

No. 71455-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

GUSTAVO NELSON ARZOLA, an individual, MICHAEL KLATT,  
an individual and SUSAN PROSSER, an individual,

Appellant/Cross-Respondent,

vs.

NAME INTELLIGENCE, INC., a Washington corporation,  
and JAY WESTERDAL, an individual,

Respondents/Cross-Appellants.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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## I. INTRODUCTION

Name Intelligence, Inc. and its principal Jay Westerdal satisfied a judgment entered under RCW 49.48.030 for exemplary damages and attorney fees. After this Court reversed that judgment, the trial court ordered repayment of those sums, under RAP 12.8, plus prejudgment interest on this liquidated amount. The trial court followed RAP 12.8, the cases interpreting the rule and the principles of restitution underlying it, and certainly did not abuse its discretion, by restoring to these judgment debtors the funds they paid in satisfying a judgment that is subsequently reversed by the appellate court. The trial court erred, however, in awarding prejudgment interest on this liquidated sum, not at the statutory rate of 12%, but at a lower rate of 5%, based on a summary conclusion that this lower rate was “equitable.”

This Court should affirm the RAP 12.8 award, save for the amount of prejudgment interest. On Name Intelligence’s and Westerdal’s cross-appeal, this Court should direct the trial court to modify its judgment by granting prejudgment interest at the statutory rate of 12% from the date the judgment was satisfied.

## II. RESTATEMENT OF ISSUES

1. Did the trial court abuse its discretion in entering a RAP 12.8 award for the amounts paid by judgment debtors to satisfy a money judgment for exemplary damages, attorney fees and litigation expenses that was subsequently reversed on appeal, plus prejudgment interest on this liquidated sum?

## III. RESTATEMENT OF THE CASE

**A. Name Intelligence and its principal Jay Westerdal satisfied a judgment for exemplary damages and attorney fees. This Court reversed the judgment because the amounts at issue were not wages.**

Respondent Name Intelligence, Inc., defendant in the trial court, is a Washington corporation co-founded by respondent Jay Westerdal, its CEO and President. (CP 18) Appellants Gustavo Arzola, Michael Klatt, and Susan Prosser, plaintiffs below, served as employees of Name Intelligence. (FF 2.1, CP 25) They are collectively referred to as plaintiffs.

In addition to their compensation, each plaintiff was allotted a fixed number of shares of Name Intelligence stock upon hiring, and promised additional shares contingent on satisfactory annual performance reviews. Allotted shares vested after five years continued employment, however, “all shares that are allocated will

be immediately granted” upon the sale of Name Intelligence to a third party. (CP 48)

In April 2008, Name Intelligence was sold to a California company, Thought Convergence, Inc., under an Exchange Agreement providing for an exchange of stock shares plus three periodic payments at yearly intervals beginning in May 2008. (CP 48-49) Because the sale to Thought Convergence included all assets of the company, Name Intelligence agreed to acquire all outstanding stock rights in the corporation, including those held by appellants. (FF 2.10, CP 26; 49) In a Stock Right Cancellation Agreement dated May 2, 2008, each of the plaintiffs agreed to surrender all stock rights and shares of common stock in return for three cash payments timed to coincide with the payments from Thought Convergence under the Exchange Agreement. (CP 49)

The amount of these payments was in proportion to each plaintiff's equity interest in the company, based on the purchase price paid by Thought Convergence for the assets of Name Intelligence. (CP 49) Each of the three plaintiffs confirmed that the amounts payable would be subject to adjustment and “shall be subject to the same terms, conditions and adjustments of the Post-Closing Payments in the Exchange Agreement.” (CP 49)

When a dispute arose resulting in litigation between Name Intelligence and Thought Convergence over the second payment due in May 2009, Name Intelligence did not pay plaintiffs 100% of the second payment under their agreement because Thought Convergence had delayed its payments to Name Intelligence. (CP 50)

Name Intelligence and Thought Convergence then resolved their dispute, reducing the purchase price Thought Convergence would pay for the company. When Name Intelligence sought to reduce the amount due plaintiffs under the third payment due in May 2010 to reflect the reduced amount, they sued Name Intelligence for breach of contract and wrongful withholding of wages. (CP 50-51)

King County Superior Court Judge Carol Schapira (“the trial court”) originally held as a matter of law that the payments due under the SRC Agreements were “wages” under RCW 49.52.050, .070 and RCW 49.48.030. (FF 2.15, CP 27) The trial court awarded plaintiffs double damages under RCW 49.52.070 on the 2009 payment and a portion of the 2010 payment. (CP 30, 51-52) It entered a judgment against Name Intelligence for \$283,479.14, of which \$253,698.36 was owed by Westerdal under RCW 49.52.070

in favor of all plaintiffs jointly, including attorney's fees of \$97,860, and litigation expenses of \$4,349.54 under RCW 49.52.070 and RCW 49.48.030. (CP 39-42)

Name Intelligence satisfied the judgment against it and Westerdal in full on March 2, 2011. (CP 44-45) Name Intelligence and Westerdal appealed, challenging only the trial court's order finding that those sums were "wages" within the meaning of the wrongful withholding of wages statute, and its award of attorney fees in the absence of a fee shifting clause in the parties' agreement.

This Court reversed and held that the payments due plaintiffs were not "wages" under RCW ch. 49.52 and RCW ch. 49.48 because their stock rights were "treated as a true equity interest or ownership right in the company" and thus "[t]he consideration the employees provided under the SRCs was not service or labor but, rather, surrender of their proprietary interest in the company stock." (CP 54-55) The Supreme Court denied review. *Arzola v. Name Intelligence, Inc.*, 172 Wn. App. 51, 288 P.3d 1144 (2012), *rev. denied*, 178 Wn.2d 1011 (2013).

**B. The trial court entered an order under RAP 12.8 restoring the sums paid to satisfy the judgment against Name Intelligence and Westerdal that had been reversed on appeal.**

Upon issuance of the mandate, Name Intelligence and Westerdal sought to recover under RAP 12.8 the funds paid in satisfaction of the judgment for exemplary damages, attorney fees, costs and litigation expenses, plus interest at 12% because the sum was a liquidated amount. (CP 13-17) Plaintiffs argued that restitution was not equitable because they pursued their claim to statutory double damages in good faith and because they had spent a portion of the judgment proceeds on taxes and attorney fees. They did not request an evidentiary hearing. (CP 64-75)

On December 10, 2013, the trial court entered an order pursuant to RAP 12.8. The trial court found that “defendants paid the entire judgment including exemplary damages, attorney fees and litigation costs on March 2, 2011,” that “defendants prevailed on appeal on the issue of whether those sums were wages (under RCW 49.52),” that “plaintiffs are entitled to retain the amounts paid to them” for damages, statutory costs and statutory attorney fees as prevailing parties for sums due under the parties’ Stock Rights Cancellation Agreement, but that “Defendants are entitled to

restitution” of the exemplary/double damages for sums withheld in 2009, 2010, attorney fees and litigation costs totaling \$254,598.236. (CP 97-98)

The trial court further set prejudgment interest at 5%, finding it “a reasonable, equitable rate . . . on the above amount of restitution from the date of payment.” (CP 98) It refused to grant plaintiffs a credit, as plaintiffs had requested, for the attorney fees they paid their counsel, or for the taxes paid on their judgment once it was satisfied. (CP 98) The trial court entered judgment on December 19, 2013 in favor of Name Intelligence and Westerdal in the principal amount of \$254,598.36, plus prejudgment interest at the rate of 5% from the date the judgment was satisfied, for a total judgment of \$293,691.50. (CP 124-26)

Plaintiffs filed a motion for reconsideration on December 30, 2013, in which, for the first time, they alleged that the trial court must enter findings of fact. (CP 127-30) The trial court denied reconsideration on the ground that the motion was filed more than ten days after the court entered its December 10, 2013 order. (CP 133-34) Plaintiffs do not challenge the denial of reconsideration on appeal.

#### IV. ARGUMENT

**A. The trial court did not abuse its discretion in applying RAP 12.8 to restore to Name Intelligence and Westerdal “the value of the property” paid in satisfaction of the money judgment that was reversed on appeal, plus prejudgment interest for the loss of use of those funds.**

**1. This Court reviews the trial court’s RAP 12.8 award for abuse of discretion.**

Plaintiffs concede that this Court defers to the trial court’s discretion, reviewing its award under RAP 12.8 only for a manifest abuse of that discretion. (App. Br. 8, citing *Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 589, ¶ 3, 159 P.3d 407 (2007)). See also *Sac Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994) (“trial courts have broad discretionary power to fashion equitable remedies”).

RAP 12.8 required the trial court to “restore” to Name Intelligence the “property taken from that party” in satisfying a money judgment that was reversed on appeal. The trial court’s decision here, in which it restored to Name Intelligence and Westerdal the funds that they paid to satisfy plaintiffs’ judgment, with prejudgment interest, was not “outside the range of acceptable choices,” given the undisputed facts and the established legal standard. See *State v. Dye*, 178 Wn.2d 541, 548, ¶ 16, 309 P.3d 1192 (2013).

**2. RAP 12.8, by its terms, required appellants to restore to Name Intelligence the money it paid to satisfy the overturned judgment.**

That this Court reviews an award under RAP 12.8 for abuse of discretion, does not mean that the Court's discretion is unfettered. This Court "must begin with the rule's plain language" to determine whether the trial court applied the proper legal standard. *Ehsani*, 160 Wn.2d at 589, ¶ 4. The trial court followed RAP 12.8 to the letter.

RAP 12.8 directs the trial court to restore to a party the amount of money paid by that party to satisfy the court's judgment after that judgment has been reversed on appeal:

If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.

RAP 12.8.

By using the word "shall," the rule makes mandatory an award if the other requirements of the rule are met. *See Sorenson v. Dahlen*, 136 Wn. App. 844, 855, ¶ 27, 149 P.3d 394 (2006) ("As a

general rule, the use of the word “shall” in a statute or court rule is mandatory and operates to create a duty.”) Where, as here, “a party has satisfied a later reversed judgment,” the trial court abuses its discretion in denying an award in contravention of the plain language of RAP 12.8. *Sloan v. Horizon Credit Union*, 167 Wn. App. 514, 520, ¶ 13, 274 P.3d 386, *rev. denied*, 174 Wn.2d 1019 (2012).

Thus, while the amount of an award under RAP 12.8 may be discretionary, the trial court lacks discretion to deny relief to a party who has satisfied the criteria of the rule. Indeed, plaintiffs conceded below that Name Intelligence and Westerdal were entitled to an award of at least \$111,000 under RAP 12.8, taking issue only with the court’s discretionary assessment of the amount of that award. (CP 64) (“Plaintiffs agree that *some* restitution is appropriate in this case.”) (emphasis in original) It is undisputed that Name Intelligence and Westerdal satisfied RAP 12.8’s criteria:

First, Name Intelligence and Westerdal “voluntarily . . . wholly satisfied a trial court decision” – the February 20, 2011 joint and several judgment entered following trial. (CP 44) Second, that judgment was “modified by the appellate court” when this Court reversed the award of exemplary damages, and with it, the attorney

fees and litigation expenses awarded under RCW 49.48.030 and RCW 49.52.070. (CP 54-56) The trial court was then authorized to enter an order under RAP 12.8 “to restore to the party [the] property taken from that party” in satisfying the trial court’s judgment. It made no error in finding that “Defendants are entitled to restitution of . . . [the] exemplary/double damages” for sums withheld in 2009, 2010, attorney fees and litigation costs totaling \$254,598.236. (CP 98)

Plaintiffs’ argument, which would require the court to determine “the net benefit to each plaintiff’s estate,” before entering a RAP 12.8 award, ignores not only the plain language of the rule and the principles of restitution upon which it rests, but also the trial court’s discretion. RAP 12.8, by its terms, does not contain a “net benefit” rule and Washington courts have not adopted such a limitation before requiring a judgment creditor to pay the amounts it has received in satisfaction of a judgment that is later reversed on appeal. *See Sloan*, 167 Wn. App. at 520 ¶¶ 11, 12 (“at the moment Horizon received and accepted money to satisfy the CR 11 judgment, it acted as a judgment creditor discharging the judgment debt, critical under RAP 12.8. . . . [W]hether unjust enrichment principles apply is beside the point”).

The *Restatement*, upon which plaintiffs rely, similarly contains no “net benefit” rule advocated by plaintiffs. The “value to the recipient” measure relied upon by plaintiffs is “the usual measure of enrichment in all cases where an innocent recipient has obtained unrequested, nonreturnable benefits.” *Restatement (Third) of Restitution and Unjust Enrichment* § 49, comment d (2011). Where, as here, however, a judgment creditor obtains payment of a judgment from the judgment debtor, the payment is not voluntary or “unrequested” and the undeserving judgment creditor is not “innocent” within the meaning of the *Restatement*:

[A]ny payment made in response to a judgment is treated as a payment made under compulsion, at least for the purpose of permitting the judgment debtor to avoid the consequences that would flow from regarding the payment as “voluntary.”

*Restatement (Third) of Restitution and Unjust Enrichment* § 18 (2011).

Thus, “where the issue in restitution is still between the original parties to the underlying proceedings, the remedy for a successful restitution claim is relatively straightforward.” *Restatement (Third) of Restitution and Unjust Enrichment* § 18, comment a (2011). The judgment debtor is entitled to restitution in the amount paid to satisfy the judgment that was reversed on

appeal because reversal “renders ‘unjust’ . . . (the judgment creditor’s) present retention of the judgment debtor’s property.” *Davenport v. Washington Educ. Ass’n*, 147 Wn. App. 704, 733, ¶ 42, 197 P.3d 686 (2008), *rev. granted*, 166 Wn.2d 1005 (2009); *Mon Wai v. Parks*, 48 Wn.2d 507, 294 P.2d 931 (1956) (pre-RAP case; judgment creditor must restore to judgment debtor money collected under writ of restitution plus interest). *See Restatement (Third) of Restitution and Unjust Enrichment* § 18, Illustration 1 (2011) (“Trial court renders a judgment in favor of A against B. B elects to satisfy the judgment . . . Appellate court reverses the judgment. B is entitled to restitution from A.”); *Restatement (First) of Restitution* § 74, Illustrations 1-3 (1937); WSBA, Appellate Practice Deskbook § 29.10(2) (3<sup>rd</sup> Ed. & 2011 Supp.) (“successful appellant is entitled to recover any funds collected by a judgment creditor”).

Plaintiffs ignore this authority, citing *Ehsani* to argue that this “straightforward” case instead presented “appropriate circumstances” that required the trial court to refuse to restore to Name Intelligence and Westerdal the money they had paid to appellants under a money judgment that was subsequently reversed. In *Ehsani*, the Court held that a non-party, the judgment creditor’s attorney who accepted the judgment debtor’s funds in

satisfaction of the judgment and then disbursed the funds to his client, is not liable to the judgment debtor under RAP 12.8 when the judgment is reversed. The *Ehsani*, Court held that the “appropriate circumstances” language of the rule encourages the courts to look at the common law of restitution to determine whether “exceptions to the general rule of restitution embodied in section 74 arise in circumstances where to require a party to make restitution would not serve the purpose of remedying unjust enrichment,” holding that no principles of restitution required the Court to expand the scope of RAP 12.8 liability to a non-party. *Ehsani*, 160 Wn.2d at 592, ¶ 8, citing *Atlantic Coast Line Railroad Co. v. State of Florida*, 295 U.S. 301, 395 (1935) (Cardozo, J.).

Similarly, here there are no “appropriate circumstances” within the meaning of RAP 12.8 that would make a “straightforward” restitutionary award inequitable. See *Restatement (Third) of Restitution and Unjust Enrichment* § 74, comment c (2011) (“when restitution inequitable”). There are certainly no circumstances that would compel this Court to hold that the trial court manifestly abused its discretion in refusing to deviate from the plain language of the rule.

By contrast, where the Supreme Court has affirmed the trial court's discretion to devise a different restitutionary remedy under RAP 12.8, the particular circumstances involve transfers of real property or other assets with fluctuating value or the rights of third parties. *See, e.g., State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 802 P.2d 1353 (1991) (judgment creditor liable for proceeds of sheriff's sale following execution on debtor's real property); *Sac Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 205, 867 P.2d 605 (1994) (where order vacating tax foreclosure judgment reversed on appeal, tax sale purchaser entitled to restitution of real property he purchased at tax foreclosure sale but denied delay damages). Those circumstances justifying an exception to the straightforward application of RAP 12.8 are simply not present here.

Plaintiffs' "net benefit" rule would also make for poor policy. Once the judgment was paid, plaintiffs had unfettered use of the funds they obtained in satisfaction of the judgment. Their argument, that they should only have to return that portion of the money providing a "net benefit," would require the court to engage in extensive fact finding and value-laden judgments about whether the funds paid in satisfaction of a judgment were put to good use. Plaintiffs argue here that the award should be reduced by payment

of their attorney fees, income taxes and the low interest rates paid by their financial institutions, but there is no reason other “worthy” payments could not also reduce the award. Would payment of charitable donations or living expenses also qualify as providing a “net benefit?” Would the party entitled to a RAP 12.8 award after paying a judgment be entitled to reap the benefit of the judgment creditor’s extraordinarily successful investments with the proceeds of the judgment? The trial court did not abuse its discretion in refusing to engage in this type of inquiry in order to resolve the straightforward application of RAP 12.8.

Plaintiffs’ contention that a straightforward application of the RAP 12.8 unfairly rewards Name Intelligence and Westerdal for failing to supersede enforcement of the judgment pending appeal is similarly without merit. Plaintiffs ignore that they would in fact be worse off had Name Intelligence and Westerdal posted a bond because they would now be liable for the significant cost of the annual premium paid on the bond amount under RAP 14.3(a)(5). That annual premium would have been a percentage of not just the principal amount of the judgment, but also two years of judgment interest at 12%, as well as the estimated attorney fees on appeal incurred by plaintiffs in the first appeal. RAP 8.1(d). Thus, had

Name Intelligence and Westerdal superseded the judgment, plaintiffs would have owed an amount in excess of the amount awarded by the trial court – the judgment amount plus only 5% interest from the date the judgment was paid – without having the benefit of the judgment proceeds for over two years.

**3. The trial court did not abuse its discretion in refusing to reduce the RAP 12.8 award.**

No principle of restitution, nor any of the undisputed facts here, required the trial court to reduce the amount owed under RAP 12.8 by the amounts paid by appellants for their income taxes and attorney fees.

**a. Plaintiffs get no credit for income taxes paid.**

The trial court refused to enter a finding regarding whether the amounts plaintiffs paid in income taxes are refundable because it was not a relevant fact for purposes of its RAP 12.8 award and because they may recover any overpayment of taxes by way of refund in subsequent years. (CP 98) The trial court did not abuse its discretion in declining to delve into how much income tax plaintiffs paid or, for that matter, how much they would obtain in the form of a refund once the judgment was reversed.

Plaintiffs cite *Restatement (First) Restitution* § 142, comment f, but they did not pay taxes or “other similar necessary expenses” in order to preserve real property, as the comment to that section of the *Restatement* requires. See *Malo v. Anderson*, 76 Wn.2d 1, 5, 454 P.2d 828 (1969) (“judgment debtor is entitled to restitution of property awarded to a judgment creditor by a judgment subsequently reversed, plus the reasonable value of its use during the interim, but diminished by expenses necessarily incurred on the property and the payment of taxes and liens”) They instead claim a right to recoup income taxes that they paid upon satisfaction of the judgment for exemplary damages, without acknowledging that they have a corresponding deduction now that those sums must be repaid. (CP 96)

The trial court’s refusal to enter a finding regarding plaintiffs’ taxes is tantamount to a finding that they failed to meet their burden of establishing the right to a reduction of the RAP 12.8 award. *Puget Sound Marina v. Jorgenson*, 3 Wn. App. 476, 480, 475 P.2d 919 (1970). The trial court’s refusal to reduce the RAP 12.8 award for plaintiffs’ income taxes was not an abuse of discretion.

**b. Plaintiffs get no credit for the fees they paid their lawyer.**

This Court reversed the award of attorney fees under RCW 49.48.030 because the dispute between Name Intelligence and plaintiffs over the amounts due them upon the sale of the company was a contract dispute and not a dispute over wages, and because the parties' Stock Right Termination Agreement contained no attorney fee provision. The trial court properly directed plaintiffs under RAP 12.8 to restore to Name Intelligence and Westerdal the amount of money paid in satisfaction of a fee judgment that was subsequently reversed.

RAP 12.8 applies when the court reverses a judgment for attorney fees that has been satisfied. *Sloan v. Horizon Credit Union*, 167 Wn. App. 514, 274 P.3d 386 (2012) (requiring restitution of judgment for fees imposed under CR 11, subsequently reversed). Plaintiffs chose to pay their lawyers to pursue a wage claim that was ultimately without merit. If plaintiffs have a claim to recover some of the fees they paid their lawyers under their contingency agreement or otherwise, that claim is between plaintiffs and their lawyer and does not defeat Name Intelligence's right to recover under RAP 12.8. The trial court properly declined

to determine whether the fees paid by plaintiffs to their counsel were “non-refundable.” (CP 98)

**4. The trial court properly awarded prejudgment interest on this liquidated sum.**

Just as plaintiffs received prejudgment interest on the liquidated sums due them under their Stock Right Cancellation agreements (CP 30-32), the trial court correctly awarded prejudgment interest on the sums paid to plaintiffs in satisfaction of the court’s judgment because the exemplary damages, attorney fees and litigation expenses are liquidated amounts. This Court consistently awards prejudgment interest where a judgment is entered for a “definite sum of money,” because it is fair and equitable to charge the party who has had unfettered use of another’s money:

Prejudgment interest awards are based on the principle that a defendant “who retains money which he ought to pay to another should be charged interest upon it.” *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 34, 442 P.2d 621 (1968). The plaintiff should be compensated for the “use value” of the money representing his damages for the period of time from his loss to the date of judgment. *Mall Tool Co. v. Far West Equip. Co.*, 45 Wn.2d 158, 177, 273 P.2d 652 (1954), *supra*; *see also Grays Harbor Cy. v. Bay City Lumber Co.*, 47 Wn.2d 879, 891, 289 P.2d 975 (1955). A defendant should not, however, be required to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to the

plaintiff. *Prier*, 74 Wn.2d at 34. *Accord, Ferber v. Wisen*, 195 Wash. 603, 610, 82 P.2d 139 (1938); *Pearson Constr. Corp. v. Intertherm, Inc.*, 18 Wn. App. 17, 20, 566 P.2d 575 (1977)

*Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 157, 810 P.2d 12 (1991).

Contrary to plaintiffs' contention, the *Restatement of Restitution* similarly authorizes prejudgment interest where, as here, the benefit conferred constitutes "a definite sum of money:"

[A] person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if:

(a) the benefit consisted of a definite sum of money. . .

*Restatement (First) of Restitution* § 156(a) (1937).

RAP 12.8 authorizes prejudgment interest on the amount of money obtained by a judgment creditor in obtaining a satisfaction of a judgment. *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 47, 802 P.2d 1353 (1991) (allowing recovery of proceeds of sale of property at execution "together with interest from the date of seizure."). The trial court's award of interest on the liquidated sum paid to satisfy a judgment later reversed is akin to the interest routinely granted on a refund of taxes wrongfully assessed or development fees paid

under an ordinance subsequently held invalid. Washington courts consistently award prejudgment interest on these sums, as they are liquidated and the government has had the use of the taxpayer's funds until the ordinance is reversed. *See Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 252, 877 P.2d 176 (1994) (affirming award of prejudgment interest on development fees held invalid); *Doric Co. v. King County*, 59 Wn.2d 741, 742, 370 P.2d 254 (1962) (affirming award of prejudgment interest on refund to taxpayer of real estate excise tax); *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 88-89, 193 P.3d 168 (2008) (reversing denial of prejudgment interest on refund due developer for payment of impact and development fees subsequently held invalid), *rev. denied*, 166 Wn.2d 1003 (2009).

Plaintiffs confuse the theories of unjust enrichment and quantum meruit in arguing that “[p]rejudgment interest is not allowable in a quantum meruit case.” (App. Br. 15, *quoting Irwin Concrete v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 200 (1982).) This is not a quantum meruit case. In holding that an amount of money due was a liquidated sum, the *Bailie* court distinguished an award for unjust enrichment, which is based upon the value of money wrongfully received by another, from a quantum

merit award, which is based on the reasonable value of services and requires the trial court to exercise discretion. 61 Wn. App. at 160.

Plaintiffs received cash in satisfaction of their judgment. After that money judgment was reversed on appeal, the trial court was authorized under RAP 12.8 to direct plaintiffs to return the cash that they had for two years. The trial court did not err in awarding prejudgment interest on its liquidated RAP 12.8 award.

**5. The trial court did not abuse its discretion in failing to hold an evidentiary hearing or enter findings of fact because the amounts at issue and other material facts and were undisputed.**

Plaintiffs' procedural objections are also without merit. Plaintiffs had no right to an evidentiary hearing on a RAP 12.8 motion, but if they had such a right, they waived it. Plaintiffs asked for a "hearing" or oral argument, not an "evidentiary hearing," below. (CP 64) A party who fails to timely request an evidentiary hearing waives the issue for appellate review. *State v. McAlpin*, 108 Wn.2d 458, 462, 740 P.2d 824 (1987); *State v. Atkinson*, 113 Wn. App. 661, 669–70, 54 P.3d 702 (2002), *rev. denied*, 149 Wn.2d 1013 (2003) (defendant waives his right to an evidentiary hearing where much of the relevant information is undisputed). Plaintiffs similarly waived their objection to the form of the trial court's RAP

12.8 order because they did not object to the trial court's failure to enter formal findings of fact and conclusions of law until filing their untimely motion for reconsideration. (CP 101-06, 127-30)

Plaintiffs had no right to an evidentiary hearing in any event because the remedy provided by RAP 12.8 here – where the judgment creditor has received payment in satisfaction of a money judgment later reversed – does not require the resolution of disputed facts. Plaintiffs did not contest the material facts – the amount of money paid and the portion that satisfied the judgment for exemplary damages, attorney fees and litigation expenses that was indisputably reversed on appeal. Their contention that restitution should have been limited to the “net benefit to their estates” rather than the amount of money they actually received presents a legal, not a factual, issue.

Even if there were disputed facts, the trial court nonetheless had the discretion to resolve those facts on the basis of declarations, rather than testimony. *See Outsource Servs. Mgmt., LLC v. Nooksack Business Corp.*, 172 Wn. App. 799, 807, ¶ 15, 292 P.3d 147, *rev. granted*, 177 Wn.2d 1019 (2013) (trial court has discretion to rely on written submissions to resolve disputed issues of personal jurisdiction under CR 12(b)(2)); *Krein v. Nordstrom*, 80 Wn. App.

306, 310, 908 P.2d 889 (1995) (no due process right to evidentiary hearing for summary adjudication of attorney lien; party could present testimony “in the form of affidavits or declarations.”); *State v. Kilgore*, 147 Wn.2d 288, 294, 53 P.3d 974 (2002) (“Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose.”). The trial court properly exercised its discretion in entering its order on RAP 12.8 relief based upon the written submissions of the parties.

While plaintiffs also argue that the trial court was required “to support its decision with . . . findings or explanation,” no court rule or principle of appellate review mandates findings of fact before entry of an order under RAP 12.8. Findings of fact are unnecessary in decisions on motions. CR 52(a)(5)(B). Where, as here, the facts are undisputed, they are also superfluous. *See City of Union Gap v. Dept. of Ecology*, 148 Wn. App. 519, 526, ¶ 11, 195 P.3d 580 (2008) (findings “neither necessary nor helpful” where there is no dispute over material facts). Finally, the trial court’s Order contains essential findings as to all material facts and is sufficient for purpose of appellate review. *See Backlund v. Univ. of Washington*, 137 Wn.2d 651, 657 n.1, 975 P.2d 950 (1999) (“The

absence of formal findings and conclusions in a memorandum opinion is not invariably fatal if we can discern what questions the trial court decided and the theory for the decision.”) The trial court’s resolution of this case was procedurally as well as substantively correct.

**6. The trial court properly entered a RAP 12.8 judgment in favor of Name Intelligence and Westerdal based on the undifferentiated joint and several judgment against them that this Court reversed.**

Plaintiffs’ objections to the trial court’s joint judgment are also without merit. The trial court originally entered a single undifferentiated judgment in favor of all three plaintiffs. The February 18, 2011 judgment did not divide the principal judgment in favor of the individual plaintiffs but listed them jointly as judgment creditors. (CP 40-42) The judgment similarly did not distinguish between the liability of Name Intelligence and Westerdal, but was a joint and several lump sum judgment against them both in favor of the three prevailing plaintiffs. (CP 40-42)

After this Court reversed the single joint and several judgment, the trial court properly entered a joint and several judgment against plaintiffs and in favor of Name Intelligence and Westerdal under RAP 12.8. Plaintiffs claim that Westerdal lacked

“standing under RAP 12.8” (App Br. 18) because he did not personally pay the judgment, but in *Sloan*, Division Three held that it did not matter for purposes of RAP 12.8 that someone other than the judgment debtor tendered the funds in satisfaction of the judgment. 167 Wn. App. at 520-21, ¶¶ 12-13. Here, Name Intelligence satisfied the judgment against both joint judgment debtors. Both Name Intelligence and Westerdal have standing to pursue RAP 12.8 relief. How they allocate the RAP 12.8 award is a matter between them, not plaintiffs.

## **V. CROSS APPEAL**

### **A. Assignment of Error on Cross-Appeal**

The trial court erred in ordering prejudgment interest on its RAP 12.8 award at the rate of 5%. (CP 97-98)

### **B. Issue Pertaining to Assignment of Error On Cross-Appeal**

Upon returning to the judgment debtor under RAP 12.8 the funds paid to satisfy a money judgment that was reversed on appeal, is the judgment debtor entitled to an award of prejudgment interest on the liquidated sum at the rate of 12% per annum?

**C. Argument on Cross-Appeal**

- 1. The trial court lacked the authority to reduce the award of prejudgment interest from 12% to 5% on the ground that a reduced rate was “equitable.”**

The trial court erred in reducing the award of prejudgment interest rate from 12%, to 5% based on its conclusion that a reduced rate of prejudgment interest was “reasonable” and “equitable.” The trial court’s misapplication of well-established legal principles in awarding prejudgment interest on this liquidated sum due under RAP 12.8 mandates reversal. *See Humphrey Indus., Ltd. v. Clay St. Associates, LLC*, 176 Wn.2d 662, 672, ¶ 19, 295 P.3d 231 (2013) (reversing denial of prejudgment interest as abuse of discretion; “untenable reasons include errors of law”); *Wright v. Dave Johnson Ins. Inc.*, 167 Wn. App. 758, 775, ¶ 32, 275 P.3d 339, *rev. denied*, 175 Wn.2d 1008 (2012).

The right to prejudgment interest on a liquidated sum is “well established [by] case law,” and is not substantially different from the statutory right to post-judgment interest under RCW 4.56.110. *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 162, 810 P.2d 12, *rev. denied*, 117 Wn.2d 1029 (1991). “A claimant’s entitlement to prejudgment interest in an

appropriate case is of the same order as the same party's entitlement to post-judgment interest." *Bailie*, 61 Wn. App. at 162. Both compensate the prevailing party for the loss of use of funds to which they are entitled. *See Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 775, 115 P.3d 349 (2005) ("Prejudgment interest is allowed in civil litigation at the statutory judgment interest rate, RCW 4.56.110, RCW 19.52.020, when a party to the litigation retains funds rightfully belonging to another and the amount of the funds at issue is liquidated, that is, the amount at issue can be calculated with precision and without reliance on opinion or discretion."), *quoting Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998).

Thus, just as RCW 4.56.110(4) mandates that "judgments *shall* bear interest from the date of entry at the maximum rate

permitted under RCW 19.52.020,”<sup>1</sup> (emphasis added) Washington courts look to the interest statutes to determine the applicable rate of prejudgment interest that is mandated by case law. *Bailie*, 61 Wn. App. at 162. In *Schrom v. Board For Volunteer Fire Fighters*, 153 Wn.2d 19, 36, 100 P.3d 814 (2004), the Court reversed the pension board’s refusal to award volunteer firefighters prejudgment interest on their restitutionary right to be reimbursed for contributions to the state pension fund after ruling that they were ineligible for state pensions. The Court relied on RCW 19.52.010(1), which mandates the statutory 12% prejudgment interest rate for

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<sup>1</sup> (1) Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: (a) Twelve percent per annum; or (b) four 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 later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action.

RCWA 19.52.020(1)

“[e]very loan or forbearance of money, goods, or things in action” when no different rate is agreed in writing.<sup>2</sup>

In *Wright v. Dave Johnson Ins. Inc.*, Division Two held that the trial court abused its discretion in refusing to award prejudgment interest on an equitable constructive trust award at RCW 19.52.010(1)'s rate of 12%. 167 Wn. App. at 776, ¶ 34. The trial court had directed return to the owner of an insurance agency of insurance policies he had transferred to his son-in-law. As part of its equitable decree, the trial court also ordered the owner to reimburse the son-in-law for the premiums paid by the son-in-law on the policies, but reduced the interest rate below 12% on the ground that the reduced rate was “fair.” 167 Wn. App. at 775, ¶ 31. Citing *Schrom*, the Court of Appeals reversed, holding that the son-in-law was entitled to interest at the rate of 12% as a matter of law under RCW 19.52.010(1):

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<sup>2</sup> (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 . . .

RCWA 19.52.010(1)

[T]he correct prejudgment interest rate to be applied...was 12 percent. The trial court did not apply the appropriate legal standard (*Schrom*) and thus abused its discretion.

167 Wn. App. at 776, ¶ 34.

Similarly, the trial court lacked the discretion to reduce the prejudgment rate of interest rate below the 12% required by statute in this case. The trial court's conclusory statement that 5% was a "reasonable, equitable rate" is akin to the trial court's refusal to award prejudgment interest at the statutory rate in *Wright* on the purported justification that a lower rate was "fair." 167 Wn. Ap. at 775, ¶ 31. This Court should reverse and remand with directions to award prejudgment interest at the rate of 12% from March 2, 2011, when Name Intelligence and Westerdal satisfied the judgment, until December 19, 2013, when judgment was entered. (CP 98, CP 126) *See Wright*, 167 Wn. App. at 777, ¶ 34 (reversing and remanding "for calculation of interest owed at 12 percent per annum under RCW 19.52.010(1).").

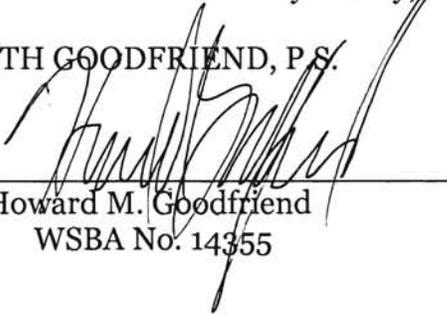
## VI. CONCLUSION

The trial court correctly directed plaintiffs to return to Name Intelligence and Westerdal, the judgment debtors, the cash paid to satisfy plaintiffs' money judgment after that judgment was reversed

on appeal. The amount paid to satisfy the judgment was a liquidated sum. The trial court lacked authority to reduce the prejudgment interest due on that liquidated sum below 12% provided in RCW 19.52.010 and .020. This Court should affirm the RAP 12.8 award, but should remand with directions to increase the rate of prejudgment interest to 12% per annum.

Dated this 18th day of July, 2014.

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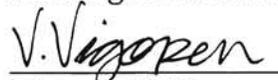
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 21, 2014, I arranged for service of the foregoing Brief of Respondents/Cross-Appellants, to the Court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
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**DATED** at Seattle, Washington this 21st day of July, 2014.

  
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Victoria K. Vigoren