

 ORIGINAL

No. 43035-5-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

PETER CHARLES SEIDEL, a single man,

Respondent/Cross-Appellant,

v.

CAROLINE HARDING, a single woman, and
The CAROLINE HARDING LIVING TRUST,

Appellant/Cross-Respondent.

COMBINED REPLY/RESPONSE BRIEF OF
APPELLANT/CROSS-RESPONDENT

Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661
Attorneys for Appellant/Cross-Respondent
Caroline Harding and The Caroline Harding Living Trust

FILED
COURT OF APPEALS
DIVISION II
2012 JUL 23 PM 1:09
STATE OF WASHINGTON
BY 
DEPUTY

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iii
A. INTRODUCTION	1
B. RESPONSE TO ASSIGNMENT OF ERROR ON CROSS-REVIEW	2
C. RESPONSE TO PETER’S COUNTERSTATEMENT OF THE CASE	3
D. ARGUMENT IN SUPPORT OF REPLY	6
(1) <u>Standard of Review</u>	6
(2) <u>The Trial Court Abused Its Discretion by Awarding Prejudgment Interest on an Unliquidated Claim</u>	6
E. ARGUMENT IN RESPONSE TO PETER’S CROSS-APPEAL	12
(1) <u>This Court Should Not Consider Peter’s Cross-Appeal</u>	12
(2) <u>Peter Is Not Entitled to Statutory Attorney Fees or Costs on Appeal</u>	13
F. CONCLUSION	13

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Bostain v. Food Express, Inc., 159 Wn.2d 700, 153 P.3d 846,
cert. denied, 552 U.S. 1040 (2007).....10

Bristol v. Streibich, 24 Wn.2d 657, 167 P.2d 125 (1946).....3

Godefroy v. Reilly, 146 Wash. 257, 262 P. 639 (1928)10

Halvorsen v. Ferguson, 46 Wn. App. 708, 735 P.2d 675 (1986),
review denied, 108 Wn.2d 1008 (1987).....3, 12

Hansen v. Rothaus, 107 Wn.2d 468, 730 P.2d 662 (1986).....7, 11

In re Santore, 28 Wn. App. 319, 623 P.2d 702, *review denied*,
 95 Wn.2d 1019 (1981)3

King Aircraft Sales, Inc. v. Lane, 68 Wn. App. 706,
 846 P.2d 550 (1993).....3, 12

Lloyd v. American Can Co., 128 Wash. 298, 222 P. 876 (1924).....8

Paduano v. J. C. Boespflug Const. Co., 66 Wn.2d 527,
 403 P.2d 841 (1965).....11

Pannell v. Food Servs. of Am., 61 Wn. App. 418,
 810 P.2d 952 (1991), *review denied*,
 118 Wn.2d 1008 (1992)7

Pearson Const. Corp. v. Intertherm, Inc., 18 Wn. App. 17,
 566 P.2d 575 (1977).....8

Prier v. Refrigeration Eng’r Co., 74 Wn.2d 25,
 442 P.2d 621 (1968).....7, 8

Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002).....3

Sime Const. Co., Inc. v. Washington Pub. Power Supply Sys.,
 28 Wn. App. 10, 621 P.2d 1299 (1980),
review denied, 95 Wn.2d 1012 (1981).....6

Ski Acres Dev. Co. v. Douglas G. Gorman, Inc., 8 Wn. App. 775,
 508 P.2d 1381 (Div. I 1973)9

State v. Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997).....10

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999).....9

State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983).....9

Stevens v. Brink’s Home Security, Inc., 162 Wn.2d 42,
 169 P.3d 473 (2007).....10

<i>Unigard Ins. Co. v. Mutual of Enumclaw Ins. Co.</i> , 160 Wn. App. 912, 250 P.3d 121 (2011).....	10-11
<i>Wright v. Tacoma</i> , 87 Wash. 334, 151 P. 837 (1915).....	7

Other Cases

<i>Cox v. McLaughlin</i> , 76 Cal. 60, 67 18 P. 100 (1888)	8
--	---

Rules and Regulations

RAP 10.3(b)	2
RAP 10.3(g)	2
RAP 14.2.....	13

A. INTRODUCTION

Appellant Caroline Harding¹ and respondent Peter Seidel were involved in an intimate relationship. After their breakup, Peter sued Caroline in two separate lawsuits to recover both the out-of-pocket expenses and the labor costs he claimed he incurred to improve Caroline's separate properties during their relationship. The underlying case involves Peter's second claim; namely, that Caroline was unjustly enriched by his efforts to improve her properties.

The trial court found that Caroline had been unjustly enriched at Peter's expense following a bench trial. But the court rejected Peter's request for \$192,000 in damages, finding that his formula for calculating his damages was unrealistic and that his claimed hourly rate and hours worked were unsupported by the record. The trial court awarded Peter \$52,500 in damages and \$22,600 in prejudgment interest. Both parties appealed.

The issue before the Court on Caroline's appeal is whether the trial court erred in awarding prejudgment interest to Peter. Prejudgment interest was improper because Caroline had no way to know what sum she

¹ Appellants Caroline Harding and The Caroline Harding Living Trust will continue to be referred to collectively as "Caroline" for convenience and ease of reading.

owed until the trial court found the facts and pronounced judgment in the case. This Court should reverse the award of prejudgment interest.

The issue before the Court on Peter's cross-appeal is whether the trial court erred in setting the amount of prejudgment interest. Because Peter failed to properly challenge the conclusion of law setting the amount of prejudgment interest, the trial court's award of \$22,600 in prejudgment interest should not be disturbed on appeal.

B. RESPONSE TO ASSIGNMENT OF ERROR ON CROSS-REVIEW

A respondent seeking cross review must state the assignments of error and the issues pertaining to those assignments of error presented for review by the respondent and include argument of those issues in the brief of respondent. RAP 10.3(b). Here, Peter offers the Court improper argument in his assignment of error on cross-review and fails to identify the issue pertaining to that alleged error as required by RAP 10.3(b). Br. of Resp't/Cross-Appellant at 2.

Peter also fails to comply with RAP 10.3(g), which mandates that an appellant pinpoint in the brief's "assignment of error" section those findings that the trial court allegedly entered erroneously. He does not assign error on cross-review to *any* of the trial court's findings of fact or

conclusions of law. Br. of Resp't/Cross-Appellant at 2.² Instead, he baldly states his disagreement with the trial court's ruling without adequately arguing the issue by reference to the record. This is insufficient. *Bristol v. Streibich*, 24 Wn.2d 657, 660, 167 P.2d 125 (1946) (noting it is not the function or duty of the appellate court to search the record for errors).

C. RESPONSE TO PETER'S COUNTERSTATEMENT OF THE CASE³

Peter presents the Court with a self-serving, lopsided view of the facts. Br. of Resp't/Cross-Appellant at 2-4. Accordingly, the Court should consider the following *unchallenged* facts found by the trial court in its memorandum decision and its formal findings of fact⁴ when deciding this case.

Both Peter and Caroline greatly overstated the value of their contributions and understated the value of the other's contribution, making

² Peter's failure to assign error on cross-review to the trial court's findings renders them verities on cross-review. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). *See also, In re Santore*, 28 Wn. App. 319, 623 P.2d 702, *review denied*, 95 Wn.2d 1019 (1981) (unchallenged findings become the established facts of the case). Similarly, his failure to assign error to conclusion of law number 7 precludes consideration on cross-review. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 722, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987). *See also, King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993) (unchallenged conclusion becomes the law of the case).

³ Peter improperly refers to an exhibit not designated as part of the record on review. Br. of Resp't/Cross-Appellant at 2.

⁴ The trial court incorporated its memorandum decision by reference in the formal findings of fact and conclusions of law. CP II:171 (finding 22).

it difficult for the trial court to place much credibility in either party's testimony that was not substantiated by credible, admitted documentation. CP II:161, 170 (finding 9).⁵

Peter's formula of multiplying 2.75 by his costs to calculate his labor costs was unrealistic in this situation. CP II:163, 170 (finding 19.A). He did not bid the Bay Center farmhouse job or jobs. CP II:163. He was merely helping his sweetheart, with no expectation of reimbursement other than his actual costs. CP II:163. His formula was "nonsensical." CP II:163.

Peter failed to convince the trial court that he suffered any more than a \$5,000 loss in each of years 2005-2007. CP II:164. His request to be reimbursed either \$55.00 or \$60.00 per hour for his labor was unsubstantiated. CP II:164. He was never expecting to charge Caroline for his time, let alone a highly skilled, full-time professional contractor/builder. CP II:164. His actual carpentry/contractor experience was minimal. CP II:164. Accordingly, the trial court set his hourly rate at \$35.00. CP II:164, 170 (finding 17).

Peter's request to be compensated for 3000 hours of labor was likewise "unreasonable and unsupported by the evidence and certainly not proven by a preponderance of the evidence." CP II:164. His testimony

⁵ "CP II" refers to the clerk's papers designated in Peter's second lawsuit, Pacific County Cause No. 08-2-00420-3.

with respect to the hours he expended working on Caroline's properties was "unreliable and unsubstantiated." CP II:164. He failed to keep a billing record or time slip to substantiate such a large, hourly figure. CP II:164. At best, he guessed at this number. CP II:164. The court found that he should be compensated for 1500 hours. CP II:164, 170 (finding 18). Any remaining hours were offset by the benefits Peter received such as room and board, Caroline's contributions both in time, effort, and money, and the then-goodwill between the parties. CP II:164-65, 170 (finding 16).

Peter's request for \$192,000 from Caroline was unreasonable and impractical. CP II:166. He offered no definitive testimony other than his own word that he typically charged 2.75 times his costs for his labor. CP II:166. He failed to provide a history of jobs he turned down during his relationship with Caroline, any written bid proposals for such jobs, or any other similar documentary evidence. CP II:166. He simply asked the trial court to "take his word that he would have made \$192,000 or more in 18 months of work." CP II:166. The court could not and did not accept Peter's undocumented earnings. CP II:166. Given the unreliability of the parties' testimony, the trial court was "left to *best estimate* a fair compensation" to Peter. CP II:164 (emphasis added).

D. ARGUMENT IN SUPPORT OF REPLY⁶

(1) Standard of Review

Caroline and Peter do not dispute the appropriate standard of review in this case. They agree this Court reviews a prejudgment interest award for an abuse of discretion. Br. of Appellant/Cross-Resp't at 11; Br. of Resp't/Cross-Appellant at 6.

(2) The Trial Court Abused Its Discretion by Awarding Prejudgment Interest on an Unliquidated Claim

Caroline and Peter agree that whether prejudgment interest is awardable depends on whether the claim is a liquidated or readily determinable claim, as opposed to an unliquidated claim. Br. of Appellant/Cross-Resp't at 12; Br. of Resp't/Cross-Appellant at 6. They also agree that a claimant is not entitled to prejudgment interest if the claim is unliquidated. Br. of Appellant/Cross-Resp't at 11; Br. of Resp't/Cross-Appellant at 6. But they disagree whether Peter's unjust enrichment claim was a liquidated claim entitling him to prejudgment interest or an unliquidated claim requiring this Court to reverse the award

⁶ Peter argues review is inappropriate because Caroline failed to supply the Court with the report of proceedings. Br. of Resp't/Cross-Appellant at 5-6, 11. The report of proceedings is unnecessary where the findings and conclusions provide a basis for the trial court's ruling. *Sime Const. Co., Inc. v. Washington Pub. Power Supply Sys.*, 28 Wn. App. 10, 18, 621 P.2d 1299 (1980), *review denied*, 95 Wn.2d 1012 (1981) (confining analysis to the trial court's findings where the parties failed to provide a report of proceedings).

of prejudgment interest.⁷ Where Peter's damages were neither liquidated nor determinable, the trial court abused its discretion by awarding prejudgment interest.

The requirement that damages be liquidated or determinable limits awards of prejudgment interest to situations where no discretion on the part of the trier of fact is required to determine the reasonable amount of damages. *Hansen v. Rothaus*, 107 Wn.2d 468, 474-78, 730 P.2d 662 (1986); *Prier v. Refrigeration Eng'r Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968). In contrast, in those cases where the demand is for something that requires evidence to establish the quantity or amount of the thing furnished or the value of services rendered, interest will not be allowed prior to judgment. *Wright v. Tacoma*, 87 Wash. 334, 353-54, 151 P. 837 (1915) (amount alleged due on contract for public improvements; claim held unliquidated, prejudgment interest not allowed). *See also, Pannell v. Food Servs. of Am.*, 61 Wn. App. 418, 449, 810 P.2d 952 (1991), *review denied*, 118 Wn.2d 1008 (1992) (holding where the amount of recovery depends on the findings of fact, prejudgment interest cannot be awarded). The rationale behind this rule is that a person must know what sum he or

⁷ Contrary to the assertion in Peter's brief at page 8, Caroline does not argue that a claim of unjust enrichment precludes recovery of prejudgment interest. Instead, she argues that Peter's claim was unliquidated because the determination of his damages depended upon the trial court's opinion or discretion. Br. of Appellant/Cross-Resp't at 13, 15-16.

she owes before that person can be held in default for not paying. *Pearson Const. Corp. v. Intertherm, Inc.*, 18 Wn. App. 17, 20, 566 P.2d 575 (1977) (citing *Cox v. McLaughlin*, 76 Cal. 60, 67 18 P. 100 (1888)). See also, *Prier*, 74 Wn.2d at 34 (noting a defendant should not be required to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to the plaintiff).

Here, there was no way to compute the value of Peter's damages without evidence to establish the value of the services he rendered because *there was no contract between the parties* specifying the compensation he was to be paid for the work he performed. The amount to which he was entitled could be arrived at only with testimony as to his competency, experience, and earning ability. *Lloyd v. American Can Co.*, 128 Wash. 298, 314, 222 P. 876 (1924). Based on the testimony, the trial court specifically found:

- Peter's formula of multiplying 2.75 by his costs to calculate his labor was unrealistic. CP II:163, 170 (finding 19.A);
- His formula was "nonsensical." CP II:163;
- His request to be reimbursed either \$55.00 or \$60.00 per hour for his labor was unsubstantiated. CP II:164;
- His actual carpentry/contractor experience was minimal. CP II:164;

- His request to be compensated for 3000 hours of labor was “unreasonable and unsupported by the evidence[.]” CP II:164;
- He failed to keep a billing record or time slip to substantiate his hours. CP II:164; and
- At best, he guessed at the number of hours he expended working on Caroline’s properties. CP II:164;

Based on these unchallenged findings⁸ it is clear that the trial court relied on opinion or discretion to determine Peter’s damages. His claim was therefore unliquidated. *Ski Acres Dev. Co. v. Douglas G. Gorman, Inc.*, 8 Wn. App. 775, 508 P.2d 1381 (Div. I 1973) (holding trial court was correct in not allowing prejudgment interest where there was a question of reasonableness of cost of repairs and, until that question was resolved by jury, claim was unliquidated).

Peter’s attempt to undermine *Lloyd* because it is “notably older than the majority of cases discussing liquidated and unliquidated damages” is unavailing. *Lloyd* is still good law because it has not been overruled by the Supreme Court. *See, e.g., State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) (noting *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983) remained good law until the Supreme Court overruled it three

⁸ Peter takes issue with Caroline’s failure to assign error to finding number 17 setting his hourly rate and finding number 18 setting his hours. Br. of Resp’t/Cross-Appellant at 9. This is a non-issue. What Peter forgets to consider is that the trial court had to exercise its discretion to make those findings because he failed to substantiate both his request for \$55.00 to \$60.00 per hour and his request for 3000 hours.

years later in another case). *See also, State v. Hairston*, 133 Wn.2d 534, 539, 946 P.2d 397 (1997) (holding that the Court of Appeals errs when it departs from the precedent of the Washington Supreme Court); *Godefroy v. Reilly*, 146 Wash. 257, 259, 262 P. 639 (1928) (“When this court has once decided a question of law, that decision, when the question arises again, is not only binding on all inferior courts in this state, but it is binding on this court until that case is overruled.”).

Peter’s reliance on *Stevens v. Brink’s Home Security, Inc.*, 162 Wn.2d 42, 169 P.3d 473 (2007) and *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007), is likewise misplaced because they are distinguishable. The critical distinction that he fails to make is that the claims in *Stevens* and *Brinks* were liquidated because they could be determined with precision and without reliance on opinion or discretion. For example, the claim in *Stevens* was liquidated because the technicians’ claim for drive time compensation was determinable based on the drive times calculated with computer software and their actual wage rates. 162 Wn.2d at 50-51. Similarly, the claim for overtime pay in *Bostain* was liquidated because Food Express paid Bostain either an hourly wage or by the mile. 159 Wn.2d at 706. In both cases, the triers of fact did not have to rely on opinion or discretion to calculate the amounts due. *See also, Unigard Ins.*

Co. v. Mutual of Enumclaw Ins. Co., 160 Wn. App. 912, 250 P.3d 121 (2011) (prejudgment interest allowed where cleanup costs and expenses could be calculated without reliance on opinion or discretion because the amount owed equaled invoices for cleanup and related costs).

Unlike the cases to which Peter's cites, here there was no way the trial court could have determined his damages with exactness. As the trial court found in the unchallenged findings, Peter's request was unsubstantiated. There was no contract between the parties addressing his compensation and he presented no evidence to support his claimed damages. Moreover, his formula for calculating his damages was unrealistic, unreasonable, and unsupported by the record. Accordingly, the trial court could not have "best estimated a fair compensation" to him without resort to opinion or discretion to set both his hourly rate and the number of hours he worked where Peter failed to provide that evidence.

Because the determination of what Caroline owed Peter was subject to the discretion of the trial court, not just as to the issue of liability but also as to the ultimate calculation of damages, the trial court's award of prejudgment interest was inappropriate in this case. *Hansen*, 107 Wn.2d 468, 476-77. *See also, Paduano v. J. C. Boespflug Const. Co.*, 66 Wn.2d 527, 403 P.2d 841 (1965) (where award to subcontractor for work performed under express contract was not determinable with exactness

from any standard fixed in subcontract and was *ascertainable only by introduction of evidence to determine reasonable value of services rendered and expenses incurred*, such sums were unliquidated, and prejudgment interest was not allowable). The Court should reverse that award.

E. ARGUMENT IN RESPONSE TO PETER'S CROSS-APPEAL

(1) This Court Should Not Consider Peter's Cross-Appeal

Peter argues on cross-review that the trial court erred in calculating the prejudgment interest to which he was entitled. Br. of Resp't/Cross-Appellant at 13-14. Even if the trial court erred, Peter fails to properly raise the issue for review.

Here, the trial court held in conclusion number 7 that Peter was entitled to prejudgment interest from August 10, 2007 to the date of judgment in the amount of \$22,600. CP 171. Peter neither assigns error to this conclusion nor to any finding which supports it. An unchallenged conclusion of law becomes the law of the case. *Halvorsen*, 46 Wn. App. at 722. Accordingly, conclusion 7 should not be disturbed on appeal. *King Aircraft Sales*, 68 Wn. App. at 717.

(2) Peter Is Not Entitled to Statutory Attorney Fees or Costs on Appeal

Costs to the prevailing party are permitted on appeal under RAP 14.2. Peter is not entitled to his statutory attorney fees and costs where he is not the prevailing party on appeal.

F. CONCLUSION

This Court should reverse the award of prejudgment interest and remand with instructions for the trial court to enter an appropriately amended judgment. The Court should reject Peter's attempt to collect additional pre-judgment interest where his failure to properly challenge conclusion 7 precludes review. Costs on appeal should be awarded to Caroline.

DATED this 20th day of July, 2012.

Respectfully submitted,



Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661
Attorneys for Appellant/Cross-Respondent

DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of: Combined Reply/Response Brief of Appellant/Cross-Respondent in Court of Appeals Cause No. 43035-5-II to the following parties:

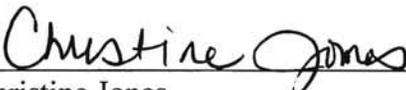
Richard Vroman
Megan M. Valentine
Ingram Zelasko & Goodwin, LLP
120 E. First Street
Aberdeen, WA 98520

Original filed with:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

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

DATED: July 23, 2012, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick

FILED
COURT OF APPEALS
DIVISION II
2012 JUL 23 PM 1:09
STATE OF WASHINGTON
BY _____
DEPUTY