Douglass was found to be in breach of contract and Landco was awarded the $800,000 as damages. (RT 865; 13).

A hearing on findings and conclusions was held on June 28, 2013. At issue is finding 18 and conclusions six and seven. Finding 18 included language which seemingly indicated that the zero interest provision extended only until December 22, 2011.[8] (CP 588). Conclusion six set prejudgment interest at 12 percent and conclusion seven stated that the judgment itself bear interest at 12 percent. (CP 591).

Judgment was entered on June 28, 2013. (CP 592, 593). Landco was awarded $800,000 for breach of contract plus $289,705 in prejudgment interest.

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[8] Findings and Conclusions are attached as Appendix C

On July 8, 2013, Douglass filed a motion for reconsideration asking the court to correct the prejudgment interest rate to zero percent and to reduce to zero the amount of interest that was to accrue on the judgment. (CP 603). Douglass' motion was denied on September 16. (CP 626). Twenty-four days later, Douglass filed its Notice of Appeal. (CP 627).

On post-trial motion, Landco requested $417,858.00 in attorney's fees. (CP 651, 660) On January 9, 2014 the trial court entered a separate judgment awarding Landco fees of $237,007.47. (CP 1061). On January 17, 2014, Douglass separately appealed that judgment as case number 322084. (CP 1063). On February 5, 2014 appeal 322084 was consolidated with 319920.

IV. SUMMARY OF ARGUMENT

Washington law recognizes that parties may agree by contract to an interest rate different from that provided for by statute. (RCW 19.52.010 (1) and RCW 4.56.110 (1)). That is exactly what the parties did in this case. However, their contract was disregarded and the statutes authorizing prejudgment interest and interest on judgments were ignored. Without any finding to support the court's conclusions on interest Landco was awarded prejudgment interest at 12 percent as well as 12 percent interest on the judgment.

During trial Landco admitted that it had agreed to reduce interest from six percent to zero in consideration for Douglass' early payment of $314,558. (RT 328; 6- 16) & (RT 331; 21- 332; 5). That did not prevent Landco from urging the court to award 12 percent interest as a penalty for Douglass' breach. (RT 889; 24- 890; 14). The statute authorizing prejudgment interest at the statutory rate conditions 12 percent on failure of the parties to otherwise agree upon a rate. (RCW 19.52.010 (1)). Interest on a judgment at 12 percent is likewise conditioned on a failure of the parties to have agreed upon a contract interest rate. (RCW 4.56.110 (1)).

Landco mistakenly contends that despite the clear language employed by the legislature, the court must award prejudgment interest at 12 percent if the parties have not contracted for a "default" rate in addition to the rate which will be applied to timely made payments. (CP 609 at 28-30) (CP 612 at 4- 6). That is not the law and there is not one case that so holds.

While admitting that it clearly understood that the parties agreement on zero interest was not conditioned upon timely payments the trial court disregarded Douglass' adamant objections to improper findings and conclusions as well as proposals for alternatives. Conclusions six and seven are unsupported by findings or legal reasoning.

V. ARGUMENT

REGARDING PREJUDGMENT INTEREST

LEGAL ISSUE NUMBER 1

Is conclusion number six, which states that Plaintiff is entitled to prejudgment interest at 12 percent per annum, supported by the findings?

The statute which authorizes prejudgment interest at 12 percent requires a failure by the parties to agree upon any interest rate. Before the court can conclude that interest is to be calculated at 12 percent it must first find that there was no other agreement on interest. Since the trial court failed to so find, conclusion six is unsupported.

1. Standard of Review

Conclusions of law are reviewed de novo. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (Div 2, 2006). They are reviewed to determine whether the trial court's findings are supported by substantial evidence, and if so, whether those findings support the conclusions of law. Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *In re Snyder*, 85 Wash.2d 182, 185-86, 532 P.2d 278 (1975).

2. The court concluded that Landco was entitled to prejudgment interest at the rate of 12 percent without a finding that the parties had not agreed in writing to a different rate.

Conclusion Number 6 Provides:

> TJ Landco is entitled to judgment in the full amount of $800,000 plus prejudgment interest at the rate of 12 percent per annum from the due dates reflected above on each successive installment to and until the date judgment is entered.

(CP 591)

Finding 18, the only finding to address interest, provides:

> The accounting acknowledged that Defendant owed Plaintiff $1,114,558.19 as of December 22, 2006 and that payment was to be made that day in the amount of $114,558.19 with the remaining $1,000,000.00 balance to be paid off in 5 equal, annual installments each year thereafter without interest until paid in full on or about December 22, 2011, See Exhibit P-19.

(CP 588). Finding 18 does not support prejudgment interest of 12 percent.

The trial court's authority to calculate prejudgment interest at 12% is derived from RCW § 19.52.010 (1) which provides in pertinent part;

> **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...** [9]

Since the statute only authorizes the court to impose 12 percent *"where no different rate is agreed to"* the court committed error by concluding that Landco was entitled to prejudgment interest at 12 percent without first finding that no different rate had been agreed to. Conclusion

[9] RCW 19.52.010 is set forth verbatim as Appendix D

six is contradicted by all of the evidence pertaining to interest.

3. **Douglass' timely objection to conclusion six was overruled and its proposed alternative was denied.**

Douglass' objection to conclusion number six proposed that the court use the actual contract language, "six percent until paid in full" and language from the modification reducing six percent to "zero interest". (CP 547 at [1]; 580 at [1])[10]. In contrast, Landco's attorney urged the court to disregard the parties agreement and instead penalize Douglass stating;

> **Prejudgment interest is favored as a "penalty" when someone wrongfully withholds payments that are due. And it's not--- It is not a contract agreement, because the contract has been breached.**

(RT 889; 24- 890; 14).

The court cited no legal authority authorizing 12 percent prejudgment interest on the facts in evidence. The court actually swept aside the parties' negotiated bargain on zero interest.

> **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, for whatever reason[11] there was an agreement that there would be no interest paid.**

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[10] Douglass' objections to findings and conclusions and its proposed additional findings are attached as Appendix E

[11] The court unfairly minimized the fact that Douglass paid $314,558 sooner than it would otherwise have been due as valuable consideration for Landco's promise to drop the interest rate to zero

> **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 starts to accrue from the date the payment should have been made I think it is appropriate to set it at 12 percent.**

(RT 891; 1- 11).

If breach, rather than the parties' agreement were test, the legislature would have found no need to include the specific language;

"***where no different rate is agreed to in writing between the parties***"

Were that the case, the legislature would have simply stated that in contract cases prejudgment interest of 12 percent shall be awarded to the non-breaching party. A statutory interpretation should not be adopted that renders any portion of the statute meaningless. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). By awarding 12 percent without finding that the parties did not agree to a different rate the trial court rendered meaningless that material part of the statute.

LEGAL ISSUE NUMBER 2

Is that part of finding 18 which states, *"on or about December 22, 2011"* and which seems to imply a date for termination of the parties' agreement that the interest rate be zero, supported by substantial evidence?

1. Standard of Review

Findings of fact are reviewed to determine whether they are supported by substantial evidence. *Premera v. Kreidler*, 133 Wn.App. 23, 31, 131 P.3d 930 (Div 2, 2006). Substantial evidence is a quantum of

evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The review is deferential; the evidence and all reasonable inferences are reviewed in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (Div 2, 2006).

2. There was no evidence that Landco's promise to charge zero interest terminated on December 22, 2011.

Finding 18 is central to Douglass' appeal since all but one of the assigned errors relate to interest and there isn't any other finding which even mentions interest. The finding seems to indicate---wrongly---that the agreement on zero interest is to terminate in December of 2011.

As already noted, finding 18 provides;

> The accounting acknowledged that Defendant owed Plaintiff $1,114,558.19 as of December 22, 2006 and that payment was to be made that day in the amount of $114,558.19 with the remaining $1,000,000.00 balance to be paid off in 5 equal, annual installments each year thereafter without interest until paid in full on or about December 22, 2011, See Exhibit P-19.

(CP 588). (Appendix C)

The words "*on or about December 22, 2011*" are not supported by the evidence. They appear in the record for the first time in Landco's submittal of proposed findings and conclusions. (CP 536; 12). Moreover, the words render the otherwise accurate finding unclear. To conform to

the evidence the court should have stopped with the words "until paid in full" because the original contract provided for interest at six percent until paid in full and the modification replaced six percent with zero. (Ex P-1; Ex P-19).

There was no testimony from which even an inference could be drawn that zero interest was conditional. To the contrary, Lasley himself testified that the six percent was reduced to zero as a tradeoff for Douglass paying $114,000 on December 22, 2006 and agreeing to pay the initial $200,000 installment sooner than previously agreed. (RT 328; 6- 16) & (RT 331; 21- 332; 5). Telling is that even under questioning by his own attorney, Lasley said nothing about an expectation of receiving interest upon default.

> **Counsel;**
>
> **The unpaid balance will carry --- I suppose that should be "an interest rate of 6 percent per annum." Did that happen?**
>
> Lasley;
>
> Well, I think that might have been part of the - - since the payment was being made, I think that was part of the - - the tradeoff with the interest, if I'm not mistaken. I could be mistaken, but I - - I don't think so. So ..." (RT 328; 6-16)
>
> **Counsel;**
>
> **Now, did TJL and Harley C. Douglass, Inc. agree that no interest would be charged on the balance that remained owing on the original purchase price? In other words, the bottom line figure on this document?**

Lasley;

The bottom line figure, yes, that's correct.

Counsel;

And did you receive a payment at the time the accounting was performed?

Lasley;

For - - I did, for $114,000 and change.

Counsel;

And was one $200,000 installment payment also made?

Lasley;

Yes. (RT 331; 21- 332; 5).

Months after the original contract was executed, Landco attempted to amend to insert a separate default rate of 12 percent.[12] During testimony about that attempt not one word was spoken about the contract rate of six percent being conditional. Which begs a question Landco may want to address in its brief; Why would Landco need the addendum if the law automatically provided for 12 percent in the event of breach?

3. **Douglass filed a formal objection to finding 18 and proposed an alternative and two additional findings.**

Douglass' objection to the finding 18 is found at CP 546; 23- 25. Douglass also proposed an alternative to finding 18 which eliminated the

[12] see RT 150; 9- 151; 16

words, "*on or about December 22, 2011*". (CP 579; 14- 17). Douglass went so far as to propose two additional findings, the first to include the original contract language calling for six percent interest "until the balance is paid in full", and the second to include the actual "zero interest" provision of the 2006 modification. (CP 552 at [13] & [14]). [13]

Landco opposed Douglass' proposals arguing;

> **I think we've stated it accurately as proposed. I think this is a mere confusion. We've indicated the evidence relied upon includes those admitted exhibits, which would include this language. I don't think there's any need to confuse the issue.**

(RT 880; 24- 881; 3)

Mr. Jolley countered;

> **I don't see how using natural (actual ?) language confuses the issue, your Honor. I think it clarifies it.** [14]

(RT 881; 4-7)

The court adopted Landco's proposed finding, adding one meaningless concession, the words "See Exhibit P-19". The addition only created confusion since that exhibit, the December 22, 2006 modification, says nothing about interest other than it is to be at the rate of zero. (Ex P-19).

A court's decision is manifestly unreasonable if the factual findings are unsupported by the record. *In re Marriage of Littlefield.* 133 Wn.2d

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[13] Appendix F

[14] Here, Douglass wonders if the court reporter misheard "natural" instead of "actual"

39, 46-47, 940 P.2d 1362 (1997). That portion of finding 18 complained of finds no support in the record. This Court is asked to remand with instruction to remove from it the words, "*on or about December 22, 2011- See P-19*".

4. **Finding 18 is all the more perplexing given the trial court's full understanding that Landco had not conditioned zero interest on timely payments.**

During argument over the findings and conclusions the trial court admitted understanding that zero interest was not limited to timely payment.

> **Q. The trial court; ...what did the contract said about interest?**
>
> A. Mr. Jolley: It said zero interest.
>
> **Q. The court; Zero interest. Assuming all the payments are made timely.**
>
> A. Mr. Jolley; It doesn't say ---
>
> **Q. The Court; It doesn't say that, I know.**
>
> A. Mr. Jolley; It doesn't say that. It just says zero interest.

(RT 882; 15- 883; 2) (CP 546; 23-26).

LEGAL ISSUE NUMBER 3

Do the findings support the award of $144,000 in prejudgment interest on installments coming due prior to December 22, 2011?

In this appeal Douglass shows why no prejudgment interest should have been awarded. This section shows why, at the least, it must be reduced by $144,000.

1. Standard of Review

Findings of fact are reviewed to determine whether they are supported by substantial evidence. *Premera v. Kreidler,* 133 Wn.App. 23, 31, 131 P.3d 930 (Div 2, 2006). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The review is deferential; the evidence and all reasonable inferences are reviewed in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (Div 2, 2006).

2. Of the $289,705 in prejudgment interest, the award of $144,000 is in direct conflict with finding 18 which indicates that there is to be no interest on installments due prior to December 22, 2011.

If, for the sake of argument, that portion of finding 18 had been supported by evidence, the finding would still not warrant the $144,000 of prejudgment interest which was awarded on installments which came due on December 22, 2008, 2009 and 2010.

In concluding that Douglass was to pay 12 percent interest from the due date of each installment the court went outside of finding 18 which

provided that there was to be no interest until "paid in full", (which has not yet happened), or "December 22, 2011". In awarding interest on the three unpaid installments that came prior to 2011 the court exceeded the scope authorized by the finding. [14]

If, on remand, this Court does not instruct that the entire prejudgment interest award be reduced to zero, Douglass asks that it at least be reduced by $144,000.

The next three sections show that calculation of prejudgment interest at 12 percent also violates the statute which authorizes the court to impose that rate.

LEGAL ISSUE NUMBER 4

When contracting parties agree in writing to interest at a certain rate must they also specify an additional "default" rate to avoid imputation of the statutory rate upon breach?

RCW 19.52.010 (1) is clear on its face. The legislative history clearly supports Douglass' position over Landco's. It indicates that the statutory rate should apply only to debts "where the parties have not considered an interest rate". [15] Moreover, there is not one reported case

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[14] Interest on the December 22, 2008 installment; $72,000
Interest on the December 22, 2009 installment; $48,000
Interest on the December 22, 2010 installment; $24,000

Total interest; $144,000

[15] Explanation of Substitute House Bill 822, April 7, 1983 attached as Appendix G-1.

which holds that an additional default rate need be mentioned in a contract to avoid imputation of the statutory rate of 12%.

1. Standard of Review

The meaning of a statute is a question of law that is reviewed de novo. *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49m 78 P.3d 1278 (2003).

2. Prejudgment interest on breach of contract is authorized by RCW § 19.52.010 (1).

The trial court has no statutory authority to assess prejudgment at 12 percent if another rate has been agreed upon by the parties. In awarding 12 percent the trial court erroneously interpreted the statute. A ruling based on an erroneous legal interpretation is an abuse of discretion. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 886, 224 P.3d 761, cert. denied, 130 S. Ct. 3482 (2010). Since calculation of interest at 12 percent was in excess of this court's authority it is a per se abuse of discretion.

RCW 19.52.010 (1) provides that the court may award "*interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties*". From previous briefing it is clear that Landco contends that the words, *"where no different rate is agreed to in writing between the parties"*, mean that the parties must have agreed upon a "default rate" *in addition to* the normal contract rate to avoid imputation of the statutory rate. (CP 609; 28- 30) (CP 612; 4- 6).

Douglass contends that the words mean what they say, i.e., where the parties have agreed in writing to a particular rate of interest the court has no authority to impose a different rate. Our Supreme Court instructs that courts should assume the Legislature means exactly what it says. *Western Telepage v. City of Tacoma,* 140 Wn.2d 599, 609, 998 P.2d 884 (2000). Construction of those words now falls to this Court.

3. To find within §19.52.010 a requirement that the parties agree upon an additional "default" rate requires one to read words into the statute not included by the legislature which would change its meaning.

A court's objective in construing a statute is to determine the intent of the legislature. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). A fundamental objective in construing the statute is to carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To determine legislative intent, a court examines the language used by the legislature in drafting the statute. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). If a statute's meaning is plain on its face, effect must be given to that plain meaning. (*Dep't of Ecology* @ 9- 10).

The meaning of the words, "*shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties*" seems obvious. By providing that 12 percent is to be imputed only where "no different rate is agreed to in writing" it logically follows

that the legislature intended that where a particular rate has been agreed to in writing the trial court has no authority to substitute 12 percent. Nowhere in the statute did the legislature use the word "default". To adopt the interpretation urged by Landco would require this Court to ignore the legislature's intent as evidenced by its choice of words and by its omission of the word "default".

Strained meanings and absurd results should be avoided. *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). Introducing the word "default" into the statute would lead to absurd results because contracting parties would then have to agree upon not one rate of interest, but two.

4. Legislative history has been provided as an aid to construction should this Court determine that RCW 19.52.010 (1) is susceptible to more than one interpretation.

RCW 19.52.010 is traced to 1854. Although it was amended in 1863, 1881, 1893, 1985, 1899, 1981, 1983, 1992 and 2011, the language at issue has remained unchanged since 1895. A review of the complete legislative history, including all bill reports, analysis, digests and synopsis, reveals no mention of any requirement that parties agree upon a "default rate" in addition to the contract rate to avoid imputation of the legal rate. In fact, the term "default" is never mentioned.

In 1893 the statute simply provided that the legal rate of interest shall be eight per cent per annum. [16] The 1895 amendment reduced the rate to seven percent and added the words still used today, "where no different rate agreed to in writing between the parties". [17] That language has remained unchanged for the past 119 years.

The March 18, 1981 Bill Report explained the background of the law;

> **When there is a loan of money but the parties have not agreed to the interest rate, the law sets the interest rate at six percent. This rate was adopted in 1895.** [18]

The formal Synopsis As Passed Legislation provided the following summary;

> **The annual rate of interest on loans for which there is no written agreement specifying a rate of interest is increased from 6 to 12 percent.** [19]

The 1983 legislation simply added language, irrelevant to any issue in this appeal, to cure confusion relating to "time-price differential" agreements. That portion of Section 1 which stated, "Every loan or forbearance of money, goods, or thing in action shall bear interest at the

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[16] Copy attached as Appendix G-2.

[17] Copy attached as Appendix G-3

[18] Copy attached as Appendix G-4

[19] Copy attached as G-5

rate of twelve percent per annum where no different rate is agreed to in writing between the parties" was again left untouched. [20]

The following language is found in the Explanation of Substitute House Bill 822;

> **RCW 19.52.010 and similar statutes in other states should apply only to debts where the parties have not even considered an interest rate.** [21]

The trial court was wrong to read a requirement into the statute not intended by the legislature. As our Supreme Court noted in *Dep't of Ecology*, "if a statute's meaning is plain on its face, effect must be given to that plain meaning". (at 9-10).

5. There is not one reported decision interpreting § 19.52.010 (1) as requiring a "default rate" in addition to an agreed upon contract rate to avoid imputation of the statutory rate of 12 percent.

Most of the cases addressing prejudgment interest address liquidated damages rather than the rate of interest. Very few decisions have touched on the issue of rate of interest. In dicta, a few cases nibble at the edge of the issue, but no court has determined that a specific default rate need be agreed to in order to avoid imputation of the statutory rate. This comes as no surprise since the statute does not require the parties to agree on more than one rate of interest.

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[20] Copy of 1983 statute attached as Appendix G-6

[21] Copy attached as G-1

There are a number of decisions which provide clear examples of when it is appropriate to impose the statutory rate because the parties had not agreed upon any rate of interest.

Scrom v Board for Volunteer Fire Fighters

In *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 100 P.3d 814, (2004), the Washington State Supreme Court provided guidance in interpreting what was meant by "no different rate having been agreed upon". There, two volunteer fire fighters who had paid into a pension fund were determined to be ineligible to receive pension benefits and it was determined that their fees should be reimbursed with 12% interest. Since at the time the payments were paid into the fund there was no reason to believe that they would ever have to be returned, there was no agreement on a rate of interest if those payments ever had to be returned.

The Court held that since there was no written provision for interest the volunteers were entitled to 12% interest on their contributions and to hold otherwise would "undercut RCW 19.52.010 which mandates 12 percent interest when no other rate was agreed upon..." (*Id* at 36).

Wright v. Dave Johnson Insurance Inc.

In April of 2012 Division II followed with a similar holding in *Wright v. Dave Johnson Insurance Inc.*, 167 Wn. App. 758, 275 P.3d 339, (Div 2, 2012). There, Johnson, who was Wright's son-in-law, paid some

of the premiums on Johnson's life insurance policy. As in *Schrom*, there was no expectation by the parties that those premiums would have to be repaid by Johnson so there was no agreement as to the rate of interest which would accrue on the premiums. In ordering Wright to reimburse Johnson the Court found;

> **There is no evidence of any agreed interest rate. Thus, under *Schrom*, the correct prejudgment interest rate to be applied to the reimbursement payments was 12% per annum under RCW §19.52.010(1).** (at 776, 777)

McDowell v. The Austin Company

In *McDowell v. The Austin Company*, 39 Wn.App. 443, 693 P.2d 744 (Div 1, 1985) the parties entered into a written agreement to resolve litigation over an indemnity claim. It provided that with regard to an eventual decision regarding ultimate responsibility, the prevailing party would be entitled to interest "at the rate established by RCW § 19.52.010". (at 446). Upon determination of final liability, the trial court awarded the prevailing party prejudgment interest at the six percent rate applicable under § 19.52.010 at the time the agreement was entered into. However, the statutory rate had doubled between the time of the agreement and the date of the calculation. (at 451).

On appeal the Reviewing Court determined that since the parties had agreed that § 19.52.010 should control, prejudgment interest should accrue at six percent from the time of the agreement until July 26, 1981,

the date on which interest under the statute was changed from six percent to 12 percent, and thereafter should be calculated at the higher rate, holding;

> **If the parties had agreed to a prejudgment interest rate 6 percent, that rate would control here. However, instead of setting a fixed rate, they elected in the Agreement to have the amount prescribed by RCW 19.52.010 be controlling.**

(at 452)

McDowell provides clear authority in support of Douglass' interpretation of the statute. In *McDowell*, the parties agreed upon a rate. It just so happened that the rate they agreed upon was the rate provided by the statute. However, as the court stated, had they agreed upon a different rate, that is the rate that would be used to calculate prejudgment interest, and the statutory increase of 6% to 12% between the date of the agreement and the effective date on which the interest rate had to be determined would have been ignored.

Chan v. Smider

A case not directly addressing the issue of whether the trial court may substitute the legal rate for a contractual rate, yet still providing guidance, is *Chan v. Smider*, 31 Wn.App. 730, 644 P.2d 727 (Div 1, 1982). *Chan* involved the sale of a Seattle apartment house via real estate contract providing for 8.5% interest. When the seller refused to close escrow Plaintiff sued. (at 732). The trial court determined that Plaintiff

was entitled to all rent the seller had received between the date closing should have occurred and the date of judgment. The court then awarded Plaintiff 8.5% interest on the rent which the seller had collected and was ordered to pay to Plaintiff. (at 733). The Seller appealed, claiming that RCW 19.52.010 required interest to be calculated at the legal rate---then 6 percent. (at 736).

The Court used the 8.5% rate contained in the contract which was higher than the legal rate. In candor, Douglass notes that *Chan's* value in supporting Douglass' position is not as great as it otherwise could have been due to the fact that this was a case in equity and indications were that 8.5% was selected by the trial court "in fairness" so that Chan would receive the same rate as he had agreed to pay under the contract. Still, *Chan* was a case where the Court adopted the contract rate over the legal rate while no reported case can be found where the legal rate has ever been selected over a plainly stated contract rate.

State v Trask

A party is entitled to prejudgment interest as provided by contract. *State of Washington v. Trask*, 98 Wn.App. 690, 695, 990 P.2d 976 (Div. 2, 2000).

Hidalgo v. Barker

In *Hidalgo v. Barker*, 176 Wn.App. 527, 309 P.3d 687, (Div 3, 2013), the parties entered into an agreement to resolve a malpractice suit. The agreement provided for prejudgment interest but at an unspecified rate. The trial court ultimately set the rate at 12 percent. The attorneys appealed. This Division held, based upon *Shrom*, that under § 19.52.010 prejudgment interest is correctly set at 12 percent ***when the parties have not agreed on some other rate***. (at 551)

(a) Landco's reliance on cases cited in prior briefing as authority that a default rate, in addition to a separately stated interest rate, is required to avoid imputation of the statutory rate upon breach has been misplaced. There is no such authority.

Douglass mentions the following three cases previously urged upon the trial court by Landco in support of its contention that a separate default rate is necessary to avoid the statutory rate as the only possible explanation for the trial court's erroneous rulings on interest.

Palmer v. Laberee

Palmer v. Laberee, 23 Wn. 409, 63 P.2d 216 (1900) was the only case in Landco's trial brief related to prejudgment interest. There, Landco mistakenly attributed *Palmer* with the following statement, "*where a note is silent as to interest after the payment is due, the creditor is entitled to interest by operation of law*". (CP 482). *Palmer* does not so hold and in

114 years has never been cited on the issue of prejudgment interest. In fact, in *Palmer*, prejudgment interest was not even an issue on review.

By the time it filed opposition to Douglass' proposed alternative conclusions six and seven and later in opposition to Douglass' Motion for Reconsideration, Landco had dropped its reliance on *Palmer* and moved on to *Peoples National Bank v. National Bank of Commerce* and *Mehlenbacher v. DeMont*. The trial court was apparently influenced by those cases in awarding 12 percent interest despite that fact that neither case found that a default rate needed to be separately agreed upon in order to avoid imputation of the legal rate.

Peoples National Bank v. National Bank of Commerce

Landco erroneously cited pages 693, 694 of *Peoples National Bank of Washington v. National Bank of Commerce of Seattle*, 69 Wn.2d 682, 420 P.2d 208 (1966) for the proposition;

> **language in the note that specifies there is to be "no interest" "until paid" is not sufficient to eliminate the distinction between pre-maturity and post-maturity interest.**

(CP 612). First, there is no language on pages 693 or 694 that in any way addresses a "distinction between pre-maturity and post-maturity interest". Moreover, no such distinction can be found anywhere within *Peoples National Bank*.

Worse, the rate of prejudgment interest was not even an issue on appeal in *People* which reviewed the following five issues;

(1) merger, (2) the dead man statute, (3) usury, (4) statute of limitations, (5) misinterpretation of a contract provision not involving interest. (at 689- 692).

At the very end of the decision the Court gratuitously noted;

> ***The notes do not provide for interest. Interest is allowed at the rate of 6 percent per annum from May 21, 1963, the date the last note matured and remained due and unpaid.***

(*Id* at 694).

Since the issue of whether or not the notes provided for interest was not an issue on appeal, the Court's comment regarding interest cannot be used in support of an argument intended to turn §19.52.010 (1) on its head. The *Peoples* Court did make one interesting observation that will be followed up on later in this brief,

> **Contracts must be reasonably construed to accomplish the intent of the parties. (at 693)**

In the forty eight years since *Peoples* was decided it has been cited just once during discussion of prejudgment interest. Interestingly that was in *Mehlenbacher v. DeMont,* 103 Wn.App. 240, 251, 11 P.3d 871 (Div 2, 2000), the other case cited by Landco in Opposition to the Motion for Reconsideration which, like *Peoples*, was cited for a holding which was not rendered.

Mehlenbacher v. DeMont

Landco misrepresented *Mehlenbacher*. Landco cited page 251 of *Mehlenbacher* for the following proposition which it did not support, "*where a contract does not specify a default rate, the statutory default rate is imposed upon default*". (CP 612; 20- 21). Landco represented that the contracts in this case are very similar to the one in *Mehlenbacher* because they do not provide default interest rates. (CP 613).

Mehlenbacher was decided on facts specific to that case which are 180 degrees different than any fact in the case on review. The *Mehlenbacher* facts left no doubt that the parties had *expressly intended a separate default rate*. Although the notes specified a --0-- per cent rate of interest they went on to impose a different rate upon default;

> **This note shall bear interest at the rate of ___per cent, per per annum after maturity or after failure to pay any installment as above specified**

The parties then failed to insert the agreed upon "default" rate. Thus, having expressed a clear intent to be bound by a different rate upon default, but having failed to insert the rate, the *Mehlenbacher* Court inserted 12 percent. The *Mehlenbacher* Court did not specify whether the legal rate was imputed because § 19.52.010 (1) required it or because the parties had clearly intended a separate default rate that was left unstated.

The actual language use by the Court is instructive;

> **Here, the note does not contain a written term for a default interest rate. The trial court imposed the statutory rate of 12 percent interest per annum to the note. We find no abuse of discretion.**

(*Id* at 251). The Reviewing Court did not hold that §19.52.010 required a separate default rate. It simply refused to find abuse of discretion by the trial court on the particular and unusual facts of that case.

Telling is the fact that on the issue of the proper rate of prejudgment interest, *Mehlenbacher* has never once been cited in any reported case. Of the five cases in which it has been cited, one concerned attorney's fees and the other four were limit to standard of review.

LEGAL ISSUE NUMBER 5

Was the Landco-Douglass contract sufficient to avoid imputation of the legal rate of 12 percent?

The parties' contract is clear as to interest. Landco's attempt to amend to insert a default rate was rebuffed. Landco sought no interest when the December 22, 2007 payment was not made until March 4, 2008. Landco even admitted at trial that it had bargained away any right to interest exceeding zero percent.

1. Standard of Review

Absent disputed facts, the construction or legal effect of a contract is determined as a matter of law. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204, 580 P.2d 617, (1978). The general rule is that contract interpretation

is a question of law. *Kelly v. Aetna Casualty & Surety Co.*, 100 Wn.2d 401, 407, 670 P.2d 267 (1983).

2. Contract interpretation begins with the contract language

The touchstone of contract interpretation is the parties intent. The intention of parties is normally to be ascertained largely from the language of the contract. *In re Estates of Wahl,* 99 Wn.2d 828, 831, 664 P.2d 1250 (1983).

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties. *Stender v. Twin City Foods, Inc.* 82 Wn.2d 250, 254, 510 P.2d 221 (1973).

As it pertained to interest, the original Landco-Douglass contract stated;

> **Purchaser and Seller agree that the intrest (sic) 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 intrest (sic) rate will be 6% per annum until balance is paid in full.**

(CP 49) (Ex P-1).

The December 2006 modification, while leaving the "until paid in full" language unchanged, provided;

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

(CP 68) (Ex P-19).

The parties clearly agreed to a rate different than 12 percent.

3. Conduct of the parties provides additional evidence of intent

(a) In June of 2004 Landco unsuccessfully attempted to obtain a modification inserting a 12 percent default rate into the contract.

Four months after execution of the original contract Landco attempted to get Douglass to agree to add a 12 percent default rate to their contract. Douglass refused. (RT 150- 9; 151; 16). Douglass' intent that there be no separate default rate was thereby expressed as was Landco's full awareness that there was no such provision in their contract. (RT 568; 15- RT 569; 7).

(b) Landco did not seek interest when Douglass was months late in paying the December 22, 2007 installment.

Long after the December 2006 modification the parties again evidenced their understanding that there was no interest to be charged on the deferred payments, even if not timely paid. When Douglass was over two months delinquent in paying the installment due December 22, 2007 no interest was offered and none was demanded. Landco's verified

complaint sought no interest on the delinquent payment and no interest was sought on it at trial.

The findings show that Douglass paid $200,000 on March 4, 2008 and nothing thereafter. (CP 583 at 7 & 8) (CP 588 at 20- 24). Landco's attorneys presented no post trial argument or briefing to indicate that any interest was ever received, claimed or expected on that default.

4. The "circumstances" at the time of the agreement are also to be examined for clues to the parties' intent.

In this case, the circumstances were Landco's dire need for money sooner than Douglass was obligated to pay it and Landco's willingness to drop the interest rate to zero in exchange for Douglass' willingness to advance money not yet due. [23]

5. Lasley testified that Landco bargained away its right to interest in exchange for early cash payments.

During trial, Landco admitted that interest had been bargained away in consideration of Douglass' early payments.

> **Counsel;**
>
> **The unpaid balance will carry --- I suppose that should be "an interest rate of 6 percent per annum." Did that happen?**
>
> Lasley;
>
> Well, I think that might have been part of the - - since the payment

[23] RT 155; 10- 156; 4 and Ex P-19 confirm that Douglass even had to loan Landco $31,000 three months prior to Landco striking the bargain to waive interest in exchange for immediate cash because Landco was "*stretched to the limit*"

was being made, I think that was part of the - - the tradeoff with the interest, if I'm not mistaken. I could be mistaken, but I - - I don't think so. So ..." (RT 328; 6-16)

Counsel;

Now, did TJL and Harley C. Douglass, Inc. agree that no interest would be charged on the balance that remained owing on the original purchase price? In other words, the bottom line figure on this document?

Lasley;

The bottom line figure, yes, that's correct.

Counsel;

And did you receive a payment at the time the accounting was performed?

Lasley;

For - - I did, for $114,000 and change.

Counsel;

And was one $200,000 installment payment also made?

Lasley;

Yes. (RT 331; 21- 332; 5).

6. The trial court clearly understood that the parties' had not limited zero interest to timely payments.

Here, the Court is urged to recall the colloquy between Douglass' attorney and the court wherein the court admitted that the contract did not say that zero interest apply only if all payments were timely made. The

testimony is stated verbatim at page 18 of this Opening Brief and found at RT 882; 15- 883; 2.

7. **These two experienced real estate developers were competent to structure their own bargain.**

While announcing the court's decision on May 24, 2013, the court described the December 22, 2006 modification as;

> **... an arm's length transaction... something, clearly, that the parties entered into knowing fully well what they were doing.**

(RT 862; 20- 25).

When speaking about how the parties had come to agree upon $3.6 million as a purchase price, the court noted;

> **These folks agreed on the price. That's really all that I needed to worry about. It was negotiated and agreed upon.**

(RT 856; 5-7)

The trial court did not explain why, therefore, it felt justified in disregarding the negotiated agreement on interest.

LEGAL ISSUE NUMBER 6

Where the parties to a written contract agree upon the rate of interest does the trial court abuse its discretion if it awards prejudgment interest at a different rate ?

1. **Standard of Review**

An award of prejudgment interest is reviewed for abuse of discretion. A ruling based on an erroneous legal interpretation is,

necessarily, an abuse of discretion. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 886, 224 P.3d 761, cert. denied, 130 S. Ct. 3482 (2010)

2. A trial court abuses its discretion when it usurps authority not granted to it and thereon issues rulings contrary to statute.

The Landco-Douglass contract specified a rate of interest. §19.52.010 (1) mandates that the rate agreed to by the parties is the rate that court is to use. The trial court therefore had no authority to calculate prejudgment interest at another rate. When the court, acting under an erroneous interpretation of a statute, awards relief in direct violation to that authorized by the statute, it has abused its discretion. (*Endicott* at 886).

A trial court also abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds. *Noble v. Safe Harbor Family Pres. Trust,* 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. *Id.; Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Awarding interest contrary to the statute was an error of law and therefore an abuse of discretion.

3. A trial court abuses its discretion when it reads into a contract, a material term not there.

Courts cannot write into a contract a provision which the parties did not incorporate therein when the subject matter was being considered and

agreed upon prior to executing the contract. *Armstrong v. Taco Time International, Inc.*, 30 Wn.App. 538, 548-49, 635 P.2d 1114 (Div 3, 1981). By determining that prejudgment interest should accrue at 12 percent after maturity the trial court inserted into the contract its own term which Landco tried in vain to get Douglass to agree to in 2004.

REGARDING INTEREST ON THE JUDGMENT

LEGAL ISSUE NUMBER 7

Is conclusion number seven, which states that Plaintiff is entitled to interest on the judgment at the rate of 12 percent, supported by the findings?

RCW 4.56.110 (1) provides that interest on judgments mirror the interest rate stated in the contract. Only if the contract rate is not set forth in the judgment shall interest accrue at 12 percent. (4.56.110 (4)). The trial court concluded that interest on Landco's judgment should bear interest at 12 percent without finding that their contract had not already provided for an agreed upon rate. The conclusion is unsupported and remand is required.

1. **Standard of Review**

Conclusions of law are reviewed de novo. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (Div 2, 2006). They are reviewed based on findings of fact to determine whether the trial court's findings are supported by substantial evidence, and if so, whether

those findings support the conclusions of law. Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *In re Snyder,* 85 Wash.2d 182, 185-86, 532 P.2d 278 (1975).

2. **The court is authorized to award 12 percent interest on judgments arising from breach of contract by RCW 4.56.110 (1) & (4).**

RCW 4.56.110 (1) & (4) which provide;

> (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.
>
> (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. [23]

In this case, the parties had a written contract which provided for the payment of interest until paid at a specified rate. Their contract could not have reflected the statute better had they had a copy of §4.56.110 (1) in front of them as it was being drafted. Before the trial court could award 12 percent under §4.56.110 (4) it first had to determine whether or not the contract provided for payment of interest until paid at a specified rate and issue a finding thereon. The trial court failed to do that.

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[23] the entire statute is included as Appendix H

Conclusion seven provides;

> Plaintiff is entitled to ... interest on all amounts at the rate of 12% per annum from the date of judgment to and until the date of full payment

(CP 591)

The only finding that even mentions interest is finding 18. However, finding 18 does not support conclusion seven and as already shown, if the trial court was relying upon the language, "*on or about December 22, 2011*" there was no evidence to support that part of the finding.

Section (1) of RCW 4.56.110 manifests a legislative intent to allow contracting parties the freedom to specify an interest rate different from the imposed by Section (4). *Jackson v. Fenix Underground, Inc.,* 142 Wn.App. 141, 146, 173 P.3d 977 (Div 1, 2007). The contracting parties are by statute, provided with the freedom to choose varying interest rates depending on their individual circumstances. (*id* at 147).

As stated earlier, in this case the circumstances were Landco's need for money sooner than Douglass was otherwise obligated to pay it and its willingness to drop the interest rate to zero in exchange for Douglass' willingness to advance money not yet due. [25]

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[25] RT 155; 10- 156; 4 and Ex P-19 confirm that Douglass even had to loan Landco $31,000

RCW 4.56.110 (1) provides that the judgment accrue interest at the same rate as is referenced in the contract, provided the court references the contract rate within the judgment. However, after concluding that the judgment should bear interest at 12 percent, the court was hamstrung by its own conclusion from including the necessary language in the judgment to allow interest to accrue at the contract rate. Where the court leaves out reference to the contract rate interest then automatically accrues at 12 percent under 4.56.110 (4).

In other words, the court's conclusion was in error because there was no finding to support it. That error prevented the court from properly applying RCW 4.56.110 (1) which then led to an improper interest rate being applied to the judgment. Judgments founded on a written contract are supposed to bear interest at the rate specified in the agreement. (*Jackson* at 142). 299, 339, 858 P.2d 1054 (1993). Awarding interest through misapplication of the statute was an error of law and therefore an abuse of discretion.

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three months prior to Landco striking the bargain to waive interest in exchange for immediate cash because Landco was "*stretched to the limit*"

3. Douglass' timely objection to conclusion seven was overruled and its proposed alternative was denied.

Douglass' objection to proposed conclusion seven contained an alternative conclusion which stated, "The Judgment to be entered herein should provide that it bears interest at 0%...". (CP 548). [26]

In a separately filed proposal of additional findings and conclusions, Douglass asked the court to conclude that interest on the judgment bear interest at zero percent. (CP 554 at [2]).[27] Douglass' objections were overruled and its proposals denied by implication when the court adopted Landco's proposed conclusion seven.

REGARDING ATTORNEYS FEES

LEGAL ISSUE NUMBER 8

Does the court abuse its discretion when it awards attorneys fees for work performed by unlicensed legal interns without finding that they were qualified to perform substantive legal work, that the work performed was of a legal nature and was supervised by an attorney?

1. Standard of Review

An appellate court will uphold an attorney fee award unless it finds the trial court manifestly abused its discretion. Discretion is abused when the trial court exercises it on untenable grounds. *Chuong Van Pham v. City of Seattle,* 159 Wn.2d 527, 538, 151 P.3d 976 (2007).

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[26] Douglass' objection to conclusion seven and alternate proposals are attached as Appendix F

[27] Id

2. Relevant Facts

On June 18, 2013 Landco filed its motion for attorneys fees as prevailing party pursuant to contract. (CP 647). Filed with the motion was the affidavit of William S. Hislop, one of Landco's attorneys, to which was attached time records showing the work performed by Mr. Hislop's firm. (CP 698- 767).

Paragraphs 7 and 8 of Mr. Hislop's affidavit established that his firm employed an undetermined number of "legal interns"---full-time students at Gonzaga University School of Law---to perform legal research, editing and administrative functions. (CP 699). Paragraph 11 verified that of the attorney fees sought, $24,514.16 resulted from the work performed by these legal interns. (CP 700).

3. Legal Argument

Washington's courts have long insisted on specific criteria that must be satisfied before a prevailing party may recover fees for the work of non-attorneys; Three of the six criteria are spelled out below;

(1). The services performed by the non-lawyer 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.

Absher Construction Company v. Kent School District 79 Wn.App. 841, 917 P.2d 1086 (Div 1, 1995). Landco's proof fell short of establishing the three criteria noted above.

Douglass' opposition argued that Landco's failure to adequately qualify the work or the interns required that their time be stricken. (CP 837, 851- 852). On October 14, 2013, the trial court awarded Landco fees based upon the work of the interns because they were law students. (CP 927). Qualification is not established by simply being a "law student".

Absher mandates that all six criteria be satisfied in order to award fees for non-lawyers. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield.* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Findings of fact and conclusions of law are also required in order to establish a record for proper review of a fee award. The absence of such a record requires remand so that the trial court may develop one. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

A finding that the interns were "full-time students at Gonzaga University" did not establish that they were qualified to perform substantive legal work. There was no evidence from which the court could discern how long the interns had been law students. A student enrolled in law school for three years might be qualified. One having enjoyed only a week of law school would certainly not.

The court's finding is particularly surprising since immediately prior to allowing fees for the work of unlicensed interns the court disallowed fees for the work of paralegals based upon failure to establish qualifications. (CP 926, 927) [26]

Since there was no evidence to establish qualification to perform substantive legal work or that any such work had been supervised by an attorney the award of $24,514.16 in attorney fees based upon the work of these unlicensed interns was a clear abuse of discretion. Douglass asks the court to reverse the trial court as to the $24,514.16 and remand for recalculation of the fee award and the judgment based thereon.

DOUGLASS SEEKS ATTORNEYS FEES ON APPEAL

The prevailing party is entitled to attorney fees and costs on appeal if requested in the opening brief and if applicable law grants to a party the right to recover. RAP 18.1 (a)- (b).

[26] the paralegals may well have been more qualified than the law students but we can't know because no qualifications were provided.

RCW § 4.84.330 allows parties to enter into agreements that allow the prevailing party to recover attorney fees in disputes arising from the agreement. The Landco-Douglass contract calls for recovery of fees by the prevailing party. (CP 47 Para (g)). A contractual provision allowing fees to the prevailing party should be honored. *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (Div 3, 2002).

VI. CONCLUSION

1. Conclusion number six is not supported by the findings and is contrary to RCW § 19.52.010 (1). Douglass seeks remand with instruction to issue a new conclusion ordering that prejudgment interest be calculated at zero percent and ordering a new judgment based upon that conclusion.

2. Finding number 18 is not supported by substantial evidence. Douglass seeks remand with instructions to issue a new finding stating that the Landco-Douglass contract specified that the rate of interest be zero and that prejudgment interest be calculated at that rate.

3. Alternatively, since the award of prejudgment interest included $144,000 contrary to finding 18, Douglass seeks remand with instruction to deduct $144,000 from the judgment.

4. Douglass asks this Court to determine that when contracting parties agree in writing that a deferred balance shall accrue interest at a certain

rate they need not specify an additional "default" rate in order to avoid imputation of the 12 percent statutory rate upon breach.

5. Douglass asks this Court to hold that The Landco-Douglass contract was sufficient to avoid imputation of the statutory rate of 12 percent.

6. Douglass asks this Court to hold that when the parties to a written contract agree upon the rate of interest the trial court abuses its discretion if it awards prejudgment interest at a different rate.

7. Douglass seeks remand with instructions to issue a new conclusion six stating that interest be calculated at zero percent and that a new judgment be issued to include reference accrual of interest at zero percent.

8. Douglass asks this Court to hold that the trial court abused its discretion when it awarded attorneys fees for work performed by unlicensed legal interns absent findings that they were qualified or supervised and to remand with instruction to reduce the attorney fee award by $24,514.00 and to reduce the judgment accordingly.

9. Douglass asks that this Court order Landco to pay Douglass reasonable attorneys fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 30th day of April, 2014

Law Office of Steven J. Hassing

Steven J. Hassing, WSBA No. 6690
Attorney for Harley C. Douglass, Inc.,
Appellant/Defendant

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** by the method indicated below, and addressed to the following:

Timothy B. Fennessy, WSBA #13809 Bradley C. Crockett, WSBA #36709 LAYMAN LAW FIRM, PLLP 601 South Division Street Spokane, WA 99202	[ ] via US Mail [ ] via Hand Delivery [ ] via Electronic Mail [ ] via Facsimile [X] Overnight Delivery
William Scott Hislop WOLFF & HISLOP 12209 E. Mission Ave., Suite 5 Spokane Valley, WA 99206	[ ] via US Mail [ ] via Hand Delivery [ ] via Electronic Mail [ ] via Facsimile [X] Overnight Delivery
Honorable Maryann C. Moreno Spokane County Superior Court Department 7 – Courtroom 408 1116 West Broadway Avenue Spokane, WA 99260	[X] via US Mail [ ] via Hand Delivery [ ] via Electronic Mail [ ] via Facsimile [ ] Overnight Delivery

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

Signed at Roseville, California this 30th day of April, 2014

Kimberley A. Hassing

APPEAL 319920/322084

APPENDIX -A

REAL ESTATE PURCHASE AND SALE AGREEMENT
WITH EARNEST MONEY PROVISION

Date February 12, 20 04

1. PARTIES: SELLER: & T.J. LANDCO LLC AND OR Assigns
BUYER: HARLEY C DOUGLASS INC.

2. PROPERTY: a. Address: _____ Tax Parcel(s): See Addendum

b. Legal Description: TBA

c. Included Items (in addition to General Provision 2.): ☐ stove/range ☐ refrigerator ☐ washer ☐ dryer ☐ dishwasher ☐ trash compactor ☐ wood stove ☐ fireplace insert ☐ security system ☐ other: _____

d. Excluded items: _____

e. Services: Without warranty or representation, Seller believes the following are available at the Property: ☐ natural gas ☐ electricity ☐ telephone ☐ cable t.v. ☐ public or community water system ☐ private water system or well ☐ irrigation system ☐ public sewer ☐ onsite sewage system ☐ other: _____

3. PURCHASE PRICE: Three Million Six Hundred Thousand
($ 3,600,000) Earnest Money: $ _____ ; to be held by ☐ Selling Broker ☐ Closing Agent; in the form of ☐ check ☐ cash ☐ promissory note (a copy of any check or note may be attached).

4. FINANCING: Agreement ☐ is ☒ is not contingent on Buyer obtaining lender financing. If so, Buyer is applying for ☐ conventional ☐ FHA ☐ VA ☐ rural development financing and shall submit application within _____ days (5 days if not filled in); amount Seller will contribute toward Buyer's loan costs, origination fees, lender required prepaid amounts and reserves, and customary buyer closing costs $ _____ ($0.00 if not filled in); maximum Seller to pay for lender required inspections and repairs $ _____ ($0.00 if not filled in); and Seller may terminate Agreement if (check if applicable): a. ☐ Buyer does not waive Financing contingency within _____ days (30 days if not filled in); or b. ☐ Buyer does not provide loan approval within _____ days (14 days if not filled in).

5. INVESTIGATION/INSPECTION PERIOD: _____ days (10 days if not filled in). (A home inspection is recommended.) Buyer elects not to conduct a home inspection.

6. TITLE INSURER: Spokane County CLOSING AGENT: Spokane County Title

7. CLOSING DATE: TBD TERMINATION DATE: TBD
POSSESSION: ☒ Closing ☐ Other _____

8. BUYER DEFAULT (check only one): ☐ Forfeiture of Earnest Money ☐ Seller's election of remedies.

9. OFFER EXPIRATION DATE: _____ COUNTEROFFER EXPIRATION DATE: _____

10. COMMISSION: Seller shall pay Listing Broker according to Listing Agreement or $ _____ or _____ % of purchase price; and Selling Broker $ _____ or _____ % of purchase price. Buyer shall pay Selling Broker $ _____ or _____ % of purchase price.

11. ADDENDA AND ADDITIONAL PROVISIONS: The following provisions and attached addenda are part of this Agreement:
☐ Disclosure of Information on Lead Based Paint and Lead Based Paint Hazards ☐ For Your Protection: Get a Home Inspection (required with FHA financing) ☐ Sale of Buyer's House ☐ Mold Disclosure and Release ☐ Buyer's Procurement of Insurance ☐ Land and Acreage ☐ Seller Financing Addendum ☒ Other: SEE Addendum "A"

12. AGENCY DISCLOSURE: Selling Licensee represents ☐ Buyer ☐ Seller ☐ both Buyer and Seller ☐ neither Buyer nor Seller.
Listing Licensee represents ☐ Seller ☐ both Buyer and Seller.

THIS IS A LEGAL AND BINDING AGREEMENT. PROVISIONS ON THE FOLLOWING PAGES ARE PART OF THIS AGREEMENT. PLEASE READ CAREFULLY BEFORE SIGNING.

Buyer's Initials (DL) (_____) Seller's Initials (HD) (_____)

Δ π EXHIBIT 2
Deponent Lasley
Date 3/24/11 Rptr. SP
WWW.DEPOBOOK.COM

WHITE - Broker / YELLOW - Seller / PINK - Buyer

Spokane County No.: 10-2-00576-0
TJ LANDCO v. HARLEY DOUGLASS
Plaintiff's Exhibit No.: P1
Disposition:

GENERAL PROVISIONS

1. **PARTIES.** Seller and Buyer agree to sell and purchase the identified Property. Seller represents that Seller is the owner of or has full right and authority to sell the Property. Unless this Agreement states Buyer is acting as a nominee or has a right to assign, Buyer's rights under this Agreement cannot be assigned by Buyer without Seller's prior written consent, which consent shall not be unreasonably withheld.

2. **PROPERTY.** Buyer and Seller authorize Broker(s) to correct unintended mistakes and omissions in the legal description, with Seller to be responsible for assuring its accuracy.

a. **Additional Included Items.** In addition to the items checked in paragraph 2.c. on Page 1, the following additional items presently located on the Property are included: attached floor coverings; screen and storm windows and doors; built-in appliances; window coverings and treatments; awnings; plumbing, lighting, heating, ventilating and cooling systems and fixtures (including light bulbs and filters); fireplace doors and gas logs; landscaping and attached irrigation equipment; hot tubs; attached television antennas/dishes and operating equipment (unless leased or rights to use are not transferable); soft water unit and/or fuel tank (unless leased); garage door openers and transmitters. Built-in appliances will be considered included regardless of whether checked on Page 1. All listed items are to be transferred free and clear with the Property at no additional cost.

b. **Property Condition.** Except as expressly provided or as required by law, Buyer is buying the Property in its present condition, "as-is". Seller has been advised of their obligation to disclose known adverse material facts affecting the property that are not apparent or readily ascertainable.

c. **Seller to Maintain Property.** Seller shall use Seller's best efforts to maintain the Property in its condition as of the date of Mutual Acceptance and until Buyer is entitled to Possession. Buyer is entitled to receive access during the week prior to Closing (or receipt of possession if early possession is granted), at a mutually agreed and reasonable time, to walk through and visually inspect the Property. This walk through is provided so Buyer may verify that no adverse material damage was previously concealed or has occurred after Buyer's last offer was made. If improvements on the Property are destroyed or materially damaged by accidental fire or other accidental casualty prior to Closing, or if material adverse changes occur in the Property for other reasons prior to change of Possession which are not the fault of the Seller, then Buyer may elect to terminate this Agreement and the earnest money shall be refunded to Buyer.

3. **PURCHASE PRICE AND PAYMENT.** Except as expressly stated: a. the Purchase Price will be paid in cash, inclusive of earnest money; and b. Buyer represents they have sufficient funds available to close this sale without relying on any contingent source of funds, including funds from loans, gifts, retirement or future earnings.

a. **Earnest Money.** Unless otherwise stated, any earnest money check, cash or note shall be provided by Buyer when offer is made. Any earnest money check shall be deposited within two days after Mutual Acceptance of this Agreement. If anyone other than Selling Broker is appointed to hold the earnest money, any earnest money check shall nonetheless be held by the Selling Broker until Mutual Acceptance of this Agreement, and then transmitted within two days of Mutual Acceptance to the person or entity designated to receive and hold such earnest money. If the amount of the earnest money deposit exceeds $10,000.00, Buyer has the right to have the earnest money placed in an interest bearing trust account for Buyer's benefit. If Buyer exercises this option, Buyer shall complete and deliver a Form W-9. Otherwise, the earnest money shall be held in a pooled trust account.

4. **LENDER FINANCING.** If Buyer's obligations are contingent upon receiving lender financing, Buyer shall make a complete written application and pay any required Lender costs within the time specified on Page 1. After the date by which loan application must be made, Buyer shall not have the right to make any additional loan applications without Seller's prior written consent, which consent will not be unreasonably withheld. Buyer shall use best efforts to obtain loan approval meeting the terms of Buyer's application, or terms more favorable to Buyer. Loan approval meeting the terms of Buyer's application, or terms more favorable to Buyer, shall be accepted by Buyer. The lender may require inspections and or work to be performed as a condition of loan approval, and Seller shall pay up to the amount Seller agreed to pay on Page 1 in advance. If the cost for such items is greater than the amount Seller has agreed to pay, and neither Buyer nor Seller agrees to pay the difference within 10 days of notification of the excess requirement, then this Agreement shall terminate.

If the final appraised valuation of the Property (after any reconsideration the lender decides to undertake) is less than the Purchase Price, then unless Seller agrees to lower the Purchase Price to the appraised valuation, Buyer may terminate this Agreement within 10 days of being notified of the final appraised valuation. If FHA, VA or USDA financing is involved, then the Amendatory Clause required by FHA Handbook 4155.1 Rev-3, shall control over any conflicting provisions in this Agreement. If Buyer is seeking FHA financing, Form HUD-92564-CN regarding home inspections is attached and part hereof.

a. **Buyer Waiver Required.** If Seller has reserved the right to terminate this Agreement in the event Buyer does not waive the financing contingency, then at any time after expiration of the required date for Buyer's waiver and until Seller receives Buyer's Notice of Waiver, Seller may give Notice terminating this Agreement. Thereafter, Buyer may not reinstate this Agreement by attempting to give later Notice of Waiver.

b. **Loan Approval Required.** If Seller has reserved the right to terminate this Agreement in the event Buyer does not provide Loan Approval, Buyer is to provide a Loan Approval Letter from their lender meeting the terms of this paragraph. Such Loan Approval Letter must confirm that the lender has reviewed and approved this Agreement as mutually accepted; has approved Buyer's credit report; and has verified and approved Buyer's employment and other sources of income, and the availability of funds required by Buyer and not being financed under the loan for which application has been made. The Loan Approval Letter must further state that, after reviewing the foregoing and other relevant information required from Buyer, Buyer is approved for the loan for which they have applied subject only to appraisal, changes in financial status of Buyer, matters affecting title to the Property, and final underwriting approval. If Seller does not receive a copy of the lender's written Loan Approval Letter by the date required, then until Buyer provides the required approval, Seller may give Notice terminating this Agreement. Thereafter, Buyer may not reinstate this Agreement by attempting to give later Notice of Waiver.

5. **INVESTIGATION/INSPECTION.**

a. **Investigation.** Buyer agrees that no information provided from or through Seller or the real estate licensees related to listing or marketing the Property, including information from the MLS, in any advertising or in any other communication, constitutes a representation of fact, and Buyer is to independently verify all such information. Accuracy of the information from Seller or the licensees to be verified by Buyer in this paragraph shall be a

material condition for purposes of this Section 5. Buyer's investigation of these matters shall be at Buyer's sole expense. Buyer may only use this investigation to object to material conditions or defects previously unknown by and undisclosed to Buyer. Buyer's investigation of the Property shall be deemed satisfactory unless Buyer gives written Notice identifying all unsatisfactory matters within the Investigation/Inspection period provided on Page 1.

b. **Home Inspection.** Buyer acknowledges having been advised that unless Buyer is qualified to fully assess the condition of the Property, Buyer is strongly advised to obtain a professional home inspection. If Buyer elects to conduct a home inspection, then Buyer's agreement is conditioned upon Buyer's review and approval of a written home inspection report, to be prepared by a qualified professional of Buyer's choice and at Buyer's expense. The inspection may cover all portions of the Property, improvements thereto, and their condition. Buyer may disapprove the inspection report on the basis of any condition identified in the inspection report that the inspector recommends be corrected, but not on the basis of purely information or preventative maintenance items. This contingency shall be conclusively deemed satisfied unless within the Investigation/Inspection period provided on Page 1, the Seller or Listing Agent receives a copy of the written inspection report and a Notice of disapproval from Buyer identifying the conditions contained within the inspection report to which Buyer objects.

If such a Notice of disapproval is received, and if within five days thereafter Seller does not agree in writing to correct the conditions identified by Buyer, then within three days thereafter Buyer may elect to terminate this Agreement and any earnest money shall be immediately released to Buyer. If Seller does agree to correct such conditions, the correction work will be promptly completed by or on behalf of Seller, at Seller's expense. The work must be completed in sufficient time prior to Closing that Buyer may cause the Property to be reinspected, at Buyer's expense, by a qualified professional of Buyer's choosing. Seller and Buyer shall be bound by approval or disapproval decisions of the professional providing such reinspection. Buyer waives the right to receive an amended Seller Disclosure Statement under RCW 64.06.040 based upon any conditions identified in the inspection report. A qualified professional shall mean a person whose occupation includes conducting professional home inspections for a fee on a regular basis, or a licensed and bonded contractor currently engaged in housing construction.

Unless otherwise expressly stipulated in this Agreement, radon levels which do not exceed current EPA guidelines shall not require correction. Further, in connection with any professional inspection, Buyer acknowledges that if any dwelling on the Property was constructed prior to 1978, there may be lead-based paint. Many pre-1978 buildings have lead-based paint. Buyer understands that, if present, lead may cause lead poisoning and associated serious health problems. If any dwelling on the Property was constructed before 1978, Buyer acknowledges receipt of the pamphlet published by the United States Environmental Protection Agency entitled "Protect Your Family From Lead in Your Home", and the addendum entitled "Disclosure of Information on Lead-Based Paint Hazards" is made part of this Agreement by this reference. If the Lead Paint Addendum is required and has not been completed prior to mutual acceptance of this Agreement, then Buyer shall have the unconditional right to terminate this Agreement for three days following Buyer's receipt of the completed Lead Paint Addendum. In addition, Buyer shall have ten days following receipt of the completed Lead Paint Addendum to conduct an inspection for lead-based paint hazards.

6. **TITLE AND TITLE INSURANCE.**

a. **Title.** Unless otherwise specified in this Agreement, title to the Property shall be marketable at Closing. Rights, reservations, covenants, conditions and restrictions, presently of record; and easements and encroachments not materially affecting the value, or unduly interfering with Buyer's intended use of the Property, shall not be deemed to render title unmarketable. Encumbrances to be discharged by Seller shall be paid by Seller on or before Closing.

b. **Title Insurance.** Seller authorizes Closing Agent, at Seller's expense, to apply for a standard form owner's policy of title insurance, with owner's additional protection and inflation protection endorsements, if applicable and available at no additional cost, to be issued by the designated title insurance company. The title policy shall contain no exceptions other than those contained in said standard form and those consistent with this Agreement.

c. **Failure of Title.** If title is not marketable or not insurable, as required in this Section, and despite Seller's payment of monetary encumbrances and best efforts to correct title defects prior to Closing, then Buyer may terminate this Agreement. In that event, Buyer's sole election shall be either to waive such defects, or to terminate this Agreement and receive a refund of the earnest money. Nothing in this provision shall diminish or affect any covenants or warranties given in any deed or other conveyance at Closing.

7. **CLOSING AND POSSESSION.**

a. **Closing and Possession.** Upon demand, Buyer and Seller will promptly deposit with the Closing Agent all instruments and monies (in cash or by cashier's check) required to complete the transaction in accordance with this Agreement. Closing shall occur on the Closing Date, or earlier by mutual agreement. In the event the transaction cannot be Closed by the specified date due to an occurrence, other than a default, outside the control of Seller or Buyer (e.g. loan preparation delay), the parties hereby agree to extend the date of Closing for a period as necessary to remedy the delaying occurrence. The date of Closing shall not, however, be extended beyond the Termination Date, unless further extension is agreed to by all parties by Addendum. Closing is defined as the date when appropriate conveyance documents have been recorded and Seller's proceeds, if any, are available for disbursement. Buyer shall be entitled to possession at 5:00 p.m. on the stated Possession Date. Possession shall be considered transferred when Buyer has physical possession of the Property, all garbage, debris, and items to be retained by Seller have been removed from the Property, and keys and openers have been provided to Buyer.

b. **Closing Costs and Prorates.** Except as specified by applicable statute or regulation, Closing Agent's fees shall be shared equally between Buyer and Seller. Seller shall pay any real estate excise tax. Taxes for the current year, condominium and homeowner's association dues (unless otherwise provided by association rules), if any, rent, interest, insurance, and water and other utility usage charges constituting liens shall be prorated as of Closing. Buyer agrees to pay for remaining fuel in fuel tank as of the date that Buyer is entitled to possession, provided that Seller obtains a written statement as to the quantity and current price thereof from the supplier. Upon request of the Closing Agent, Seller shall also provide the names and addresses of the providers of all lienable utilities, including special districts, entitled to collect charges in connection with the Property.

c. **Closing Instruments.** Except as provided in this Agreement, if there are provisions for: (a) conveyance of fee title, title shall be conveyed by Statutory Warranty Deed; (b) Seller financing, Seller and Buyer shall execute Note Form LPB #28-A secured by Deed of Trust Form LPB #22 or Real Estate Contract Form LPB #44, whichever is specified by Seller on or prior to Closing; (c) sale and transfer of a vendee's interest under an existing real estate contract, Seller and Buyer shall execute Purchaser's Assignment of Contract and Deed LPB Form #14.

8. **DEFAULT.** If either Buyer or Seller defaults, the non-defaulting party may seek specific performance and/or damages, or upon Buyer's default, Seller may elect to retain Buyer's earnest money deposit as liquidated damages. Provided, if Section 8 on Page 1 indicates that Seller's remedy is Forfeiture of Earnest

Money, then Seller's exclusive remedy in the event of Buyer's default shall be forfeiture of Buyer's earnest money deposit, up to a maximum of five percent (5%) of the Purchase Price. Any additional earnest money deposit shall be refunded to Buyer. This provision shall not, however, entitle Buyer to receive a return of other non-refundable amounts which may have been paid to Seller, such as early possession rent, extension fees designated as such, payments for upgrades and Buyer specified modifications to new construction, and similar items.

If a dispute should arise regarding the disbursement of any earnest money, the party holding the earnest money may interplead the funds into court after deducting and retaining costs of the interpleader, including reasonable attorneys' fees. Any forfeited earnest money shall, after deduction of expenses incurred by either Listing or Selling Broker on behalf of Seller or Buyer, be divided equally between Seller and Listing Broker, provided, however, that the amount due Listing Broker shall not exceed the agreed brokerage fee.

9. **ACCEPTANCE OF OFFERS AND COUNTEROFFERS.** Seller shall have until the Offer Expiration Date to accept Buyer's initial offer, unless sooner withdrawn. If Seller makes a counteroffer, Buyer shall have until the Counteroffer Expiration Date to accept Seller's Counteroffer, unless sooner withdrawn. Any offer or counteroffer for which no acceptance date is stated shall be considered to provide two days for acceptance unless sooner withdrawn by the offering party. An offer or counteroffer shall be considered accepted when a copy signed by all necessary parties has been delivered or transmitted by facsimile to the office of the Broker representing the last offering party (or the party if not represented), which date shall be the date of Mutual Acceptance. Any offer or counteroffer may only be withdrawn prior to acceptance by delivering or transmitting by facsimile Notice of withdrawal to the office of the Broker representing the party to whom the offer or counteroffer was made (or the party if not represented). Any change in the terms presented in an offer or counteroffer shall be considered a counteroffer. Any offer or counteroffer not accepted within the time period required shall cause this Agreement to lapse; and any earnest money deposit shall be returned to Buyer.

10. **COMMISSION.** To the extent not specified in Section 10 on Page 1, commission shall be paid as provided in any listing or other written commission agreement. Seller irrevocably assigns a portion of Seller's proceeds, and Buyer irrevocably assigns a portion of Buyer's funds, to the Brokers sufficient to satisfy the commission obligation. This assignment may only be modified by written agreement signed by the Brokers.

11. **CONTINGENCIES AND ADDENDA.** Except as expressly provided in this Agreement or as required by law, Buyer's obligations are not subject to any contingencies. If any applicable contingency is not satisfied or waived, and unless Buyer or Seller defaults, this Agreement shall terminate and the earnest money shall be refunded to Buyer.

12. **AGENCY REPRESENTATION.** If the Selling and Listing Licensees are affiliated with the same Broker, and both Seller and Buyer are being represented (including by dual agents) then the Broker is a dual agent. Each party confirms that prior oral and/or written disclosure of agency was provided to them in this transaction and that each has received a copy of the document entitled "The Law of Real Estate Agency".

13. **GENERAL PROVISIONS:**

(a) **Notices.** Notice must be given in writing. Notices to Seller must be signed by at least one (1) Buyer and shall be deemed to be given when actually received by Seller, or at the office of Listing Broker. Notices to Buyer must be signed by at least one (1) Seller and shall be deemed to be given when actually received by Buyer, or at the office of Selling Broker. Both parties must keep Brokers advised of their whereabouts. Brokers and Licensees have no responsibility for Notices beyond calling the party or delivering the Notice to the party's last known address.

(b) **Computation of Time.** Unless provided otherwise, "days" are calendar days and any period of time in this Agreement shall expire at 9:00 p.m. of the last day of the specified time period. Other than any time periods provided in Section 9, if the last day is a Saturday, Sunday, or legal state holiday as defined in RCW 1.16.050, then such period shall expire on the next day which is not a Saturday, Sunday or legal holiday. In calculating any time period, the date of the event commencing the period shall not be counted. Unless otherwise specified, time periods in this Agreement commence on Mutual Acceptance.

(c) **Faxes and Counterparts.** Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission shall be the same as delivery of an original. At the request of either party, or the Closing Agent, the parties will confirm facsimile transmitted signatures by signing an original document. This Agreement may be signed in counterparts.

(d) **Integration.** This Agreement represents the final integrated contract of the parties and supersedes any prior MLS Data Forms, proposals, offers, negotiations, revisions, unincorporated written communications or oral discussion, statements, representation or agreements.

(e) **Time is of the Essence.** Time is of the essence as to all terms and conditions of this Agreement.

(f) **Backup Offers.** Buyer is aware that during the term of this Agreement, Seller may continue to accept backup offers.

(g) **Attorney's Fees.** If Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their reasonable attorneys' fees. This provision shall survive Closing.

14. **RESPONSIBILITY FOR INFORMATION.** Buyer and Seller agree and warrant that: except as expressly provided to the contrary in this Agreement, all representations and information regarding the Property and the transaction are solely from the Seller or Buyer, and not from any of the Brokers or Licensees. Seller and Buyer shall indemnify and hold the real estate Brokers and Licensees harmless in the event any of their statements or information are false. The parties also acknowledge that none of the Brokers or Licensees is responsible for assuring that either Buyer or Seller performs their obligations to the other under this Agreement. The parties further agree and acknowledge that none of the Brokers or Licensees have agreed to independently investigate or confirm any matter or item related to this transaction except as is specifically stated here, or in a separate writing signed by such Broker or Licensee.

NOTICE: THIS AGREEMENT HAS SIGNIFICANT LEGAL AND FINANCIAL CONSEQUENCES. IF YOU DO NOT UNDERSTAND THE EFFECT OF ANY PART, INCLUDING ANY ADDENDA, YOU ARE ADVISED BEFORE SIGNING TO SEEK INDEPENDENT LEGAL AND FINANCIAL COUNSEL BEFORE SIGNING. THE BROKERS AND LICENSEES CANNOT GIVE YOU LEGAL ADVICE. EACH OF THE UNDERSIGNED HAS READ THIS ENTIRE AGREEMENT AND AGREES TO BE BOUND BY ALL TERMS AND PROVISIONS.

BUYER _____ DATE _____

BUYER _____ DATE _____

BUYER'S PRESENT ADDRESS:

STREET _____ CITY _____ STATE _____ ZIP _____

Phone: ( ) _____ (Work) ( ) _____ (Home)

Fax: ( ) _____

email: _____

SELLER _____ DATE _____

SELLER _____ DATE _____

(Seller's name printed)

SELLER'S ADDRESS:

STREET _____ CITY _____ STATE _____ ZIP _____

Phone: ( ) _____ (Work) ( ) _____ (Home)

Fax: ( ) _____

email: _____

SELLING BROKER

Selling Licensee(s): _____

Phone: ( ) _____ (Work) ( ) _____ (Home)

Fax: ( ) _____

email: _____

LISTING BROKER

Listing Licensee(s): _____

Phone: ( ) _____ (Work) ( ) _____ (Home)

Fax: ( ) _____

email: _____

Seller(s) authorize their lender to provide information to the Closing Agent regarding their loan, including information on the status of the loan, restrictions, and payoff quotations.

Seller's Loan # Mortgagee's Name/Address

Mutual Acceptance of this final Agreement as defined in Section 9, occurred on _____
(Date to be inserted by licensee at the time of Delivery of mutually accepted final Agreement.)

Federal law may impose certain duties upon broker(s) or signatories when any of the signatories receives certain amounts of United States currency in connection with a real estate closing.

WHITE - Broker / YELLOW - Seller / PINK - Buyer

ADDENDUM "A" To PURHASE AND SALE AGREEMENT

Date February 12, 2004 Between T.J.Landco L.L.C (Seller) and Harley C Douglass Inc. (Purchaser) for the property located in Spokane County in the State Of Washington referred to as Meadow Point Landing (94 acres MOL). Parcel numbers as follows: 34282.0010,34082.009,34083.9028,34053.0051G,34052.0051H,34053.0044,34053.0020, 34053.0045,34071.0001,34082.0008G,34082.0008H.

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 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 intrest 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 intrest rate will be 6% per annum until balance is paid in full.
   F) An escrow account will be set up and the time of closing, and each party will pay their share of stated escrow fees.
   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.

2) Sale is subject to Seller obtaining Preliminary Plat approval from the City Spokane that is also reviewed and acceptable to Purchaser 20 days prior to closing.

3) Sale contingent on City Of Spokanes commitment of providing water and sewer by the year 2005.

4) Closing Date will be 25 days after purchaser's receipt of Hearing Examiners Report.

5) Earnest Money in the amount of 50,000.00 Dollars will be in the form of an unsecured note due 5 days after Purchaser's approval of Preliminary Plat at which time the Earnest Money will be deemed non-refundable.

6) Closing Agent will be Spokane County Title located at 1010 North Normandie in Spokane , Washington. 99201

7) Purchaser is aware there is two wells on the property that will need to be abandoned.

T.J Landco LLC 2-27-04
SELLER DATE

PURCHASER 2-23-04
DATE

07 236

APPEAL 319920/322084

APPENDIX -B

Meadow Point Landing Project

	$ 3,600,000.00	Original Purchase Price	
less	$ 500,000.00	Discount for Stranahan & Schneider Purchase and	
	$ 3,100,000.00	Loan Payoff	
	$ 3,100,000.00		
less	$ 480,885.40	Stranahan 5/7/04	
less	$ 10,426.94	Stranahan 5/7/04	
	$ 2,608,687.66		
	$ 2,608,687.66		
less	$ 680,653.69	Schneider 6/1/04	
	$ 1,928,033.97		
	$ 1,928,033.97		
less	$ 342,739.47	Lindsey 8/3/06	
	$ 1,585,294.50		
	$ 1,585,294.50		
less	$ 31,000.00	Loan 9/13/06	
	$ 1,554,294.50		
	$ 15,000.00	Timber Tax Est	
	$ 148,125.95	Interest on Stranahan 5/7/04 to 11/09/06	
	$ 7,369.69	Loan Origination Fee Not to Exceed 1.5% 5-07-04	1.5% 491,312.34
	$ 8,063.91	Loan renewal Fee Not to Exceed 1.5% 5-07-05	1.5% 537,594.00
	$ 9,003.85	Loan renewal Fee Not to Exceed 1.5% 5-07-06	1.5% 600,256.92
	$ 200,303.27	Interest on Schneider 6/1/04 to 11/09/06	
	$ 10,209.81	Loan Origination Fee Not to Exceed 1.5% 6-1-04	1.5% 680,653.69
	$ 11,187.09	Loan renewal Fee Not to Exceed 1.5% 6-1-05	1.5% 745,806.18
	$ 12,508.18	Loan renewal Fee Not to Exceed 1.5% 6-4-06	1.5% 833,878.35
	$ 11,740.69	Interest on Linsey 8/3/06 to 11/09/06	
	$ 5,141.09	Loan Origination Fee Not to Exceed 1.5% 8/3/06	1.5% 342,739.47
	$ 617.79	Interest on Loan 9/13/06 to 11/09/06	
	$ 465.00	Loan Origination Fee Not to Exceed 1.5% 9/13/06	1.5% 31,000.00
less	$ 439,736.31		
	$ 1,114,558.19		

12-22-06
#989
Based on 371 Lots
if less credit will
be given out of
1,000,000.00
Hayden 12-22-06

12-22-06
1,000,000.00 for Balance
Payment of 200,000.00
per year for 5 years
at 2020 interest.
Hayden 12-22-06

EXHIBIT 1
DATE: 9-27-10
NAME: C. Stadtmueller

Spokane County No.: 10-2-00576-0
TJ LANDCO v. HARLEY DOUGLASS
Plaintiff's Exhibit No.: P19
Disposition:

APPEAL 319920/322084

APPENDIX -C

JUDGE MARYANN C. MORENO

FILED

JUN 28 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR SPOKANE COUNTY

TJ LANDCO, LLC, a Washington Limited Liability Company,

Plaintiff,

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,

Defendant.

No. 10-2-00576-0

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

INTRODUCTION

THIS MATTER was presented to Judge Mary Ann C. Moreno at hearing without a jury, from May 6, 2013 to May 14, 2013. Timothy B. Fennessy and Bradley C. Crockett of Layman Law Firm, PLLP, represented Plaintiff at trial in association with Wm. Scott Hislop, of the Law Office of Wolff & Hislop, (hereinafter "Plaintiff's counsel"); J. Steve Jolley of Herman, Herman & Jolley, P.S. represented Defendant Harley C. Douglass, Inc. The parties submitted oral and documentary evidence and the matter was taken under advisement on May 14, 2013. Judge

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ORIGINAL

Moreno delivered her oral ruling on May 24, 2013, and presentment was set for June 28, 2013. The Court hereby issues the following Findings of Fact, Conclusions of Law and Order of Judgment.

ISSUES NOT IN DISPUTE

By agreement of the parties as set forth in the Trial Management Joint Report, the following issues were not in dispute by the time of trial:

1. In February 2004, TJ Landco and HCDI entered into a Real Estate Purchase and Sale Agreement whereby HCDI agreed to pay $3.6 million for 94 acres of undeveloped property subject to TJ Landco obtaining preliminary plat approval from the City of Spokane that is acceptable to HCDI. Purchase was further contingent upon the City of Spokane's commitment of providing water and sewer by the year 2005.

2. In March of 2004, the City of Spokane indicated to TJ Landco that sewer and water services would be available to service the project in 2005.

3. In October 2006 TJ Landco was given final approval of the Preliminary Plat for Meadow Point Landing Project. The Hearing Examiner's Decision stated "the site will not be easy to develop because of the slopes, especially the steep slopes along the eastern and northern edges." Furthermore it stated that "City streets will have to be developed with the grade no greater than that approved by the Public Works and Fire Departments. Currently there are streets within this plat with grades in excess of eight percent." The Decision further recognized that the right of way for a portion of Meadow Lane Drive was too narrow to allow the construction of a normal collector road, stating "The right-of-way for Meadowlane Drive will be 60 feet wide except for a portion on the north end of the plat where two other property ownerships require that the right-of-way be reduced to 40 feet." The Decision indicated that the Developer would be responsible for the costs of constructing the infrastructure necessary for the development.

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4. After reviewing the Preliminary Plat and the City's decision, HCDI determined the Meadow Point Landing Project was viable.

5. On December 22, 2006 HCDI and TJ Landco met and prepared a written account stated for the project indicating that HCDI owed $1,114,558.19 to TJ Landco on the project. The account stated established that the outstanding balance would be paid in installments with $114,558.19 at the time of the account stated and then five annual installments of $200,000.

6. On December 22, 2006, HCDI wrote a check to TJ Landco for $114,558.19. Printed on the check were the words "Paid in Full."

7. In March 2008 HCDI sent a check to TJ Landco for $200,000. Printed and handwritten on the check were the words "Paid in Full."

8. HCDI has not made any additional payments on the outstanding balance of $800,000.00 from the Account Stated.

DISPUTED ISSUES

The issues to be decided, as set forth in the Trial Management Joint Report, signed by J. Steve Jolley on behalf of Defendant and accepted by Timothy B. Fennessy on behalf of Plaintiff at the Pre-Trial Conference on April 25, 2013, were as follows:

1. Whether HCDI breached its contractual obligation to make four additional payments of $200,000 each for a total of $800,000 to TJ Landco;

2. Whether TJ Landco warranted that the roads as represented on the Preliminary Plats prepared by the licensed surveyor, Mike Phillips, were feasible as drawn;

3. Whether TJ Landco orally promised or impliedly warranted that it would stub sewer and water to the development based on an indication in the Hearing Examiner's Decision that the "developer" was responsible for all infrastructure related to the project.

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4. Whether TJ Landco agreed that HCDI is entitled to credit against the $1,000,000.00 which remained owing after the December 22, 2006, account stated was agreed to by the parties for any lots lost due to problems with the Simpson Plat Maps?

5. Whether some of the 371 lots shown on the Simpson Plat Maps are lost when the right of way for Meadowlane Drive is increased to 60 feet in width as required by the conditions of the plat?

6. Whether some of the 371 lots shown on the Simpson Plat Maps are lost due to the required dedication of a portion of the plat to the Washington Department of Transportation.

7. Whether some of the 371 lots shown on the Simpson Plat Maps are lost when Meadowlane Drive is realigned in order to correct sight/distance and set back requirements at the west end of the restricted 40 foot section of said Meadowlane Drive?

8. Whether the roads can be constructed as shown on the Simpson Plat Maps?

9. Whether HCDI has been damaged due to loss of lots and the fact that the roads cannot be built as shown on the Simpson Plat Maps; and, the amount of said damages?

10. Whether HCDI has the right to offset damages against any amounts owing to TJ Landco, LLC.

EVIDENCE CONSIDERED

The record in this matter consisted of the following evidence:

A. The testimony of Plaintiff's sole member, Tod Lasley, presented at hearing on May 6 and May 7, 2013;

B. The testimony of Eldon Brown, an employee of the City of Spokane Engineering Services Department who was involved in the Preliminary Plat evaluation process on behalf of the City of Spokane throughout that process, presented at hearing on May 7, 2013;

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C. The testimony of Mike Phillips, an employee of Simpson Engineering and the licensed professional surveyor involved in preparation of the conceptual drawing used to support Plaintiff's application for Preliminary Plat approval with the City of Spokane's Hearing Examiner, presented on May 7, 2013;

D. The testimony of Jay R. Bonnett, an expert employed by Defendant as a forensic engineer in this case, presented on May 9 and 13, 2013;

E. The testimony of Harley C. Douglass, the sole member of Defendant HCDI, presented at hearing on May 9 and 13, 2013;

F. Numerous exhibits offered by both parties as admitted on May 6, 7, 9 or 13, 2013; and,

G. A site visit by Judge Moreno with counsel from both sides and Tod Lasley and Harley Douglass in attendance.

FINDINGS OF FACT

The undisputed facts set forth in the preceding list of Undisputed Issues and transcript of the Court's Oral Ruling partially granting directed verdict issued on May 14, 2013 are incorporated into these Findings of Fact and Conclusions of Law, as is the transcript of the Court's Oral Ruling issued on May 24, 2013. Each Finding below relates to all other Findings and is not restricted to the heading of the section in which it is listed.

Based on the evidence presented at trial, the Court makes the following findings of fact:

1. Plaintiff filed its complaint February 9, 2010, alleging breach of contract;

2. The parties signed an agreement for the purchase and sale of 94 acres of raw land at the undisputed price of $3.6 Million, Defendant having signed the document first on February 23, 2004 and Plaintiff signing on February 27, 2004;

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3. The terms of the Agreement required that the Seller, TJ Landco by Tod Lasley obtain from the City of Spokane a commitment by the City to provide sewer and water, and preliminary plat approval, which was to be reviewed and acceptable to the Purchaser, HCDI by Harley C. Douglass. The Agreement did not require TJ Landco to stub sewer and water to the development;

4. The Agreement also contains a clause providing that the prevailing party in any litigation related to enforcement of the contract shall be entitled to reasonable attorney fees incurred in association with the litigation;

5. TJ Landco and Tod Lasley retained Mike Phillips through Simpson Engineers to design and draw the preliminary plat map which was submitted in support of the application for approval in April of 2005;

6. Preliminary Plat approval was given by the City of Spokane's Hearing Examiner on April 19, 2006, which was appealed to the City Counsel and final approval following remand to the Hearing Examiner was granted in October of that year;

7. A Preliminary Plat is a conceptual plan. It is very common to have changes between the preliminary plat and final approval. It is also common for a developer to obtain deviations from various requirements after preliminary plat approval is obtained.

8. Following final approval by the Hearing Examiner, Defendant and Harley C. Douglass had or had access to all information that was included in TJ Landco's file, including without limitation: both written decisions by the City of Spokane's Hearing Examiner, the Simpson Engineering Preliminary Plat Maps provided to the City of Spokane in support of the Preliminary Plat application, portions of staff reports, portions of the public testimony related to the Preliminary Plat application, numerous communications between Lasley and the City

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Engineers, the Planning Department, the Washington State Department of Transportation, and associated documents;

9. The Hearing Examiner's approval of the Preliminary Plat included several comments about the facts established with regard to the specific 94 acres and associated development proposal, including: reference to the fact that the site will not be easy to develop because of the steep slopes, approval for 48 foot wide roads throughout the development, contrary to general road width recommendations referenced by the City Staff, with the exception of one specific road, Meadowlane Drive, which was required to have a 60 foot right of way, and a 40 foot right of way that was clearly observable by anyone who drove up Meadowlane Drive and past the Lund property;

10. In 2005, HCDI provided its own engineer, Whipple Engineering, with the preliminary plat. Whipple Engineering performed work on the project, including designing potential apartment complexes within the development and coordinating with the City of Spokane regarding the project on behalf of HCDI.

11. Harley C. Douglass drove past the Lund property into the 94 acres that form the subject of this dispute prior to negotiating, drafting and signing the December 22, 2006 accounting;

12. The parties met on December 22, 2006, during which time an accounting was discussed, agreed, reduced to writing by Harley C. Douglass and signed by both parties;

13. Harley C. Douglass hand wrote some information on the final version of the accounting, which was prepared at his office, and included an allowance for credit to be given in the event less than 371 lots were achieved in the final plat approval;

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14. Harley C. Douglass is an experienced developer with more than 20 years of experience in the field and took all of the information given to him, utilized his experience and concluded that the plat was viable;

15. In submitting a Preliminary Plat application with design concept maps, the practice is to draw as many lots as possible in order to avoid any wasted land;

16. There was no guarantee for 371 developed lots;

17. TJ Landco did not promise or warrant that the roads depicted on the preliminary plat application could be built exactly as drawn without further modification;

18. The accounting acknowledged that Defendant owed Plaintiff $1,114,558.19 as of December 22, 2006 and that payment was to be made that day in the amount of $114,558.19 with the remaining $1,000,000.00 balance to be paid off in 5 equal, annual installments each year thereafter without interest until paid in full on or about December 22, 2011, See Exhibit P-19;

19. Defendant did, in fact, pay the initial amount of $114,558.19 by check to Plaintiff on December 22, 2006;

20. An additional payment of $200,000 was made by check to Plaintiff dated March 4, 2008, but no additional payments have been made of the remaining $800,000.00;

21. $200,000 became due and payable to TJ Landco on or about December 22, 2008, in an amount that is readily determined without reference to anything outside the documents available to the parties;

22. $200,000 additionally became due and payable to TJ Landco on or about December 22, 2009, in an amount that is readily determined without reference to anything outside the documents available to the parties;

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23. $200,000 additionally became due and payable to TJ Landco on or about December 22, 2010, in an amount that is readily determined without reference to anything outside the documents available to the parties;

24. $200,000 additionally became due and payable to TJ Landco on or about December 22, 2011, in an amount that is readily determined without reference to anything outside the documents available to the parties;

25. TJ Landco was denied the use of the money withheld by HCDI.

26. TJ Landco did not promise or warrant that it would stub in sewer and water to the development;

27. Harley C. Douglass' testimony at trial contradicted previously provided Declarations which were part of the record in this case, particularly with regard to the acceptability and/or viability of the Preliminary Plat as approved by the Hearing Examiner;

28. Harley C. Douglass' testimony at trial was evasive with regard to what he knew in 2006 and/or 2007;

29. Harley C. Douglass never discussed any of his alleged concerns with regard to the Preliminary Plat with Tod Lasley or provided an explanation for refusing to pay as additional installments became due;

30. Harley C. Douglass refused to meet with Tod Lasley to discuss past due payments and either Harley C. Douglass or someone on his behalf refused to accept Tod Lasley's certified letter;

31. Such actions by Harley C. Douglass affected his credibility with regard to portions of his testimony in this particular case;

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32. Jay R. Bonnett is Harley C. Douglass' brother-in-law, had done significant work on behalf of Harley C. Douglass in the past and appeared somewhat biased in favor of Harley C. Douglass;

33. Jay R. Bonnett did not provide any solid engineering work in support of his disagreement with the conclusions contained in the materials compiled by the City Engineering Department or as presented in the design drawings made by Mike Phillips of Simpson Engineering in support of the Preliminary Plat application;

34. Harley C. Douglass sold the subject property to his parents for $500,000.00 and stipulated that he has no claim for damages arising as a result of that real property transfer;

35. Harley C. Douglass never actually developed any of the 94 acres prior to sale to his parents;

36. The subject property had not been developed at the time of hearing and it is unknown how many lots will be achieved in the course of such development; and,

37. Harley C. Douglass did not make any good-faith attempts to mitigate any perceived failure of TJ Landco or Tod Lasley with regard to the Lund property.

CONCLUSIONS OF LAW

1. TJ Landco fulfilled its obligations under the agreement.

2. HCDI breached its agreement with TJ Landco by failing to pay $800,000 in installment payments as they came due.

3. HCDI is not entitled to a reduction or offset from the amount owed under the agreement.

4. HCDI failed to establish any affirmative defense by a preponderance of the evidence;

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5. HCDI failed to establish any counterclaim entitling it to an offset by a preponderance of the evidence;

6. TJ Landco is entitled to judgment in the full amount of $800,000 plus prejudgment interest at the rate of 12% per annum from the due dates reflected above on each successive installment to and until the date judgment is entered;

7. Plaintiff is entitled to reasonable attorney fees and statutory costs as established plus interest on all amounts at the rate of 12% per annum from the date of judgment to and until the date of full payment; and,

8. Judgment should be entered in favor of Plaintiff and against HCDI on Plaintiff's breach of contract claim, for the damages found above.

DONE IN OPEN COURT this 28 day of June, 2013

HONORABLE JUDGE MARYANN C. MORENO

Presented by:

LAYMAN LAW FIRM, PLLP

TIMOTHY B. FENNESSY, WSBA #13809
BRADLEY C. CROCKETT, WSBA #36709
Attorneys for Plaintiff

Approved as to form:

HERMAN, HERMAN & JOLLEY, P.S.

with telephonic approval BRAD CROCKETT

J. STEVE JOLLEY, WSBA #12982
Attorney for Harley C. Douglass, Inc.

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APPEAL 319920/322084

APPENDIX -D

RCW 19.52.010
Rate in absence of agreement — Application to consumer leases.

(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: PROVIDED, That with regard to any transaction heretofore or hereafter entered into subject to this section, if an agreement in writing between the parties evidencing such transaction provides for the payment of money at the end of an agreed period of time or in installments over an agreed period of time, then such agreement shall constitute a writing for purposes of this section and satisfy the requirements thereof. The discounting of commercial paper, where the borrower makes himself or herself liable as maker, guarantor, or indorser, shall be considered as a loan for the purposes of this chapter.

(2) A lease shall not be considered a loan or forbearance for the purposes of this chapter if:

(a) It constitutes a "consumer lease" as defined in RCW 63.10.020;

(b) It constitutes a lease-purchase agreement under chapter 63.19 RCW; or

(c) It would constitute such "consumer lease" but for the fact that:

(i) The lessee was not a natural person;

(ii) The lease was not primarily for personal, family, or household purposes; or

(iii) The total contractual obligation exceeded twenty-five thousand dollars.

[2011 c 336 § 542; 1992 c 134 § 13. Prior: 1983 c 309 § 1; 1983 c 158 § 6; 1981 c 80 § 1; 1899 c 80 § 1; RRS § 7299; prior: 1895 c 136 § 1; 1893 c 20 § 1; Code 1881 § 2368; 1863 p 433 § 1; 1854 p 380 § 1.]

Notes:

Short title -- Severability -- 1992 c 134: See RCW 63.19.900 and 63.19.901.

Severability -- 1983 c 158: See RCW 63.10.900.

APPEAL 319920/322084

APPENDIX -E

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

TJ LANDCO, LLC, a Washington Limited Liability Company, Plaintiff, vs. HARLEY C. DOUGLASS, INC., a Washington Corporation; SECURE SELF STORAGE, LLC, a Washington Limited Liability Company; HARLEY C. DOUGLASS and LISA DOUGLASS, husband and wife; and JOHN DOE PARTNERSHIP, Defendants.	No. 10-2-00576-0 DEFENDANTS OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT

Defendant, Harley C. Douglass interposes the following objections to Plaintiffs Proposed Findings of Fact:

[1] Plaintiff has not numbered its Proposed Findings of Fact. This makes it difficult for this Court to consider the findings; for the Defendant to interpose objections; and for the parties and in the event of an appeal for the Court of Appeals to address issues concerning the proposed finding of fact and objections thereto.

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[2] The proposed finding of fact appearing at page 6, lines 8 – 10 is contrary to the evidence. See, clause 13(g) of the parties Real Estate Purchase and Sale Agreement, Plaintiff's Exhibit P-1 which provides as follows:

> (g) Attorney's Fees. If Buyer, or Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their reasonable attorneys' fees. This provision shall survive Closing.

This finding of fact should be corrected by deleting the words "and costs" because the parties' agreement does not provide for an award of costs.

[3] The proposed finding of fact appearing at page 7 lines 4 – 12 on line 10 and after the name Meadowlane Drive should be amended to include the following words: "which was required by the conditions of the plat to have a 60 foot right of way".

[4] In the proposed finding of fact appearing at page 7 lines 24 – 26 the words "final plat approval" should be deleted and replaced with "the Simpson Engineers Preliminary Plat Plans."

[5] In the proposed finding of fact appearing at page 7 lines 28 – 30 at line 30 the words "more than acceptable" should be deleted.

[6] The proposed finding of fact appearing on page 8 line 4 should be deleted because it is contrary to the evidence. In their December 22, 2006. Accounting Agreement the parties agreed there were to be 371 lots and HCDI was to receive a credit it fewer lots were achieved. The actual language used by the parties was: "Based on 371 lots if less credit will be given out of 1,000,000." See, Exhibit P – 19.

[7] The proposed finding of fact appearing on page 8 lines 8 – 12 should be changed to recite the actual language the parties used in their December 22, 2006 Accounting Agreement. That language was as follows: "1,000,000 balance. Payment of 200,000 per year for 5 years at zero interest." See, Exhibit P – 19.

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[8] The proposed finding of fact appearing at page 9 lines 29 – 30 and page 10 lines 1 – 3 should be deleted because it is contrary to the evidence produced at trial.

[9] The proposed finding of fact appearing at page 10 lines 12 – 13 should be deleted because it is contrary to the evidence produced at trial. HCDI made an offer to purchase the Lund property which was rejected. HCDI also paid Todd Whipple thousands of dollars to try to solve the main road access problems.

II DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

Defendant, Harley C. Douglass interposes the following objections to Plaintiffs Proposed Conclusions of Law:

[1] The interest rate provided for in conclusion of law number 6 should be changed to 0% or in the alternative to 6% per annum which is the interest rate provided for in the parties Real Estate Purchase and Sale Agreement and/or the December 22, 2006 Accounting Agreement.

The Accounting Agreement provided: "1,000,000 balance. Payment of 200,000 per year for 5 years at zero interest." See, Exhibit P – 19.

The portion of Addendum "A" of the parties' Real Estate Purchase and Sale Agreement which was not modified by the Accounting Agreement provides as follows:

> C) The unpaid balance will carry and [sic] interest rate of 6% per annum.
>
> . . . .
>
> 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 the balance is paid in full.

See, Exhibit P – 1.

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[2] The words "and costs as established" should be deleted from proposed conclusion of law 7 because the parties Real Estate Purchase and Sale Agreement contains no clause where the parties agreed to costs.

[3] The Judgment to be entered herein should provide that it bears interest at 0% or in the alternative at 6%.

Respectfully submitted this 24th day of June, 2013.

Herman. Herman & Jolley, P.S.

By: _____
J. Steve Jolley, WSBA #12982
Attorney for Harley C. Douglass, Inc.

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JUN 27 2013
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WOLFF & HISLOP

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SPOKANE
JUN 27 2013
Layman Law Firm

FILED
JUN 27 2013
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

TJ LANDCO, LLC, a Washington Limited Liability Company, Plaintiff, vs. HARLEY C. DOUGLASS, INC., a Washington Corporation; SECURE SELF STORAGE, LLC, a Washington Limited Liability Company; HARLEY C. DOUGLASS and LISA DOUGLASS, husband and wife; and JOHN DOE PARTNERSHIP, Defendants.	No. 10-2-00576-0 DEFENDANTS OBJECTIONS TO PLAINTIFF'S FIRST AMENDED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT

Defendant, Harley C. Douglass interposes the following objections to Plaintiffs Proposed Findings of Fact:

[1] Proposed finding of fact 9 should have language added after the name Meadowlane Drive to include the following words: "which was required by the conditions of the plat to have a 60 foot right of way". Also, after the words "and a 40

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foot right of way" the following language should be added "along the boundary line of the Lund property".

[2] In proposed finding of fact 12, after the name "Harley C. Douglass" the words "and Tod Lasley" should be added.

[3] In proposed finding of fact 13 the words "final plat approval" should be deleted and replaced with "the Simpson Engineers Preliminary Plat Plans."

[4] In proposed finding of fact 14 the words "more than acceptable" should be deleted.

[5] Proposed finding of fact 16 should be deleted because it is contrary to the evidence. In their December 22, 2006, Accounting Agreement the parties agreed there were to be 371 lots and HCDI was to receive a credit it fewer lots were achieved. The actual language used by the parties was: "Based on 371 lots if less credit will be given out of 1,000,000." See, Exhibit P – 19.

[6] Proposed finding of fact 18 should be changed to recite the actual language the parties used in their December 22, 2006 Accounting Agreement. That language was as follows: "1,000,000 balance. Payment of 200,000 per year for 5 years at zero interest." See, Exhibit P – 19.

[7] The following phrase should be added to the end of proposed finding 25 "but made no demand for interest until after this action was commenced."

[8] Proposed finding of fact 37 should be deleted because it is contrary to the evidence produced at trial. This finding should be deleted and replaced with: "HCDI made an offer to purchase the Lund property which was rejected. HCDI also paid Todd Whipple thousands of dollars to try to solve the main road access problems."

II DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

Defendant, Harley C. Douglass interposes the following objections to Plaintiffs Proposed Conclusions of Law:

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[1] The interest rate provided for in conclusion of law number 6 should be changed to 0% or in the alternative to 6% per annum which is the interest rate provided for in the parties Real Estate Purchase and Sale Agreement and/or the December 22, 2006 Accounting Agreement.

The Accounting Agreement provided: "1,000,000 balance. Payment of 200,000 per year for 5 years at zero interest." See, Exhibit P – 19.

The portion of Addendum "A" of the parties' Real Estate Purchase and Sale Agreement which was not modified by the Accounting Agreement provides as follows:

C) The unpaid balance will carry and [sic] interest rate of 6% per annum.

. . . .

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 the balance is paid in full.

See, Exhibit P – 1.

[2] The Judgment to be entered herein should provide that it bears interest at 0% or in the alternative at 6%.

Respectfully submitted this 27th day of June, 2013.

Herman, Herman & Jolley, P.S.

By: _____
J. Steve Jolley, WSBA #12982
Attorney for Harley C. Douglass, Inc.

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APPEAL 319920/322084

APPENDIX -F

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

TJ LANDCO, LLC, a Washington Limited Liability Company, Plaintiff, vs. HARLEY C. DOUGLASS, INC., a Washington Corporation; SECURE SELF STORAGE, LLC, a Washington Limited Liability Company; HARLEY C. DOUGLASS and LISA DOUGLASS, husband and wife; and JOHN DOE PARTNERSHIP, Defendants.	No. 10-2-00576-0 DEFENDANTS OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT

Defendant, Harley C. Douglass interposes the following objections to Plaintiffs Proposed Findings of Fact:

[1] Plaintiff has not numbered its Proposed Findings of Fact. This makes it difficult for this Court to consider the findings; for the Defendant to interpose objections; and for the parties and in the event of an appeal for the Court of Appeals to address issues concerning the proposed finding of fact and objections thereto.

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[2] The proposed finding of fact appearing at page 6, lines 8 – 10 is contrary to the evidence. See, clause 13(g) of the parties Real Estate Purchase and Sale Agreement, Plaintiff's Exhibit P-1 which provides as follows:

> (g) Attorney's Fees. If Buyer, or Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their reasonable attorneys' fees. This provision shall survive Closing.

This finding of fact should be corrected by deleting the words "and costs" because the parties' agreement does not provide for an award of costs.

[3] The proposed finding of fact appearing at page 7 lines 4 – 12 on line 10 and after the name Meadowlane Drive should be amended to include the following words: "which was required by the conditions of the plat to have a 60 foot right of way".

[4] In the proposed finding of fact appearing at page 7 lines 24 – 26 the words "final plat approval" should be deleted and replaced with "the Simpson Engineers Preliminary Plat Plans."

[5] In the proposed finding of fact appearing at page 7 lines 28 – 30 at line 30 the words "more than acceptable" should be deleted.

[6] The proposed finding of fact appearing on page 8 line 4 should be deleted because it is contrary to the evidence. In their December 22, 2006, Accounting Agreement the parties agreed there were to be 371 lots and HCDI was to receive a credit it fewer lots were achieved. The actual language used by the parties was: "Based on 371 lots if less credit will be given out of 1,000,000." See, Exhibit P – 19.

[7] The proposed finding of fact appearing on page 8 lines 8 – 12 should be changed to recite the actual language the parties used in their December 22, 2006 Accounting Agreement. That language was as follows: "1,000,000 balance. Payment of 200,000 per year for 5 years at zero interest." See, Exhibit P – 19.

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[8] The proposed finding of fact appearing at page 9 lines 29 – 30 and page 10 lines 1 – 3 should be deleted because it is contrary to the evidence produced at trial.

[9] The proposed finding of fact appearing at page 10 lines 12 – 13 should be deleted because it is contrary to the evidence produced at trial. HCDI made an offer to purchase the Lund property which was rejected. HCDI also paid Todd Whipple thousands of dollars to try to solve the main road access problems.

II DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED CONCLUSIONS OF LAW

Defendant, Harley C. Douglass interposes the following objections to Plaintiffs Proposed Conclusions of Law:

[1] The interest rate provided for in conclusion of law number 6 should be changed to 0% or in the alternative to 6% per annum which is the interest rate provided for in the parties Real Estate Purchase and Sale Agreement and/or the December 22, 2006 Accounting Agreement.

The Accounting Agreement provided: "1,000,000 balance. Payment of 200,000 per year for 5 years at zero interest." See, Exhibit P – 19.

The portion of Addendum "A" of the parties' Real Estate Purchase and Sale Agreement which was not modified by the Accounting Agreement provides as follows:

C) The unpaid balance will carry and [sic] interest rate of 6% per annum.

. . . .

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 the balance is paid in full.

See, Exhibit P – 1.

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[2] The words "and costs as established" should be deleted from proposed conclusion of law 7 because the parties Real Estate Purchase and Sale Agreement contains no clause where the parties agreed to costs.

[3] The Judgment to be entered herein should provide that it bears interest at 0% or in the alternative at 6%.

Respectfully submitted this 24th day of June, 2013.

Herman, Herman & Jolley, P.S.

By: _____
J. Steve Jolley, WSBA #12982
Attorney for Harley C. Douglass, Inc.

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

TJ LANDCO, LLC, a Washington Limited Liability Company,

Plaintiff,

vs.

HARLEY C. DOUGLASS, INC., a Washington Corporation; SECURE SELF STORAGE, LLC, a Washington Limited Liability Company; HARLEY C. DOUGLASS and LISA DOUGLASS, husband and wife; and JOHN DOE PARTNERSHIP,

Defendants.

No. 10-2-00576-0

[PROPOSED] ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUESTED BY DEFENDANT HCDI

1 ADDITIONAL FINDINGS OF FACT

As requested by Defendant Harley C. Douglass, Inc., and good cause appearing the Court makes the following Additional Findings of Fact:

[1] The parties Real Estate Purchase and Sale Agreement including Addendum "A" thereto contains no provision for an award of costs to the prevailing party in this action. See, clause 13(g) of the parties Real Estate Purchase and Sale Agreement, Plaintiff's Exhibit P-1 which provides as follows:

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(g) Attorney's Fees. If Buyer, or Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, each prevailing party shall recover their reasonable attorneys' fees. This provision shall survive Closing.

[2] Exhibit D-1 admitted at trial is a letter from the city zoning and subdivision administration director, Steve Haynes to Tod Lasley of TJ Lanco, LLC dated March 18, 2005. Mr. Lasley received this letter more than a year before the initial hearing examiner decision dated April 19, 2006.

In the first paragraph of his letter Mr. Haynes states:

> I have done a preliminary review of the proposed Meadow Landing preliminary plat and have found that the following corrections should be made before the plat is submitted to the city of Spokane:

Number 1 on Mr. Haynes' list of required corrections was that the streets be platted with standard street width of sixty (60) feet. Mr. Lasley did not direct TJL's agent Simpson engineers to make this correction and submit the plat map plans in the form directed by Mr. Haynes.

[3] At no time did the City of Spokane ever agree to reduce the required width of Meadow Lane Road to less than 60 feet.

[4] The staff report to the hearing examiner dated March 20, 2006 [exhibit D-112] states beginning at the bottom of page 5, paragraph d.:

> The proposal includes public streets, no alleys are proposed. The street right of way width proposed for this plat is forty eight feet wide instead of the standard sixty feet. The city engineer has found this width to be acceptable with the exception of Meadowlane drive, which needs to maintain a sixty foot width. . . .

[5] TJL never provided the City of Spokane or HCDI with a Preliminary Plat Map which platted Meadow Lane Road at the required 60 foot width.

[6] Mr. Bonnett, HCDI's Engineer Expert analyzed this situation and calculated the area which would be lost from each of the Lots abutting Meadowlane Road when the

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width of the required right of way is increased to 60 as required by the conditions of the preliminary plat approval. Based upon his calculations, Mr. Bonnett determined and opined that 59 of the lots shown on the Simpson Plat Map would have areas less than the 7,200 square feet required by the applicable zoning code. Mr. Bonnett further opined that these 59 lots would be non-conforming and unbuildable lots.

[7] The conditions of the Plat also require a dedication of a portion of the development's land to the Washington State Department of Transportation for a Right of Way. Mr. Bonnett was of the opinion that when the WSDT Right of Way is considered 8 additional lots shown upon the Simpson Plat Map become non-conforming and non-buildable.

[8] Storhaug Engineering, acting as an expert for TJL, attempted to reconfigure the Simpson plat map plans; but was unable to say whether its configuration was workable because of issues it was not able to resolve in its analysis of the problem. As indicated in Storhaug's February 27, 2013 Memorandum it was unable to render an opinion as to whether it was possible to reconfigure the Simpson Plat Map Plan to achieve 371 lots because of unresolved issues including:

[A] Storehaug does not know whether WSDOT will allow the intersection of Meadowlane Road and Meadowlane Drive to be located within the WSDOT Right of Way.

[B] Storehaug did not consider the effect of the required WSDOT right of way on their proposed reconfiguration of lots.

[C] Storhaug has not determined curve radii along the roadway centerlines per the City of Spokane standards, which consider design speeds, sight distances, roadway crown, building proximity, and vertical grades.

[D] Storhaug did not address the 10 foot utility easement which is required alongside all roads in the plat.

[E] Storhaug did not address the required set back of the access road from the Lunds' home.

[F] Storhaug did not address the sight-distance hazard for the Lund home due to its proximity to the main access road.

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[9] Based upon the inability of three other engineering firms to reconfigure the lots in the development to achieve 371 lots, Mr. Bonnett also opined that it was not possible to achieve 371 lots in a preliminary plat map or this project. In fact the maximum number of lots which could be achieved were 304 lots.

[10] Preliminary plat map plans are important documents. They are in fact the most important documents in the preliminary platting process. As such developers, contractors, owners, city staff and hearing examiners all rely on these plan and expect them to meet certain minimum standards.

[12] The evidence from both Plaintiff and Defense witnesses was that these minimum standards require that:

- the plans must comply with the conditions of the plat:
- the plans are accurate;
- the plans must be workable;
- roads can be built as depicted on the plat map plans;
- the number of lots shown can be achieved; and,
- the plans comply with applicable zoning and municipal code provisions.

[13] In February 2004 HCDI and TJL executed a Real Estate Purchase and Sale Agreement including Addendum A thereto. In Addendum A the parties agreed that:

> C) The unpaid balance will carry and [sic] interest rate of 6% per annum.
>
> . . . .
>
> 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 the balance is paid in full.

[14] On December 22, 2006 the parties met and agreed to an accounting. Because HCDI had been acting as TJL's bank up until the time of the accounting, the parties agreed to certain credits to HCDI for interest, loan origination fees and other items. The parties reached agreement as to the amount owing by HCDI to TJL as of December 22, 2006. The parties also agreed to installment payments and that zero interest was to be charged on the unpaid balance. The parties also agreed that if fewer than 371 lots were achieved by the Simpson Preliminary Plat Map Plans that HCDI was

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to receive a credit against the $1,000,000 balance which remained due and payable after the accounting agreement. The accounting also established the amount of money Plaintiff was to be paid for its services and this amount was $1,114,558.19.

[15] Both Mr. Douglass and Mr. Lasley testified that the per lot credit which would be due if less than 371 lots were achieved was $9,703.50 per lot [i.e., $3,600,000.00 / 371 = $9,703.50].

[16] Although the first installment payment in the amount of $200,000.00 was due on December 22, 2006, HCDI did not make the payment until March 4, 2008. In accordance with the parties Accounting Agreement which provided for zero interest, TJL did not demand interest in addition to the principal payment.

[17] At no time prior to the commencement of this action did TJL ever demand interest or claim any interest was due in addition to the unpaid installments totaling $800,000.00.

[18] HCDI did not discover that the roads shown on the Simpson Preliminary Plat Map Plans could not be built as shown until it was so advised by it engineer at the time, Todd Whipple.

[19] HCDI did not discover that the Simpson Plat Map Plans only achieved 304 buildable lots until it retained Jay Bonnett in the spring of 2012 to review and analyze the Simpson Plans.

[20] HCDI made efforts to mitigate its damages. It made an offer to purchase the Lund property which was rejected. In addition it hired Todd Whipple, P.E. to attempt to relocate the main access road to the project.

II ADDITIONAL CONCLUSIONS OF LAW

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[1] Plaintiff is only entitled to recover statutory costs in this action because the parties' Real Estate Purchase and Sale Agreement contains no provision agreeing to an award of costs to the prevailing party in any dispute arising from said Agreement.

[2] Because the parties agreed that there would be zero interest payable on the unpaid balance of $1,114,558.19 agreed to in their December 22, 2006, Accounting Agreement, Plaintiff is not entitled to recover interest in this action and the Judgment to be entered herein shall bear interest at 0%. Alternatively, based upon Addendum "A" to the parties' Real Estate Purchase and Sale Agreement, Plaintiff is entitled to recover interest at the rate of 6% per annum on installments from the date they became due until paid and the Judgment to be entered herein shall bear interest at 6% per annum.

[2] Plaintiff breached the parties Real Estate Purchase and Sale Agreement by failing to provide Defendant with Preliminary Plat Map Plans which complied with the conditions of the preliminary plat approval and Defendant was damaged by this breach of contract.

[3] An implied warranty of good faith is part of the parties' agreement.

[4] An implied warranty fitness for a particular purpose is part of the parties' agreement and requires that the Simpson Preliminary Plat Map Plans contemplated as part of the consideration for the purchase price meet certain minimum standards. This implied warranty requires that the Simpson Preliminary Plat Map Plans be workable and satisfy the following minimum standards:

- the plans must comply with the conditions of the plat;
- the plans are accurate;
- the plans must be workable;
- roads can be built as depicted on the plat map plans;
- the number of lots shown can be achieved; and,
- the plans comply with applicable zoning and municipal code provisions.

[5] Plaintiff breached the implied warranties and Defendant was damaged in that it did not receive the benefit of its bargain.

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[6] In the December 22, 2006 Accounting Agreement the parties agreed that Defendant's benefit of the bargain was $1,114,558.19, which is the sum by which Defendant has been damaged by Plaintiff's breach of contract and breach of implied warranties.

[7] Defendant is entitled to offset its damages in the sum of $1,114,558.19 against the remaining unpaid balance of the parties agreement in the amount of $800,000.00 which results in net damages to Defendant of $314,558.19.

[8] Judgment should be entered herein in favor of Defendant and against Plaintiff for net damages of $314,558.19 together with reasonable attorney fees and statutory costs.

DONE IN OPEN COURT this 28th day of June, 2013.

HONORABLE JUDGE MARYANN C. MORENO

Presented By:

Herman, Herman & Jolley, P.S.

By: _____
J. Steve Jolley, WSBA #12982
Attorney for Harley C. Douglass, Inc.

Approved as to Form

Layman, Law Firm, PLLP

By: _____
Timothy B. Fennessy, WSBA # 13809
Bradley C. Crockett, WSBA #36709
Attorneys for Plaintiff

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APPEAL 319920/322084

APPENDIX -G-1

EXPLANATION OF SUBSTITUTE HOUSE BILL 822

This bill will amend the legal interest rate statute to state in clear language its commonly believed intent.

Unfortunately, a recent lower appellate court case, Topline Equipment Co. v. Stan Whitty Land, Inc., 31 Wn.App. 86 (1982) misconstrued the statute as an interest rate "disclosure" statute. The decision creates uncertainty as to the obligation of parties under some contracts.

This bill will not increase any interest rates charged or chargeable in any transaction. It will apply only to commercial contracts since Truth in Lending covers all consumer transactions. It only clarifies that the parties are obligated to pay in accordance with the terms of the contracts which they entered, even if the agreed upon rate is not explicitly stated.

RCW 19.52.010 and similar statutes in other states should apply only to debts where the parties have not even considered an interest rate.

Applying the statute to existing sales contracts, leases, or promissory notes causes hardship and possible loss to parties which have relied on its common meaning. Applying it to certain leases and to conditional sale contracts which were only recently held to be subject to the usury statute also works an unfairness to those commercial parties who have relied upon the normal and usual meaning of this and similar statutes.

SENATE BILL REPORT

SHB 882

BY House Committee on Financial Institutions & Insurance (originally sponsored by Representative Tanner)

Changing provisions relating to interest rates in the absence of an express agreement.

HOUSE COMMITTEE on Financial Institutions and Insurance

SENATE COMMITTEE on Financial Institutions

Senate Hearing Date(s): April 6, 1983

Senate Majority Report: Do pass. SIGNED BY Senators Moore, Chairman; Bender, Vice Chairman; Bottiger, Clarke, Jones, Sellar, Warnke.

Senate Staff: Gary Pedigo (753-7559); Blaine Gibson (754-2106)

SYNOPSIS AS OF APRIL 7, 1983

BACKGROUND:

Division Two of the Court of Appeals upheld a decision in Topline Equipment Co. v. Stan Whitty Land, Inc., 31 Wn. App. 86 (1982) that construed RCW 19.52.010 as an interest rate disclosure statute. Its application would be only to commercial contracts since consumer transactions require disclosure of interest rate under Truth of Lending Simplification and Reform Act (Title VI of PL 96-221).

SUMMARY:

Language clarifies that the parties are obligated at the date of the act retrospectively and prospectively in accordance with the terms of contracts without the interest rate being explicitly stated.

Fiscal Note: none requested

APPEAL 319920/322084

APPENDIX -G-2

CHAPTER XX.

[S. B. No. 66.]

TO FIX THE LEGAL RATE OF INTEREST.

AN ACT to fix the legal rate of interest.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. The legal rate of interest shall be eight per cent. per annum.

SEC. 2. All state, county, city or school warrants, or other warrants, drawn on public funds shall bear interest at a rate not exceeding the legal rate.

SEC. 3. Any rate of interest agreed upon by parties to a contract, except on warrants as named in section two of this act specifying the same in writing, shall be valid and legal.

SEC. 4. Judgments shall bear the legal rate of interest from date of the entry thereof.

SEC. 5. All acts or parts of acts in conflict herewith are hereby repealed.

Approved February 21, 1893.

APPEAL 319920/322084

APPENDIX -G-3

and the amount constituting a share; if not a joint stock company, then the terms of admission to membership.

3. The object for which the corporation is formed.

4. By what officers the affairs of said corporation shall be managed, and when such officers are to be elected, or, if appointed, when and by whom such appointments are to be made.

Passed the senate February 13, 1895.
Passed the house March 14, 1895.
Approved March 20, 1895.

CHAPTER CXXXVI.

[S. B. No. 303.]

ESTABLISHING LEGAL RATE OF INTEREST AND TO PREVENT USURY.

AN ACT to establish the legal rate of interest in the State of Washington, and to prevent usury.

Be it enacted by the Legislature of the State of Washington:

Interest rate determined, how

SECTION 1. Every loan or forbearance of money, goods or thing in action shall bear interest at the rate of seven per centum per annum where no different rate is agreed to in writing between the parties. The discounting of commercial paper, where the borrower makes himself liable as maker, guarantor or indorser, shall be considered as a loan for the purposes of this act.

Interest twelve per cent., when.

SEC. 2. Any rate of interest not exceeding twelve per centum per annum agreed to in writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve per centum per annum.

Warrants, legal rate of

SEC. 3. All state, county, city, town and school warrants, and all warrants or other evidences of indebtedness

drawn upon or payable from any public funds, shall bear interest at a rate not greater than eight per centum per annum, unless a less rate be specified therein.

Judgments, legal rate of

SEC. 4. 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 such contracts: *Provided*, That said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of seven per centum per annum from date of entry thereof.

Penalty for violations

SEC. 5. If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and the defendant shall recover costs; and if interest shall have been paid, judgment shall be for the principal, less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest; and the acts and dealings of an agent in loaning money shall bind the principal, and in all cases where there is illegal interest contracted for by the transaction of any agent, the principal shall be held thereby to the same extent as though he had acted in person. And where the same person acts as agent for the borrower and lender, he shall be deemed the agent of the lender for the purposes of this act.

SEC. 6. Nothing herein contained shall be construed as affecting any contract or obligation made or entered into prior to the taking effect of this act, nor the rate of interest provided by law for state, municipal or other public bonds.

Passed the senate March 2, 1895.

Passed the house March 14, 1895.

Approved March 20, 1895.

APPEAL 319920/322084

APPENDIX -G-4

HOUSE OF REPRESENTATIVES
STATE OF WASHINGTON

BILL REPORT

(as passed by committee)

47th session

Bill No.: HB 136

Companion Measure: SB 3066
Original: X
Amended:
Substitute:

Date: March 18, 1981
Staff: Peter Rothschild
Phone: 3-4845

BRIEF TITLE: (from Status of Bills)
Interest rates certain loans

SPONSOR(S): (note if agency; committee; executive request)
Lewis/Heck/Flanagan.

Reported by Committee on:	Recommendation:	Roll Call Vote:	FISCAL NOTE INFORMATION			
			Prepared	Attached	Requested	
Fin. Inst. & Ins. (14)	DP (9)	9 Y 0 N				none requested

Majority Report signed by:
DAWSON/Bickham/Lux/Bond/Dickie/McGinnis/
Nisbet/Sanders/Scott.

Minority Report signed by: (if requested)
none requested

ANALYSIS: (background/summary/effect of amendments or substitute, as applicable)

BACKGROUND:

When there is a loan of money but the parties have not agreed to the interest rate, the law sets the interest rate at six percent. This rate was adopted in 1895.

SUMMARY:

The interest rate on loans with an unspecified interest rate is raised from six to 12 percent.

☐ continued on reverse

Arguments presented for:
The interest rate was adopted by the Legislature in 1895 and it is time to raise it. Creditors will refuse to pay their bills because the maximum interest rate is much better than they can get anywhere else.

☐ continued on reverse

Arguments presented against:
none presented

☐ continued on reverse

Principal proponents:
Representative Lewis

Principal opponents:
none

Attachments: Committee Roll Call Vote Sheet

APPEAL 319920/322084

APPENDIX-G-5

HB 136

BRIEF TITLE: Increasing rates on certain loans.

SPONSORS: Representatives Lewis, Heck and Flanagan

HOUSE COMMITTEE: Financial Institutions and Insurance

SENATE COMMITTEE: Financial Institutions and Insurance

Staff: Dave Neale (753-3526); Gail Toraason (753-1838); Don Vogt (753-1828)
Committee Hearing Dates (Session): April 8, 1981

Majority Report (DP) signed by: Senators Sellar, Bauer, Bluechel, Bottiger, Clarke, Haley, Pullen and Rojahn

SYNOPSIS AS PASSED LEGISLATURE

BACKGROUND:

A statute enacted in 1895 provides that in the absence of a written agreement otherwise, loans bear interest at an annual rate of 6 percent. It is contended that in view of current interest rate levels, the 1895 statute should be amended to increase the rate of interest on these loans to 12 percent.

SUMMARY:

The annual rate of interest on loans for which there is no written agreement specifying a rate of interest is increased from 6 to 12 percent.

Appropriation: none
Revenue: none
Fiscal Note: none requested

VOTES ON FINAL PASSAGE:

House	87	3
Senate	44	4

EFFECTIVE: July 26, 1981

APPEAL 319920/322084

APPENDIX -G-6

1983
REVISED CODE
of
WASHINGTON

Containing all laws of a general and permanent nature enacted through September 10, 1983

Volume 2

Titles

18 Businesses and Professions
19 Business Regulations—Miscellaneous
20 Commission Merchants—Agricultural Products
21 Securities and Investments
22 Warehousing and Deposits
23 Corporations and Associations (Profit)
23A Washington Business Corporation Act
24 Corporations and Associations (Nonprofit)
25 Partnerships
26 Domestic Relations
27 Libraries, Museums, and Historical Activities
28A Common School Provisions
28B Higher Education
28C Vocational Education

Published by The Statute Law Committee under authority of Chapter 1.08 RCW

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c 21 § 1; 1929 c 216
RRS § 6866. Form-

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URY

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Interest
rates on pledged property: RCW 19.60.060.
rates on warrants: Chapter 39.56 RCW.
Retail installment sales of goods and services: Chapter 63.14 RCW.

19.52.005 Declaration of policy. RCW 19.52.005, 19.52.020, 19.52.030, 19.52.032, 19.52.034, and 19.52.036 are enacted in order to protect the residents of this state from debts bearing burdensome interest rates; and in order to better effect the policy of this state to use this state's policies and courts to govern the affairs of our residents and the state; and in recognition of the duty to protect our citizens from oppression generally. [1967 ex.s. c 23 § 2.]

Severability——1967 ex.s. c 23: "If any provision of this chapter is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the chapter and the applicability thereof to other persons and circumstances shall not be affected thereby." [1967 ex.s. c 23 § 8.]

Savings——1967 ex.s. c 23: "The provisions of this 1967 amendatory act shall not apply to transactions entered into prior to the effective date hereof." [1967 ex.s. c 23 § 9.]

19.52.010 Rate in absence of agreement——Application to consumer leases. (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: *Provided*, That with regard to any transaction heretofore or hereafter entered into subject to this section, if an agreement in writing between the parties evidencing such transaction provides for the payment of money at the end of an agreed period of time or in installments over an agreed period of time, then such agreement shall constitute a writing for purposes of this section and satisfy the requirements thereof. The discounting of commercial paper, where the borrower makes himself liable as maker, guarantor, or indorser, shall be considered as a loan for the purposes of this chapter.

(2) A lease shall not be considered a loan or forbearance for the purposes of this chapter if:

(a) It constitutes a "consumer lease" as defined in RCW 63.10.020; or

(b) It would constitute such "consumer lease" but for the fact that:

(i) The lessee was not a natural person;

(ii) The lease was not primarily for personal, family, or household purposes; or

(iii) The total contractual obligation exceeded twenty-five thousand dollars. [1983 c 309 § 1; 1983 c 158 § 6; 1981 c 80 § 1; 1899 c 80 § 1; RRS § 7299. Prior: 1895 c 136 § 1; 1893 c 20 § 1; Code 1881 § 2368; 1863 p 433 § 1; 1854 p 380 § 1.]

Reviser's note: This section was amended by 1983 c 158 § 6 and 1983 c 309 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Severability——1983 c 158: See RCW 63.10.900.

19.52.020 Highest rate permissible——Setup charges. Any rate of interest not exceeding the higher of twelve percent per annum or four percentage points above the equivalent coupon issue yi the Federal Reserve Bank of San F erage bill rate for twenty-six week termined at the first bill market during the preceding calendar montl ing by the parties to the contract, sl person shall directly or indirectly money, goods, or things in action, o any greater interest for the loan or money, goods, or things in action: *Pi* loan of money in which the funds a ceed the sum of five hundred doll may be charged and collected by tl setup charge shall not be considered *Provided further*, That such setup c ceed four percent of the amount of fifteen dollars, whichever is the les loans of under one hundred dollars ceeding four dollars may be so charg

Any loan made pursuant to a com an interest rate permitted at the time made shall not be usurious. Credit e an open-end credit agreement upo computed on the basis of a balanc standing during a billing cycle shall the rate at which interest is charged any day during the billing cycle. [1 ex.s. c 23 § 4; 1899 c 80 § 2; RRS § 136 § 2; 1893 c 20 § 3; Code 1881 § 2; 1854 p 380 § 2.]

Severability——1981 c 78: "If any provision cation to any person or circumstance is held i the act or the application of the provision to o stances is not affected." [1981 c 78 § 7.]

Severability——Savings——1967 ex.s. c 2 RCW 19.52.005.

Interest on judgments: RCW 4.56.110.

19.52.030 Usury——Penalty u tract——Costs and attorneys' fees. (of interest than is allowed by statute for or received or reserved, the contr ous, but shall not, therefore, be void. such contract proof be made that grea has been directly or indirectly contrac reserved, the creditor shall only be ent pal, less the amount of interest accru rate contracted for; and if interest sh the creditor shall only be entitled to twice the amount of the interest p amount of all accrued and unpaid debtor shall be entitled to costs and neys' fees plus the amount by which paid under the contract exceeds the an creditor is entitled: *Provided*, That th commence an action on the contract sions of this section if a loan or forbea corporation engaged in a trade or bu poses of carrying on said trade or busi also, in connection with such loan o creation of liability on the part of a na property for an amount in excess of

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APPENDIX -H

Inside the Legislature

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RCW 4.56.110
Interest on judgments.

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.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3)(a) Judgments founded on the tortious conduct of a "public agency" as defined in RCW 42.30.020 shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(b) Except as provided in (a) of this subsection, judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the prime rate, as published by the board of governors of the federal reserve system on the first business day of the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(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. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is

also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090.

[2010 c 149 § 1; 2004 c 185 § 2; 1989 c 360 § 19; 1983 c 147 § 1; 1982 c 198 § 1; 1980 c 94 § 5; 1969 c 46 § 1; 1899 c 80 § 6; 1895 c 136 § 4; RRS § 457.]

Notes:

Application -- Interest accrual -- 2004 c 185: See note following RCW 4.56.115.

Application -- 1983 c 147: "The 1983 amendments of RCW 4.56.110 and 4.56.115 apply only to judgments entered after July 24, 1983." [1983 c 147 § 3.]

Effective date -- 1980 c 94: See note following RCW 4.84.250.