JUN 02 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By________

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

BRIEF OF RESPONDENT

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APPENDIX

A. Exhibit 1; D-101 - Addendum "B" to Purchase and Sale Agreement of June 2004 and D-102 Addendum "B" to Purchase and Sale Agreement of June 16, 2004

I. INTRODUCTION

Over the course of time, Respondent T & J Landco Co, LLC, (hereinafter "TJ Landco" or "Respondent") fully performed all of its obligations with regard to the biggest land development project in its roughly 10 year existence. All that remained was being paid for its services. In December of 2006, TJ Landco agreed that Appellant Harley C. Douglas, Inc. (hereinafter "HCDI" or "Appellant") could have 5 years to complete the payment.

However, HCDI has now wrongfully withheld 4 payments of $200,000 as they became due and owing. At trial, HCDI tried, unsuccessfully, to assert claims of offset, affirmative defenses and/or counterclaims. Having having lost at trial, Appellant attempts to convince this Court to re-write the Contract to add a clause providing it a way to avoid pre and post judgment interest on the $800,000 judgment entered by the trial court. To that end, HCDI argues from unsupported assertions that are contrary to the uncontested Findings of Fact below.

Additionally, it seeks to have this Court overrule the trial judge's reasoned decision to award contractually proper fees for efficient and effective legal work performed by Gonzaga Law

School students employed as law clerks. Six full years have now passed since TJ Landco last received payment on HCDI's debt and it is time for equity to be done in this case.

Respondent respectfully submits that the trial court's decisions should be affirmed in all respects.

II. SUPPORT FOR TRIAL COURT'S DECISIONS

1. The trial court properly determined that based on the agreement of the parties, 5 equal, annual installments were to be paid each year from December 2007 forward, with the final payment from HCDI to TJ Landco to be made "on or about December 22, 2011."
2. The trial court properly denied HCDI's proposed alternative Finding 18 because the trier of fact found that by the parties' agreement, the final $200,000 contracted installment payment was to be made on or about December 22, 2011.
3. The trial court properly awarded $144,000 in prejudgment interest on installments wrongfully withheld from TJ Landco on December 22, 2008, 2009 and 2010 because HCDI breached the agreement each time it wrongfully withheld payments. The amounts owed by HCDI were readily determinable and TJ Landco was entitled to the funds on each listed date.

4. The trial court properly determined in Conclusion 6 that prejudgment interest in this matter, awarded as expectation damages for serial breaches of contract, can be assessed at a rate of 12 percent per annum.
5. The trial court properly denied HCDI's proposed conclusion that prejudgment interest be calculated at zero percent.
6. The trial court properly awarded $289,709.60 in prejudgment interest calculated at the statutory interest rate of 12% from the date each payment became due to the date judgment was entered in favor of TJ Landco as expectation damages resulting from HCDI's breaches.
7. The trial court correctly interpreted the law in awarding interest on the judgment at 12 percent per annum.
8. The trial court properly addressed HCDI's objection to conclusion seven.
9. The trial court properly denied HCDI's proposed alternative conclusion seven stating that the judgment should accrue interest at zero percent despite the breach of agreement.
10. The trial court properly excluded language in the judgment that interest was to accrue at zero percent.

11. The trial court properly exercised its discretion in awarding TJ Landco's attorney's fees for services performed by legal interns.

III. LEGAL UNDERPINNINGS OF PROPER DETERMINATIONS BELOW

1. Conclusion number six, states that TJ Landco is entitled to prejudgment interest at 12 percent per annum. That conclusion is firmly supported by the Court's Findings that HCDI wrongfully withheld readily determinable amounts when they came due on specific dates as outlined in Findings of Fact 18, 21, 22, 23, 24 and 25.
2. Trial court's Finding 18 is supported by substantial evidence and the Court as the trier of fact determined that the date for the final payment under the account stated was December 22, 2011. Further, this Finding is not necessary to affirm the award of prejudgment interest against HCDI for its wrongful refusal to pay sums that were readily determinable as they became due and owing under the Account Stated.
3. The trial court's Findings support an award of prejudgment interest on installments that became due prior to December 22, 2011, but which HCDI wrongfully withheld from TJ Landco. Those installments were for sums due and that were readily

determinable without reference to anything outside the agreement of the parties.

4. The trial court awarded prejudgment interest for liquidated sums that were due but not paid. In such circumstances, the court may set the interest rate at the statutory rate of 12%, particularly when the terms of the contract that HCDI breached contained no reference to damages following breach.

5. Where the parties did not agree to a default interest rate and the trial court awarded prejudgment interest as a measure of damages, the trial court does not abuse its discretion in awarding prejudgment interest at the statutory rate of 12%.

6. The trial court's conclusion (number 7) that TJ Landco is entitled to post judgment interest at the statutory rate of 12 percent is supported by Findings that HCDI breached the agreement on payments owed.

7. The trial court properly exercised its discretion when it awarded attorney fees for work performed by legal interns when the record demonstrates that the interns were qualified to perform legal work based on their education, were supervised by licensed attorneys and the time billed was for legal work.

IV. STATEMENT OF THE CASE

A. The Parties agreement and HCDI's breach

TJ Landco, LLC is a single member LLC, owned and operated by Tod Lasley. Mr. Lasley grew up in Bickelton, Washington and worked at the Les Schwab store there following high school and a 1 ½ year attempt at getting his college degree. (RT 100: 11 to 101: 18). After obtaining his real estate license, Mr. Lasley worked selling property for several years. (RT 101: 20 to 107: 4). TJ Landco was formed in 1993. (RT 107: 5-11).

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

HCDI is a Washington Corporation owned by Harley C. Douglass, an experienced developer with more than 20 years in the field and real property inventory valued in excess of $9,500,000. (RT 560: 21-23; 599:2 to 600:2). After Harley C. Douglass reviewed the proposed project, the parties entered into a Real Estate Purchase and Sale

Agreement whereby HCDI agreed to pay $3.6 million for 94 acres of undeveloped property. (CP 44). The deal was subject to TJ Landco obtaining preliminary plat approval from the City of Spokane that was acceptable to HCDI. (CP 49). The Agreement also contained a clause that the prevailing party in any litigation related to enforcement of the contract shall be entitled to reasonable attorneys' fees associated with the litigation. (CP 47). There was no provision for an interest rate in the event of default in Respondent's payment obligations. (CP 44-49).

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

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

On December 22, 2006 TJ Landco and HCDI met to discuss the final amount owed to TJ Landco on the project. HCDI prepared an Accounting which was signed by both parties. In that document, the parties recognized that HCDI still owed $1,114,558.19 to TJ Landco. HCDI paid TJ Landco $114,558.19 on that day (CP 70) and the

remaining amount of $1,000,000 was acknowledged as a valid debt to be paid in 5 equal, annual installments of $200,000 per year. (CP 68; RT 298: 4-24). The money was being paid for "the preliminary plat" and there was no discussion, negotiation or agreement for a default interest rate. (RT 578: 17-25; RT 574: 14-16).

In December 2007, TJ Landco requested payment of the first $200,000. HCDI delayed payment until March 8, 2008, at which time TJ Landco accepted the payment. (CP 73).

On December 22, 2008, HCDI failed to make the $200,000 installment payment as required (CP 588). HCDI delayed payment but did not provide any explanation for the failure to pay the installment as it came due. (CP 589)

On December 22, 2009 HCDI failed to make the next $200,000 installment when it came due. (CP 588) Eventually, Harley C. Douglass refused to speak with Tod Lasley and to provide any explanation as to why he had not paid the installments as they came due. (CP 524; 589)

Mr. Lasley made several attempts to contact Mr. Douglass to discuss the past due payments. Mr. Douglass refused to meet with Mr. Lasley. Mr. Douglass, or someone on his behalf refused to accept a certified letter that TJ Landco sent to HCDI.

In February of 2010, TJ Landco filed an action against HCDI in an attempt to enforce the terms of the agreement. (CP 3-13)

HCDI also failed to make the $200,000 installment payments that came due on December 22, 2010 and December 22, 2011. To date, HCDI has not paid anything to retire any portion of the $800,000 debt that is owed. Such money continues to be wrongfully withheld from TJ Landco, which has virtually killed the business.

B. Trial Proceedings.

In response to the TJ Landco's complaint, HCDI alleged that TJ Landco had entered into an accord and satisfaction because Harley C. Douglass had written "paid in full" on the check that he sent in March of 2008. This affirmative defense was dismissed on a motion for summary judgment that was not appealed.

After the conclusion of the trial, the court issued an oral opinion outlining its Findings and conclusions in the case. (RT 843-866). The court then issued Findings of Fact and Conclusions of Law, which incorporated her prior oral ruling. (CP 581-591).

The court found that TJ Landco had fulfilled its obligations under the agreement (CP 590) and that HCDI was contractually obligated to make $200,000 payments on December 22 in 2008, 2009, 2010 and 2011. (CP 588-589). It is undisputed that HCDI refused to

make such payments, and the court concluded that HCDI had breached the agreement. (CP 590, Conclusion 2).

The court also found that Mr. Douglass's testimony at trial contradicted previously provided declarations, that his trial testimony was evasive, and that his actions during the course of this dispute "affected his credibility with regard to portions of his testimony in this particular case." (CP 589; Findings of Fact 27, 28, 29, 30 & 31).

The court further found that TJ Landco had been denied use of the $800,000 that HCDI owed to TJ Landco from the date each installment became due and went unpaid. (CP 589; Finding of Fact 25). Based on these Findings, the court awarded TJ Landco prejudgment interest, as follows:

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

(RT 891:1-11 Emphasis added).

C. Attorney Fee Award

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

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

On October 14, 2013 the trial court issued a memorandum decision on the attorney fee application. The trial court addressed the request for attorney fees for times performed by non-lawyers. The court specifically indicated that it considered the *Absher* criteria. The court disallowed the request for fees related to paralegals because although the billing records reflected work that was legal in nature, there was "no indication as to the qualifications of the paralegals and paraprofessionals from either firm." (CP 926-927). As for the interns, the court concluded that because they were properly supervised and their qualifications were properly established, therefore "the fees for their services are allowable." (CP 926-927)

V. SUMMARY OF LAW AND ARGUMENT

The trial court properly awarded prejudgment interest at the statutory rate to TJ Landco as a measure of damages based its on Findings of Fact that HCDI wrongfully withheld payment of liquidated sums that were readily determinable without opinion or reference to anything outside of the documents.

Additionally, the trial court properly applied RCW 4.56.110 to award post judgment interest at the statutory rate of 12% where the court concluded that HCDI had breached its contractual obligations. Further,

the Agreement did not provide a default interest rate and as a result, the terms of the contract did not govern the post breach interest rate(s).

HCDI's arguments on prejudgment and post judgment interest are not predicated upon the Court's determination of the facts of the case and are inaccurate statements of the law. The uncontested Findings of the trial court include determinations that HCDI failed to pay TJ Landco four $200,000 payments that were due under the contract on December 22, 2008, December 22, 2009, December 22, 2010 and December 22, 2011. Under the law, the trial court properly awards prejudgment interest on liquidated sums as an element of damages unless the court determines that the equities require otherwise. Likewise, under RCW 4.56.110 the imposition of post judgment interest is mandatory. The purpose of both prejudgment and post judgment interest is to compensate for denying the time value of money wrongfully withheld by HCDI.

Finally, the court properly awarded TJ Landco attorneys' fees, including time spent by interns who were qualified to perform supervised services and did provide those legal services in this case. There has been no appeal of the 12% post judgment interest rate applied to the award of attorneys' fees.

VI. ARGUMENT

While HCDI has presented many contentions on appeal related to prejudgment interest, its major argument is that the trial court could not award prejudgment interest at 12% because the contract between the parties provided that the balance owed would not bear interest. This argument fails the contract at issue did not contain a written term for a default interest rate. Further, prejudgment interest was not based on the terms of the contract, but was awarded as a measure of damages since the sums HCDI owed were liquidated amounts due on specific dates and wrongfully withheld by HCDI. As a result, the court correctly applied the statutory interest rate to apply in the event of any default.

A. Response to Legal Issue Number 1: The Trial court's Conclusion of Law No. 6 is supported by the undisputed evidence, several Findings of Fact and non-appealed Conclusions of Law Numbers 1 through 5 as an appropriate way to measure the damages caused by HCDI's breach of agreement to make installment payments totaling $800,000 due and owing to TJ Landco

There is a difference between a contractual right to interest and prejudgment interest as a claim for expectation damages following breach of contract. *Farm Credit Bank v. Tucker*, 62 Wn. App. 196, 200, 813 P.2d 619 (Div. 3 1991). When the contract specifies an interest rate applicable to the debt and the creditor claims interest as a contractual right, the court has no discretion to deny interest because "where it is

reserved expressly in the contract...it becomes part of the debt." *Id.* (*citing Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176, 3 S. Ct. 570, 572, 28 L. Ed. 109 (1884)). However, where the claim is for prejudgment interest by way of expectation damages, it is awarded to compensate for denying the use value of money wrongfully retained by the defendant, not as a contractual right. *Id.*

1. Standard of Review

Prejudgment interest on a liquidated claim is an element of damages grounded in sound public policy. *Colonial Imps. v. Carlton N.W., Inc.*, 83 Wn.App. 229, 242, 921 P.d2d 575 (1996). However, a court has authority to deny prejudgment interest where there are equitable grounds for denial. *Farm Credit Bank v. Tucker*, 62 Wn. App. 196, 200, 813 P.2d 619 (Div. 3 1991). A trial court's award of prejudgment interest is reviewed under the abuse of discretion standard. *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 300, 991 P.2d 638 (1999); *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 775, 115 P.3d 349 (2005). A trial court abuses its discretion when its decision is arbitrary, manifestly unreasonable, or based upon untenable grounds. *Mehlenbacher v. DeMont*, 103 Wn.App. 240, 2501-51, 11 P.3d 871 (2000) (quoting *Atwood v. Shanks*, 91 Wn.App. 404, 409, 958 P.2d 332 (1998)). Stated another way, appellate courts give

great weight to a trial court's exercise of discretion. *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986).

2. The court concluded that TJ Landco is entitled to prejudgment interest at the rate of 12 percent as a measure of damages based on appropriate Findings that the sums owed were liquidated amounts due on specified dates.

The trial court awarded TJ Landco prejudgment interest in light of the fact that sums claimed were liquidated amounts that were owed on specified dates. Courts award prejudgment interest in contract litigation when one party to an agreement wrongfully retains funds rightfully belonging to the other party. *Crest Inc. v. Costco Wholesale Corp.,* 128 Wn.App. 760, 775, 115 P.3d 349 (Div 1, 2005). The court in *Crest* stated: "Prejudgment interest is a make-whole remedy which is grounded in the "sense of justice in the business community . . . that he who retains money which he ought to pay to another should be charged interest on it."" *Id at 775.* Prejudgment interest is awarded from the date when the claim is liquidated. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). A claim is liquidated when it is for a fixed sum or the evidence provides a basis upon which recovery could be computed with exactness. *Id.*

Here, the court properly applied the law on prejudgment interest to the facts. HCDI incorrectly asserts that Finding 18 is the only Finding pertaining to the issue of the prejudgment interest. The trial court's award of prejudgment interest at 12% was supported by Finding 18 along with Findings 21-25, which stated that four installments of $200,000 became due and payable to TJ Landco for four consecutive years on December 22, 2008, 2009, 2010 and 2011. The Court also found that these amounts were readily determined without reference to anything outside the documents available to the parties and that "TJ Landco was denied the use of the money withheld by HCDI." Based on these Findings, the trial court properly concluded that TJ Landco was entitled to prejudgment interest as a measure of expectation damages from the date each installment was due until the date judgment was entered.

3. HCDI's objection to Conclusion Six was properly addressed because prejudgment interest was awarded as an equitable remedy for breach of contract and the parties contract does not include a written term covering interest in the event of a default in payment by HCDI.

The trial court's award of prejudgment interest was based on HCDI's breach of the contract. Since the sums owed were liquidated, it was appropriate for the trial court to address HCDI's objection to

Conclusion 6 and to deny the alternative proposed conclusion that suggested zero percent or alternatively six percent interest.

As HCDI mentioned in its opening brief, the trial court clearly indicated that the prejudgment interest was not awarded based on contract, rather it was awarded as a liquidated damage after the underlying contract had been breached as to each payment. Yet, HCDI argues that the trial court erred by not referencing the pre-maturity interest rate established by the underlying agreements. HCDI suggests that: "the court actually swept aside the parties' negotiated bargain on zero interest by assuming unsupported facts about the parties' agreement to zero interest while installment payments are being made." The facts, however, do not reveal any agreement between the parties that HCDI could simply skip any payment without being asked to pay for the damage that such default would cause TJ Landco. There is no evidence that anyone believed that the $114,588.19 payment was "early" or considered payment "in exchange" for a reduced interest rate. In fact, there is no evidence of any negotiation in that regard. The language at issue simply sets forth the $1,000,000.00 balance owed by HCDI with provision that it would be paid in $200,000 increments over 5 years without interest. Not one shred of evidence was introduced by HCDI to show that this was a written term intended to avoid the statutory interest

rate after default. That argument, which is just that, was never presented at trial.

Further, the court did not award TJ Landco any interest on the installment payments until after each payment was due and owing; after HCDI wrongfully breached the agreement and refused to pay. The only party attempting to sweep aside the bargain is HCDI. In its uncontested conclusion of law, the court stated: "HCDI breached its agreement with TJ Landco by failing to pay $800,000 in installment payments as they came due." (Conclusion 2). Accordingly, the trial court properly denied HCDI's proposed alternative Conclusion of Law because it was based on an inaccurate application of the law to these facts.

B. Response to HCDI's Legal Issue Number 2: The portion of the trial court's Finding 18 that references "December 22, 2011" is related to the calculation of the date on which the 5th payment of $200,000 became due.

1. Standard of Review

When Findings of Fact and Conclusions of Law are entered following a bench trial, appellate review is limited to determining whether the Findings are supported by substantial evidence and, if so, whether the Findings support the trial courts conclusions of law and judgment. *Buck Mountain Owners' Ass'n v. Prestwich,* 174 Wn.App. 702, 713, 308 P.3d 644 (2013). Appellate courts defer to the trier of fact

for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidy,* 147 Wn.2d 78, 87, 51 P.3d 793 (2002). There is a presumption in favor of the trial court's Findings, and the party claiming error has the burden of showing that a Finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.,* 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Appellate courts are deferential in their review of Findings of Fact made by the trial court. Furthermore, unchallenged Findings of Fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 810, 808, 828 P.2d 549 (1992).

2. The uncontested evidence established that the final payment owed to TJ Landco was due on December 22, 2011

The parties entered into an account stated on December 22, 2006. In that agreement, it was recognized that HCDI owed TJ Landco $1,114,558.19. HCDI paid TJ Landco $114,558.16 that day and committed to pay off the balance owed by making annual payments of $200,000 per year for five years. Thus, the final payment of $200,000 would become due on or about December 22, 2011.

Additionally, TJ Landco's representative Tod Lasley testified about the agreement as follows:

Lasley: So that day, I received a -- a check for 114,588. And then the agreement was that the balance would be paid -- that the balance of the million dollars would be paid in -- in five payments of $200,000 per year.

Counsel: So each anniversary you were entitled to $500,000?

Lasley: Correct.

Counsel: Pardon me. $200,000?

Lasley: 200,000, yes. And the -- the 22nd of December.

Counsel: For the succeeding how many years?

Lasley: For the next five years.

(RT 298:5-14). Mr. Lasley's testimony, which was not controverted, reflects the understanding that HCDI would pay TJ Landco $200,000 each year on December 22 for five years, which makes the final payment due and owing on December 22, 2011.

Viewing the evidence and testimony in a light most favorable to TJ Landco, the trial court's Finding 18 which states:

> 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 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."

is supported by substantial evidence. Accordingly, the trial court properly addressed HCDI's proposed alternative to Finding 18.

3. Harmless Error

Alternatively, Washington courts have established that any defect in the Finding of fact which does not materially affect the merits of the controversy is harmless error, not grounds for reversal. *W. L. Reid Co. v. M-B Contractor Co.,* 46 Wn.2d 784, 791, 285 P.2d 121, 125,(Wash. 1955); citing *In re Bailey's Estate*, 178 Wash. 173, 34 P. (2d) 448 (1934). Below, the trial court concluded that prejudgment interest was proper because the individual payments owed were a liquidated amount due on a specific day based on the contractual agreement of the parties. The interest awarded was at the statutory rate beginning after each failure by HCDI. The purpose of the award is by way of compensation for expectation damage to the non-breaching party. Accordingly, while Finding 18 may be central to HCDI's appeal, it was not central to the trial court's award of prejudgment interest. The date that the final amount owed was to be paid in full was only tangentially related to the due dates for each $200,000 installment. Each wrongful withholding of payment commenced a new damage to Plaintiff.

C. <u>Response to HCDI's Legal Issue Number 3:</u> The trial court's Findings support the award for prejudgment interest in the amount of $144,000 prior to December 22, 2011 because the trial court found that HCDI wrongfully withheld annual installment payments that were owed to TJ Landco.

1. Standard of Review

As detailed previously in section VI B 1, Findings are entitled to a presumption and the opposing party bears the burden of proving lack of substantial evidence. Furthermore, unchallenged Findings of Fact are deemed true on appeal.

2. The award of $289,705 in prejudgment interest is consistent with Finding 18.

As articulated above, the trial court properly awarded prejudgment interest based on its determination that TJ Landco's claims were for liquidated amounts that were due on determinable dates. This award is based on the entirety of the record, including without limitation Findings 21-25. Finding 18 consistently referenced the Account Stated (P-19) which acknowledged that the $1,000,000 balance was to be paid to TJ Landco in five annual installments. The agreement was signed on December 22, 2006, the first payment of $114,558.19 was made that day. Thus, the final payment became due on December 22, 2011. Accordingly, Finding 18 is consistent with the award of prejudgment interest from December 22 of each year (2008, 2009, 2010, 2011) as each successive refusal resulted in increased economic damage to TJ Landco.

It is important to point out that HCDI's proposed interpretation of the contract would result in an absurd outcome. Specifically, without one

shred of evidence, HCDI asks this court to declare that it could hold onto the contractually owed $1,000,000 without penalty at least for 5 years. This runs directly contrary to the established law that "Prejudgment interest is a make-whole remedy which is grounded in the "sense of justice in the business community . . . that he who retains money which he ought to pay to another should be charged interest on it."" *Id.* (*quoting Colonial Imports v. Carlton N.W., Inc.*, 83 Wn. App. 229, 242, 921 P.2d 575 (Div. 1, 1996)).

D. <u>Response to HCDI's Legal Issue Number 4:</u> The prejudgment interest was awarded as a measure of damages following each breach and wrongful withholding of $200,000 by HCDI.

There is a difference between a contractual right to interest and prejudgment interest as a claim for expectation damages. *Farm Credit Bank v. Tucker*, 62 Wn. App. 196, 200, 813 P.2d 619 (Div. 3 1991). Where the claim is for prejudgment interest on expectation damages it is awarded to compensate for loss of the use value of money wrongfully detained by the defendant. *Id.* HCDI's appeal is based on the false assertion that the trial court's award of prejudgment interest arose out of the contract. RCW 19.52.010 was not the basis for the trial court imposing prejudgment interest since the contract does not contain a clause that addresses interest in the event of default.

Nonetheless, as outlined below, even if RCW 19.52.010 was the basis, the proper interest rate after default would be 12%.

1. RCW 19.52.010 is one source that authorizes prejudgment interest in a breach of contract case

If the court awarded interest under the contract, then the statutory default interest rate specified in RCW 19.52.010 would still apply. The contract entered into by HCDI and TJ Landco did not specify a default interest rate. RCW 19.52.010 applies to transactions, agreed to in writing, that "provide[s] for the payment of money at the end of an agreed period of time or in installments over an agreed period of time."

"Absent a written agreement regarding interest, RCW 19.52.010 imposes a statutory rate." *Mehlenbacher*, 103 Wn. App. 250, 251, 11 P.3d 871 (Div. 2, 2000). Contrary to HCDI's assertion, where a contract does not specify a default interest rate, the statutory default interest rate is imposed once a default has occurred. *Peoples Nat'l Bank v. Nat'l Bank of Commerce*, 69 Wn.2d 682, 420 P.2d 208 (1966). This remains the rule even where, just as in the case at hand, a contract clearly specifies that the applicable interest rate is zero percent prior to default. *Mehlenbacher* at 250. Further, 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. *Peoples*

Nat'l Bank v. Nat'l Bank of Commerce, 69 Wn. 682, 694, 420 P.2d 208 (1966). While this was not an express holding in *Peoples*, it is relevant that the Washington Supreme Court identified that the parties had agreed to an interest rate in a contract, but then awarded prejudgment interest at the statutory rate following the breach in that matter. *Id.*

In *Mehlenbacher*, the parties entered into a promissory note specifying that the outstanding balance would bear interest at zero percent. 103 Wn. App. at 250. The agreement contained a provision where the parties could enter the rate that would apply after maturity of the note, but the blank was not filled in by the parties. The trial court awarded prejudgment interest pursuant to RCW 19.52.010 at the maximum statutory rate of 12 percent. *Id.* at 251. The appellate court affirmed, because the contract did not specify a default interest rate and the 12 percent statutory default interest rate imposed by RCW 19.52.010 becomes the appropriate default rate. *Id.* at 251. The language in this case is similar to that used in *Mehlenbacher*. Similarly, in the case at bar, if TJ Landco had requested prejudgment interest as a contractual right, and the court had so awarded it, the implied intent to use the statutory rate in absence of a clear written agreement to the contrary would result in application of the 12 percent rate following each default.

In fact, the court in Mehlenbacher directly addressed HCDI's current argument stating:

> The two cases the DeMonts [Appellants] relied upon do not support their position that the interest rate should be zero. *Petroscience*...however, interprets Texas statutes, not Washington statutes. *Peoples Nat'l Bank v. Nat'l Bank of Commerce,* 69 Wn.2d 682, 420 P.2d 208 (1966), held that when parties executed multiple promissory notes, some with and some without default interest rates, the court could imply that the parties intended the statutory rate of interest to apply to those notes not specifying a rate. The DeMonts distinguish *People's National Bank* as it involved multiple promissory notes, not just one. But the *People's National Bank* court applied the statutory interest rate to notes containing no stated rate of interest on default. And that is precisely what the trial court did here. **We affirm the award of 12 percent interest after default on the note.**

Mehlenbacher v. DeMont, 103 Wn. App. at 251. It is a settled issue of law in Washington that unless the contracting parties expressly agree to a default interest rate, the court is free to impose the statutory rate on the wrongfully withheld balance due.

2. A plain reading of the RCW 19.52.010 demonstrates that for a contractual rate to apply the parties must express an agreement to that rate.

The statute raised by HCDI provides that the court may award "interest at a rate of twelve percent per annum where no different rate is agreed to in writing between the parties." RCW 19.52.010(1). HCDI is asking the court to read into the parties agreement a term that is not present, a default interest rate. HCDI readily admits that the contract

between the parties in this case makes no mention of a default interest rate by the way it attempts to frame the alleged issue of first impression "...must they also agree on additional default rate...?" (Appellant's Brief page 2). Notably, HCDI cites to no Washington case law upholding a trial court's decision to imply a default interest rate other than what is provided by the statute when none was expressly stated by the parties in the agreement. The plain meaning of RCW 19.52.010(1) is that if the parties have not expressly agreed in writing to an interest rate to address default, then the statutory rate (currently 12%) is the appropriate rate to apply.

3. The legislative history is unnecessary, but further supports the conclusion that the court should supply a default interest rate should the parties fail to include this term in a contract.

Inherent in HCDI's argument is an assumption that the parties agreed in writing to waive any interest in the event of default. This position is taken in the total absence of evidence. Thus, there is no need for this court to review the legislative history provided.

Nonetheless, The legislative history demonstrates that the statute was revised to address an appellate court decision that ruled interest rates must be disclosed in writing in order to be valid. Nowhere in the legislative history provided by HCDI does it address the situation of

default interest rates. Accordingly, the legislative history does not support the proposition that a trial court should impose implied terms to written agreements related to default interest rates.

4. The reported case law is clear that the trial court does not abuse its discretion by imposing the statutory rate as the default interest rate when a contract fails to establish a default rate.

Contrary to HCDI's claim that "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," the court in *Mehlenbacher* upheld a trial court's imposition of the statutory rate of 12% in a case where the underlying note provided for an interest rate of 0%. *Mehlenbacher,* 103 Wn. App. at 249-251, 11 P.3d at 876-877 (2000). The court relied on the Washington Supreme Court decision of *Peoples Nat'l Bank v. Nat'l Bank of Commerce*, 69 Wn.2d 682, 420 P.2d 208 (1966).

HCDI next cites and explains a number of cases for its position that it is only "appropriate to impose the statutory rate because the parties had not agreed upon any rate of interest." Appellants brief at pg 26-30. Respondents agree that the courts in those cases properly imposed the statutory interest rate in the absence of a written agreement. However, none of those cases support HCDI's position that the court

must avoid using the statutory rate in the event of a default when the parties only agreed to a prematurity interest rate.

HCDI argues that the decision in *McDowell v. The Austin Company*, 39 Wn.App. 443, 693 P.2d 744 (Div. 1, 1985), provides "clear authority" in support of HCDI's interpretation of the statute. Appellant's Brief at page 28. However, a review of the *McDowell* case reveals that the facts in that case are markedly different from the present situation. Notably, the agreement in *McDowell* contained a provision establishing prejudgment interest.

Specifically, *McDowell* involved interpretation of a Stand Still agreement, whereby the parties agreed to reserve for a later determination which party would bear the ultimate responsibility for paying a settlement agreement that had been reached. The Stand Still Agreement stated "the prevailing party shall be entitled to interest on the amount of their [sic] prior contribution, or portion thereof, at the rate established by RCW 19.52.010…" *Id.* at 446. At the time the agreement was entered RCW 19.52.010 provided that the statutory rate was 6% but before the issue was resolved the statutory rate increased to 12%. *Id.* at 451. On appeal, the court determined that because the parties had expressly agreed to the rate by referencing RCW 19.52.010 rather than stating a specific figure, like 6%, that the claim bore interest at the

statutory rate of 6% from the date of the agreement until the date the statutory rate changed, and from that date until judgment was entered, it bore interest at the higher statutory rate of 12%. *Id.* at 451-452.

Factually distinct from the present case, *McDowell* nonetheless demonstrates that courts will follow the clear terms of a contractual agreement. Thus, the first analysis is to determine if the parties agreed to a default interest rate. In the case at bar they did not. When the contract does not include a default rate, the court is empowered to use the Statutory rate provided by the Legislature.

Chan v. Smider

As HCDI conceded, this case does not address the issue raised in this appeal. However, it does stand for the proposition that a trial court has latitude to exercise discretion in the award of prejudgment interest, the purpose of which is to put the nonbreaching party in the position it would have been in had the other party performed. *Chan v. Smider*, 31 Wn.App. 730, 644 P.2d 727 (Div. 1, 1982).

HCDI breached its contractual obligations when it withheld funds that TJ Landco would have otherwise been able to use and invest. Just as in *Chan*, the trial court properly exercised its discretion by awarding TJ Landco 12% on the funds that HCDI failed to pay.

State v. Trask

This case is also distinguishable in that the parties expressly agreed that "the amount by which the jury's award exceeded $2.5 million would bear simple interest at 12 percent per annum." *State v. Trask*, 98 Wn.App. 690, 692-693, 990 P.2d 976 (Div. 2, 2000). The parties clearly agreed to a prejudgment interest rate and the court agreed to impose that rate. No such agreement existed between HCDI and TJ Landco.

Hidalgo v. Barker

Again, this case deals with a settlement agreement that specifically provided for prejudgment interest. 176 Wn.App. 527, 309 P.3d 687 (Div. 3, 2013). However, the parties failed to specify the rate of interest and so the court exercised its discretion and set prejudgment interest at 12 percent because the parties had not agreed on some other rate.

HCDI fails to cite a single case where a trial court was determined to have abused its discretion in awarding the statutory interest rate where the parties have not expressly indicated what rate will govern outstanding balances owed after maturity or default.

E. HCDI's Legal Issue Number 5: The contract did not serve as the basis for the trial court's award of prejudgment interest.

The trial court awarded prejudgment interest as a "make whole remedy" based on the factual Findings that TJ Landco's claim was for liquidated amounts that were readily determinable on specific due dates. Accordingly, the underlying contract was not the basis for imputation of the legal rate of 12% interest on each default date. As detailed above, the contract between the parties was silent as to the interest rate after default. Therefore, even if interest was awarded as a term of the contract, then the court properly exercised its discretion in setting the interest rate at the statutory rate of 12%.

The meaning of a contract provision is a mixed question of law and fact, with the intent of the parties controlling. Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn3d 411, 424 n. 9, 191 P. 866 (2008). Intent is determined by viewing the contract as a whole, its objective, the conduct of the parties, and the reasonableness of their interpretations. Berg v. Hudesman, 115 Wn. 2d 657, 667, 801 P. 2d 222 (1990). Resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law and applying that law to those facts. Tapper v. Employment Security Department, 122 Wn.3d 397, 403, 858 P.2d 494 (1993). By the time this contract clause was written, TJ Landco had fully performed its obligations under the contract. The only obligation remaining was payment by Appellant. There was no

evidence presented at the trial with regard to a discussion waiving interest in the event of HCDI's failure to make timely payment at any time over the next five years. Coming off its biggest year of home building ever, 2006, and in light of HCDI's prior determination that the plat was viable, there was no reason for such discussion. (RT 601: 9 – 22; RT 591: 17 – 25)

1. The plain language of the contract reflects no agreement as to the interest rate that would apply to amounts that were owed but not paid.

HCDI spends time addressing the parties' prior agreements, which are not relevant to the issue of whether the agreement entered on December 22, 2006 contained an express provision establishing the interest rate that would apply to amounts that had become due but were not paid. Instead, the account stated clearly reflects that the parties agreed that $1,000,000 would be paid in annual installments of $200,000 over five years and that the outstanding balance would not bear interest before they became due.

2. There is no conduct of the parties that provides evidence of an intent to agree to a default interest rate.

a. A prior proposed agreement is not relevant to a subsequent agreement.

HCDI attempts to argue the respective party's intent in entering the December 22, 2006 account stated by mentioning HCDI's failure to

sign a proposed modification to the initial REPSA contract in 2004. In proposing this argument for the first time on appeal, HCDI's recitation of the facts is misleading. The proposed modification in 2004 contained numerous changed terms, not just the inclusion of a default rate. (D-102 and D-102, attached as Exhibit 1 hereto). Further, though it is true that the parties did not enter into this modification, there is nothing in the record to demonstrate that HCDI's failure to sign the modification related to the inclusion of a default interest rate. (RT 150:9-151:16; 568:15-569:7). HCDI's argument is an improper attempt to read subjective intent into the December 22, 2006 Account Stated.

b. TJ Landco's acceptance of a late payment without requiring interest does not demonstrate waiver.

Again, HCDI attempts to read subjective intent into a contract based on unexplained actions of the parties. HCDI was approximately two months late in paying the first $200,000 installment under the December 22, 2006 Account Stated. The check contained the language "Pd. in full." While it is true that TJ Landco cashed the check and did not pursue interest on this late payment, this does not demonstrate an intent by TJ Landco to allow HCDI to withhold all future payments owed without recourse. Furthermore, HCDI has failed to cite any authority for this proposition and did not raise any argument that TJ Landco had

waived its right to claim interest on this basis at the trial court below. Accordingly, HCDI's argument that TJ Landco is not entitled to interest because it accepted a late payment should be disregarded.

3. While TJ Landco did agree to forego prematurity interest, the agreement was in exchange for a specific schedule of $200,000 payments.

HCDI attempts to separate its obligation to make five annual installments of $200,000 from the benefit it received of not having to pay interest on those amounts. It is clear and undisputed that HCDI breached its contractual obligation to make the annual installments when they were due. HCDI now urges this court to find on appeal that the parties agreed the outstanding balance would not bear interest despite serial defaults. TJ Landco only sought interest on the amounts owed after the date the installment payments became due.

Under HCDI's proposed interpretation of the Account Stated, HCDI would be permitted to avoid paying the amounts owed, even after the judgment was entered, and the outstanding balance would never increase. Not only is this ridiculous and contrary to the established law, it would render the terms of the contract that HCDI make annual payments meaningless.

4. HCDI attempts to take portions of the record out of context to support its otherwise untenable position.

Next, HCDI mischaracterizes the trial court's colloquy with HCDI's counsel. HCDI cited the record which states:

> The Court: And if I recall, the – what did the contract say about interest? I know we're going to talk about that.
> Mr. Jolley: It said zero interest.
> The Court: Zero interest. Assuming all the payments are made timely.
> Mr. Jolley: Well, it doesn't say—
> The Court: It doesn't say that, I know.

HCDI failed to state that this exchange occurred as part of a discussion whereby HCDI's counsel had requested to modify a Finding to state that TJ Landco "made no demand for interest until after this case was commenced." The purpose of this colloquy was not to determine whether the zero interest was tied to timely payments, but rather whether the requested Finding was appropriate. The trial court denied the request because the court "did not consider or hear any testimony with regard to a failure of Mr. Lasley to make a demand for interest."

Furthermore, HCDI attempts to ignore the portion of the trial court's record where it clearly articulated its basis for awarding 12% prejudgment interest. The court stated:

> So the zero percent interest and the 6 percent interest are based upon a contract. And the contract called for certain payments to be made within a year's time. And the parties agreed first that it would be 6 percent. Then they changed it up a bit in the accounting, and for whatever reason there was an agreement that there would be no interest paid. But basically, <u>all bets are off: If you're not going to abide by</u>

the contract and the Court finds breach of contract and I order the prejudgment interest, the interest rate starts to accrue from the date the payment should have been made. I think it is appropriate to set it at 12 percent.

(RT 891:1-11 *emphasis added*)

5. **There is no evidence in the record that the parties ever contemplated prejudgment interest following default.**

While the court recognized in its holding that the parties were competent to enter a contract, there is nothing in the record to indicate that the parties contemplated prejudgment interest after default as a potential term. Indeed, by the time of the Account Stated, TJ Landco had completely performed. Thus, there was no chance for it to default on the agreement.

The basis for the trial court's decision to award prejudgment interest was that HCDI failed to pay sums that were readily determinable on the dates that were to be made and TJ Landco was denied use of those funds. With no clear written agreement between the parties waiving default interest, the court properly applied the statutory 12% rate.

F. HCDI's Legal Issue Number 6: The trial court did not abuse its discretion where it awarded prejudgment interest as a measure of damages based on Findings that HCDI wrongfully retained four $200,000 installment payments that that were owed to TJ Landco.

1. Standard of Review

As previously stated, a trial court's decision to grant prejudgment interest is given great weight on appeal and will not be overturned unless it is demonstrated that the trial court abused its discretion. *Colonial Imps. v. Carlton N.W., Inc.*, 83 Wn.App. 229, 245, 921 P.d2d 575 (1996).

2. **The trial court properly exercises its discretion when it awards prejudgment interest based on a liquidated claim for money owed.**

As previously set forth in Section VI A 2 above, prejudgment interest is appropriately awarded as expectation damages where the sum claimed is liquidated.

3. **The trial court did not abuse its discretion by refusing to read into a contract a term that was not there.**

HCDI is asking for this court to write into the contract a term that does not exist, namely a default interest rate. The trial court properly refused HCDI's request to introduce a term that was not agreed to by the parties. Instead, the trial court properly applied the law by imposing the statutory rate because the parties had not agreed to a rate in the event of default.

G. **<u>HCDI's Legal Issue Number 7:</u> The award of post judgment interest at the statutory rate of 12% is supported by Findings that HCDI had breached its contractual obligations and TJ Landco was entitled to interest as a matter of law, not based on the contract.**

"Postjudgment interest, unlike prejudgment interest, is mandatory under RCW 4.56.110." *Womack v. Rardon*, 133 Wn. App. 254, 264, 135 P.3d 542, (Div. 3, 2006). RCW 4.56.110(1) & (4) 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.

The trial court properly applied the statutory rate of interest as the contracts at issue in this case did not provide for a default interest rate. Furthermore, the clear language of section 1 which states PROVIDED, reflects the discretion the trial court has in setting the rate of post judgment interest. Here, the trial court did not set forth a contractual rate in the judgment.

1. Standard of Review

As stated previously the trial court's Findings of Fact are affirmed unless the appealing party demonstrates that a Finding is not supported by substantial evidence. *Fisher Props, Inc. v. Arden-May Fair, Inc.,* 115 Wn.2d 364, 369, 798 P.2d 799 (1990). The trial court's Conclusions of Law are reviewed *de novo*. *Sunnyside Valley Irrigation District v. Dickie,* 149 Wn.3d 873, 880, 73 P.3d 369, 372 (2003).

2. The court is authorized to award 12% on judgments in this case because no default judgment was agreed to by the parties.

As outlined in the argument related to prejudgment interest, TJ Landco and HCDI did not execute a written agreement reflecting a default interest rate. Accordingly, the trial court could not look to the contract to determine the post judgment interest rate.

HCDI contends that TJ Landco "mistakenly attributed Palmer with the following statement 'where a note is silent as to interest after payment is due, the creditor is entitled to interest by operation of law.'" (Appellant's Brief at page 30) HCDI argues that "Palmer does not so hold and in 114 years has never been cited on the issue of prejudgment interest." (Appellant's Brief at pages 30-31) Interestingly, HCDI does not make the same claim regarding whether *Palmer* has been cited for this proposition in determining post judgment interest.

Specifically addressing this issue, Division 2 Court of Appeals analyzed the award of post judgment interest where a contract was involved and stated:

> "A closer reading of *Palmer* reveals, however, that the case principally stands for the proposition that where the balance due on a promissory note, which contains no provision for interest after maturity, is reduced to judgment, and the judgment contains no recital of interest, it draws interest at the legal rate specified by statute for judgments."

In re Marriage of McLaughlin, 46 Wn.App. 271, 274, 729 P.2d 659, 661 (Div. 2, 1986) (*analyzing citing Palmer v. Laberee*, 23 Wash. 409, 63 P. 216 (1900)).

Likewise, in *Puget Sound Nat'l Bank v. St. Paul Fire & Marine Ins. Co.,* the court cited the *Palmer* decision for the proposition that the right to post judgment interest is not a matter of contract, but rather a "matter of legislative discretion." 32 Wn. App. 32, 48, 645 P.2d 1122, review denied, 97 Wn.2d 1036 (1982).

Likewise, in *Kitsap County Bank v. Lewis*, the appellate court upheld the trial court's award of post judgment interest at the default statutory rate despite the fact that the judgment incorporated by reference several notes that contained a different interest rate. 24 Wn. App. 757, 759, 603 P.2d 855 (Div. 2, 1979). The court went on to state that "[w]hen a judgment does not contain a recital as to rate of interest it shall draw, the judgment bears interest at the rate specified in subsection (2) of RCW 4.56.110." *Id.*[1] A judgment cannot incorporate an interest rate by reference, it must actually be set "set forth in the judgment." *Id.* (*citing Palmer v. Laberee*, 23 Wash. 409, 63 P. 216 (1900)). "[A] judgment should be complete in itself and should contain any instructions the court

[1] RCW 4.56.110(2) is now codified as RCW 4.56.110(4) and has been changed from "eight percent per annum" to "the maximum rate permitted under RCW 19.52.020"

considers the facts and law justify." *Id.* at 759-760. RCW 4.56.110(1), requiring interest at the contract rate, only applies if "said interest rate is set forth in the judgment," otherwise RCW 4.56.110(4) applies and the maximum statutory rate permitted under RCW 19.52.020 of 12 percent is applicable.

Without an express contractual agreement as to default interest, the trial court properly applied RCW 4.56.110(4) to establish the post judgment interest at 12%.

3. The trial court properly addressed HCDI's objection to Conclusion 7 and denied its proposed alternative conclusion.

In light of the trial court's determination that post judgment interest was governed by the statutory rate, the trial court properly addressed HCDI's objection and denied HCDI's proposed alternative conclusion.

H. <u>HCDI's Legal Issue Number 8:</u> The trial court properly exercised its discretion in awarding attorney fees for work performed by interns who were qualified to perform supervised services and did provide those services in this case.

1. Standard of Review

As conceded by HCDI, "the amount of a fee award is discretionary, and will be overturned only for manifest abuse." *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987) *citing*

Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 595-596, 675 P.2d 193 (1983). To overturn an award the trial court must have exercised its discretion on untenable grounds or for untenable reasons. *Chuong Van Pham supra,* 159 Wn.2d at 538 (*citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

2. Relevant Facts

In support of its application for attorney fees, TJ Landco submitted the Affidavit of William S. Hislop (CP 698-767). Paragraphs 7 and 8 of Mr. Hislop's Affidavit established that the firm hired full time law students in good standing to perform a variety of tasks including legal research and editing. (CP 699; 713-761)

Attached to Mr. Hislop's Affidavit was a copy of the time records showing the work performed by Mr. Hislop's firm. (CP 705-767) These records included entries for work performed by legal interns which detailed the date the work was performed, the nature of the task completed, the rate and the amount of time spent on the task. In her decision, the trial court referenced her review of the tasks and held that the records demonstrate that the time submitted for the legal interns was substantive legal work. (See e.g. CP 713)

3. Analysis of attorney fee award

The determination of a fee award should not become an unduly burdensome proceeding for the court or the parties. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995). Furthermore, an "explicit hour-by-hour analysis of each lawyer's time sheets" is unnecessary as long as the award is made with a *consideration of the relevant factors* and reasons sufficient for review are given for the amount awarded. *Id. (emphasis added)*

Fees for non-lawyers may be properly requested as part of an attorney fee award. *Id.* at 848. The policy behind awarding fees for work performed by non-lawyers is to encourage attorneys to be efficient in the use of resources. *Id.* at 844.

The *Absher* case identifies the relevant factors that a trial court considers in determining whether fees for non-lawyer personnel is compensable. *Id.* The trial court below specifically indicated that it considered the *Absher* criteria in reviewing TJ Landco's request for non-lawyer time. (CP 926-927) From that review, the trial court denied the request for work performed by paralegals because there was insufficient proof of their qualification, but awarded fees for work performed by full time law students from Gonzaga University. *Id.* The court determined that these students were presumably qualified to perform substantive legal work based on their status as current law students in good standing

at an ABA accredited law school. HCDI argues that something more should be provided, but does not articulate what the standard is nor does HCDI cite any case that establishes a test for determining how much legal education is sufficient for interns to be educationally qualified. The court considered their qualifications through education and did not abuse its discretion in determining that law students were qualified to perform legal research and writing tasks.

Finally, it is not untenable for a trial court to conclude that law student interns were supervised by the attorneys; especially where the billing records demonstrate that the interns' work was incorporated into the attorneys' work product. HCDI's proposed heightened, yet vague, review requirements are not supported by law nor are they practical.

The court reviewed the time entries that detailed the specific tasks performed by the legal interns, demonstrating that the services were legal in nature. HCDI did not object to any of the entries as not constituting substantive legal work. The court did not abuse its discretion in determining that the work performed by the legal interns was legal in nature.

The trial court considered the attorney fee application under the *Absher* criteria, by reviewing the affidavit of TJ Landco's counsel including extensive billing records; the trial court also considered the

HCDI's objections. The trial court concluded that the legal work performed by law students working under the supervision of the firm's attorneys were appropriate and therefore permitted as part of the attorney fee award. TJ Landco requests that this Court affirm the trial court's proper exercise of discretion in awarding attorney's fees that included time for work efficiently performed by legal interns

I. TJ Landco is entitled to attorneys' fees on appeal.

The prevailing party is entitled to attorney fees on this appeal. TJ Landco requests that this court award TJ Landco its fees on appeal.

VII. CONCLUSION

Based on the trial court's proper exercise of discretion and application of the law, TJ Landco respectfully requests this Court affirm the trial court's: (1) award of prejudgment interest at the statutory rate of 12% from the date that each installment payment was due until the date of the judgment; (2) award of post-judgment interest on the entire judgment at the statutory rate of 12%; and (3) award of attorneys' fees for interns who were properly qualified and supervised in the work they performed on this case. In doing so, TJ Landco will finally receive the benefit of the bargain that HCDI has wrongfully denied it for the past 6 years. Additionally, TJ Landco requests an award of attorneys' fees on this appeal.

DATED this 2ND day of June, 2014.

LAYMAN LAW FIRM, PLLP

TIMOTHY B. FENNESSY, WSBA #13809
BRADLEY C. CROCKETT, WSBA #36709
Attorneys for Respondent
601 S. Division St.
Spokane, WA 99202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June 2014, I served a true and correct copy of the foregoing BRIEF OF RESPONDENT by delivering the same to the following attorneys of record, by the method indicated below, addressed as follows:

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

Laura Edmonston

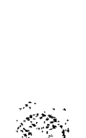
LAURA K. EDMONSTON

ADDENDUM "B" TO PURCHASE AND SALE AGREEMENT

This is Addendum "B" to Purchase and Sale Agreement dated February 12, 2004, and Addendum "A" thereto, between TJ Landco, LLC, (Seller) and Harley C. Douglass, Inc. (Purchaser) for the property located in Spokane County in the State of Washington commonly referred to between Purchaser and Seller as Meadow Point Landing consisting of approximately 74 acres, more or less.

Said Purchase and Sale Agreement and Addendum "A" are hereinafter collectively referred to as "Agreement" and are hereby amended to read as follows:

1) The purchase price shall be Two Million Six Hundred Twenty Thousand Dollars ($2,620,000.00) less the Sellers estimated sale and closing costs on the Schneider property in the approximate sum of $14,500 and the estimated compensating tax, interest and penalty in the approximate sum of $14,000 which would be due if the Stranahan property, Parcels Nos. 34082.0051 & 34082.0009, and portions of 34083.9028 and 34087.9013, were to be removed from the open space timber classification at the time of closing. Purchaser agrees to continue the property in the open space timber classification. The purchase price shall be paid as provided in Paragraphs 2 and 3 hereof.



2) Purchaser will purchase from Seller the property commonly known as the Schneider Property, 6421 S. Meadow Lane Rd, Parcel #'s 34053.0051G, 34053.0051H, 34053.0044, 34053.0020, 34053.0045, 34071.0001, 34082.0008G, 34082.0008H, for a purchase price of $663,936.00 to be paid in cash at closing. Closing shall be on or before June 1, 2004. Purchaser shall pay all sale and closing costs including but not limited to excise tax, title insurance, recording fees, and closing attorney fee. Property taxes shall not be prorated. Seller shall have no costs in connection with the sale of said property.

3) Upon Seller receiving preliminary plat approval of Meadow Point Landing, Purchaser shall close the purchase of the property commonly known as the Lindsey Property, Parcel No. 34282.0010 for a purchase price of $1,956,064 less the Sellers estimated sale and closing costs and the compensating tax, interest and penalty as provided in paragraph (1) above. The purchase price shall be paid and the closing completed upon the following terms and conditions.

   1. $956,064.00 cash at closing less the Sellers estimated sale and closing costs and compensating tax, interest and penalty as hereinbefore provided.

   2. The balance of $1,000,000.00 shall be paid by a Promissory Note, secured by a Deed of Trust (LPB Form 22), as follows:

   (i) For the first twenty-four (24) months the unpaid principal balance shall bear interest per annum at the applicable Federal rate on the date of

closing, but not to exceed six percent (6%) per annum. Beginning with the twenty-fifth (25th) month, the unpaid principal balance shall bear interest at the rate of 6% per annum until paid in full.

(ii) Purchaser shall pay annual principal payments of $200,000, or more at Purchaser's option, plus interest as hereinbefore provided. The first annual payment plus interest shall be due twenty-four (24) months from the date of closing and annual payments thereafter on the same day of each year until the principal and interest are paid in full.

(iii) The Promissory Note shall provide for a late charge of $500 on any payment received more than fifteen (15) days after due and interest upon default at the rate of 12% per annum. Said Promissory Note and Deed of Trust shall be escrowed at Adept Escrow with each party paying one-half of the escrow fees.

(iv) Partial releases of the Deed of Trust will be delivered upon a lump sum payment in a sum to be determined by taking the number of developed lots in the Lindsey Property (Parcel # 34082.0010) and dividing the original amount of the Promissory Note in the sum of $1,000,000 by the number of said lots. For example, if there are 100 lots, then the per lot partial release payment would be $10,000. Said partial releases shall only be granted if the Purchaser is current on the Promissory Note.

4) The purchase of the Lindsey property is contingent upon Seller obtaining preliminary plat approval of the Lindsey property from the City of Spokane on or before December 31, 2005.

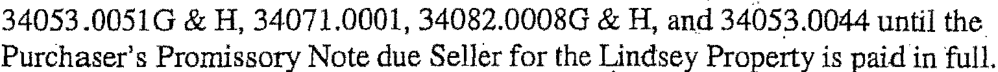
5) The purchase of the Lindsey property is contingent upon City of Spokane's commitment to provide water and sewer to the property by December 31, 2005.

6) The closing date for the Lindsey property will be 25 days after Purchaser's receipt of the Hearing Examiner's Report approving the preliminary plat of the Lindsey property.

7) The closing Agent will be Herman, Herman, and Jolley, P.S. in Spokane Valley, Washington. Seller and Purchaser acknowledge that Herman, Herman & Jolley, P.S. has advised and represented both parties in this and other transactions and hereby consent to said attorneys acting as closing agent for this transaction and waive any conflict of interest.

8) Purchaser is aware there are two wells on the Schneider property which will need to be abandoned by the Purchaser at Purchaser's expense.

9) Seller shall reserve an easement for ingress, egress and utilities over and across the platted roads on the Schneider property, Parcel Nos. 34053.0020, 34053.0045,


34053.0051G & H, 34071.0001, 34082.0008G & H, and 34053.0044 until the Purchaser's Promissory Note due Seller for the Lindsey Property is paid in full.

10) The Purchaser's interest is assigned from Harley C. Douglass, Inc. to Secure Self Storage, LLC, which is now the Purchaser under the Agreement and Secure Self Storage, LLC agrees to assume the Purchaser's obligations under the Agreement.

11) Seller entered into Agreements to purchase approximately 40 acres from Loyal and Sallie Moore for the sum of $480,000 and to exchange the Moore property for approximately 20 acres of property owned by Denise Stranahan and the Floyd Stranahan Trust. Seller assigned its right under said Agreements to Purchaser and Purchaser completed the purchase of the Moore property and the exchange of the Stranahan property. Said $480,000 is a part of the 3.6 Million Dollars which Purchaser originally agreed to pay Seller under the Agreement. Said 3.6 Million Dollars has been further reduced by $500,000 which is the Sellers estimated savings from not having to joint venture the development as a result of the Purchaser purchasing the Moore property directly from Moore and exchanging it with Stranahan.

12) The legal description for the property shall be added by the closing agent and shall consist of the property described under parcel nos. 34282.0010, 34053.0051G, 34053.0051H, 34053.0044, 34053.0020, 34053.0045, 34071.0001, 34082.0008G, 34082.0008H.

13) Except as modified and amended hereby, all other terms and conditions of the Agreement shall remain in full force and effect.

Dated this ____ day of June, 2004.

TJ LANDCO, LLC	SECURE SELF STORAGE, LLC
BY: *[signature]* /member	BY: ______________________
	HARLEY C. DOUGLASS, MEMBER
	HARLEY C. DOUGLASS, INC.
	BY: ______________________
	HARLEY C. DOUGLASS, PRESIDENT

ADDENDUM "B" TO PURCHASE AND SALE AGREEMENT

This is Addendum "B" to Purchase and Sale Agreement dated February 12, 2004, and Addendum "A" thereto, between TJ Landco, LLC, (Seller) and Harley C. Douglass, Inc. (Purchaser) for the property located in Spokane County in the State of Washington commonly referred to between Purchaser and Seller as Meadow Point Landing consisting of approximately 74 acres, more or less.

Said Purchase and Sale Agreement and Addendum "A" are hereinafter collectively referred to as "Agreement" and are hereby amended to read as follows:

1) The purchase price shall be Two Million Six Hundred Twenty Thousand Dollars ($2,620,000.00) less the Seller's sale and closing costs which the Purchaser paid for Seller on the sale of the Schneider property in the sum of $14,969.98 and the estimated compensating tax, interest and penalty in the approximate sum of $14,000 which would be due from Purchaser if the Stranahan property, Parcels Nos. 34082.0031 & 34082.0009, and portions of 34083.9028 and 34087.9013, were to be removed from the open space timber classification at the time Purchaser closes on the Lindsay propoerty. Purchaser agrees to continue the Stranahan property in the open space timber classification. Purchaser has borrowed money from American West Bank in order to purchase both the Schneider and Stranahan properties. Seller agrees to bear the Purchaser's loan origination fees on both loans in a sum not to exceed one and one half percent (1.5%) of the amount due from Purchaser to close each transaction plus the interest which Purchaser pays on the amount due to close each transaction from the date the respective transactions are closed. The amount of said loan origination fees and interest shall be credited against the purchase price. The amount due from Purchaser to close the Schneider and Stranahan properties is $680,653.69 and $491,312.34 respectively. The purchase price shall be paid as provided in Paragraphs 2 and 3 hereof.

2) Purchaser will purchase from Seller the property commonly known as the Schneider Property, 6421 S. Meadow Lane Rd, Parcel #'s 34053.0051G, 34053.0051H, 34053.0044, 34053.0020, 34053.0045, 34071.0001, 34082.0008G, 34082.0008H, for a purchase price of $663,936.00 to be paid in cash at closing. Closing shall be on or before June 1, 2004. Purchaser shall pay all sale and closing costs including but not limited to excise tax, title insurance, recording fees, and closing attorney fee. Property taxes shall not be prorated. Seller shall have no costs in connection with the sale of said property.

3) Upon Seller receiving preliminary plat approval of Meadow Point Landing, Purchaser shall close the purchase of the property commonly known as the Lindsey Property, Parcel No. 34282.0010 for a purchase price of $1,956,064 less the Sellers estimated sale and closing costs, the compensating tax, interest and penalty, the loan origination fees and loan interest as provided in paragraph (1) above. This purchase price shall also be subject to further adjustment if the preliminary plat is approved with more or

EXHIBIT 1

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less than 371 buildable lots. A buildable lot is any lot upon which the Purchaser can obtain a building permit for a single family dwelling. For each buildable lot more or less that 371, the price shall be increased or decreased by $8,355.00. The purchase price shall be paid and the closing completed upon the following terms and conditions.

1. $956,064.00 cash at closing less the Sellers estimated sale and closing costs and compensating tax, interest and penalty as hereinbefore provided.

2. The balance of $1,000,000.00 plus any increase or decrease in the purchase price due to preliminary plat approval for more or less that 371 buildable lots shall be paid by a Promissory Note, secured by a Deed of Trust (LPB Form 22), as follows:

(i) For the first twenty-four (24) months the unpaid principal balance shall bear interest per annum at the applicable Federal rate on the date of closing, but not to exceed six percent (6%) per annum. Beginning with the twenty-fifth (25th) month, the unpaid principal balance shall bear interest at the rate of 6% per annum until paid in full.

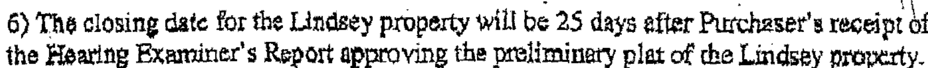
(ii) Purchaser shall pay annual principal payments of $200,000, or more at Purchaser's option, plus interest as hereinbefore provided. The first annual payment plus interest shall be due twenty-four (24) months from the date of closing and annual payments thereafter on the same day of each year until the principal and interest are paid in full.

(iii) The Promissory Note shall provide for a late charge of $500 on any payment received more than fifteen (15) days after due and interest upon default at the rate of 12% per annum. Said Promissory Note and Deed of Trust shall be escrowed at Adept Escrow with each party paying one-half of the escrow fees.

(iv) Partial releases of the Deed of Trust will be delivered upon a lump sum payment in a sum to be determined by taking the number of developed lots in the Lindsey Property (Parcel # 34082.0010) and dividing the original amount of the Promissory Note in the sum of $1,000,000 by the number of said lots. For example, if there are 100 lots, then the per lot partial release payment would be $10,000. Said partial releases shall only be granted if the Purchaser is current on the Promissory Note.

4) The purchase of the Lindsey property is contingent upon Seller obtaining preliminary plat approval of the Lindsey property from the City of Spokane on or before December 31, 2005.

5) The purchase of the Lindsey property is contingent upon City of Spokane's commitment to provide water and sewer to the property by December 31, 2005.


6) The closing date for the Lindsey property will be 25 days after Purchaser's receipt of the Hearing Examiner's Report approving the preliminary plat of the Lindsey property.

7) The closing Agent will be Herman, Herman, and Jolley, P.S. in Spokane Valley, Washington. Seller and Purchaser acknowledge that Herman, Herman & Jolley, P.S. has advised and represented both parties in this and other transactions and hereby consent to said attorneys acting as closing agent for this transaction and waive any conflict of interest.

8) Purchaser is aware there are two wells on the Schneider property which will need to be abandoned by the Purchaser at Purchaser's expense.

9) Seller shall reserve a 60 foot easement for ingress, egress and utilities over and across the Schneider property, Parcel Nos. 34053.0020, 34053.0045, 34053.0051G & H, 34071.0001, 34082.0008G & H, and 34053.0044 until the Purchaser's Promissory Note due Seller for the Lindsey Property is paid in full.

10) The Purchaser's interest is assigned from Harley C. Douglass, Inc. to Secure Self Storage, LLC, which is now the Purchaser under the Agreement and Secure Self Storage, LLC agrees to assume the Purchaser's obligations under the Agreement.

11) Seller entered into Agreements to purchase approximately 40 acres from Loyal and Sallie Moore for the sum of $480,000 and to exchange the Moore property for approximately 20 acres of property owned by Denise Stranahan and the Floyd Stranahan Trust. Seller assigned its right under said Agreements to Purchaser and Purchaser completed the purchase of the Moore property and the exchange of the Stranahan property. Said $480,000 is a part of the 3.6 Million Dollars which Purchaser originally agreed to pay Seller under the Agreement. Said 3.6 Million Dollars has been further reduced by $500,000 which is the Sellers estimated savings from not having to joint venture the development as a result of the Purchaser purchasing the Moore property directly from Moore and exchanging it with Stranahan.

12) The legal description for the property shall be added by the closing agent and shall consist of the property described under parcel nos. 34282.0010, 34053.0051G, 34053.0051H, 34053.0044, 34053.0020, 34053.0045, 34071.0001, 34082.0008G, 34082.0008H.

13) Except as modified and amended hereby, all other terms and conditions of the Agreement shall remain in full force and effect. The terms and conditions of the Agreement and this Addendum shall survive the closing of all or any portion of the property referred to herein. This Addendum may be signed in counterparts and a fascimile signature shall be deemed an original.

Dated this 16 day of June, 2004.

TJ LANDCO, LLC

BY: Ted J Lenley/member

SECURE SELF STORAGE, LLC

BY: ______________________
HARLEY C. DOUGLASS, MEMBER

HARLEY C. DOUGLASS, INC.

BY: ______________________
HARLEY C. DOUGLASS, PRESIDENT