

No. 71455-4-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

GUSTAVO NELSON ARZOLA, MICHAEL KLATT, and
SUSAN PROSSER

Appellants/Cross Respondents,

v.

NAME INTELLIGENCE, INC. and JAY WESTERDAL

Respondents/Cross Appellants.

REPLY BRIEF OF APPELLANTS/CROSS RESPONDENTS' BRIEF

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I. REPLY TO RESTATEMENT OF THE CASE

Insofar as they are relevant to the issues on appeal, Appellants make the following corrections and additions to the case as stated by Respondents:

Appellants *did* request an evidentiary hearing in the trial court in response to Respondent's Motion for Entry of Judgment. CP 64: "Plaintiffs respectfully request that this Court conduct a hearing..."; CP 74: "Any conflict in evidence accentuates the need for a hearing..."; CP 75: "Plaintiffs respectfully request a hearing so that this Court can take evidence and exercise its discretion..." No hearing was granted.

Further, the only evidence offered (via declaration because no hearing was granted) established that the "use value" of the monies paid in satisfaction of the judgment was between .18% and .5% during the pendency of the first appeal. This was the only evidence before the trial court upon which it could have conceivably made its ruling.

II. REPLY ARGUMENT

A. **The trial court abused its discretion when it failed to conduct an evidentiary hearing to determine the actual benefit received by the Appellants.**

A trial court abuses its discretion when it bases its decision on "untenable grounds" (i.e. its implied or express findings are "unsupported by the record"), or the decision is based on "untenable reasons" (i.e. it is

“based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *State v. Dye*, 178 Wn.2d 541, 548 (2013) (incompletely quoted by Respondents/Cross-Appellants at p. 8).

By failing to conduct an evidentiary hearing on the value of what was actually received by the Appellants, and then presuming a “value” unsupported by the evidence actually presented, the trial court abused its discretion. As discussed in Appellants’ opening brief (and below), the Appellants did not receive or retain the value apparently imputed by the trial court.

B. RAP 12.8 must be construed in conjunction with the common law of restitution, and does not simply require a reimbursement of any sums paid out by a party prior to reversal of a trial court decision.

NI argues (simplistically) that RAP 12.8 instructs a trial court to restore “property taken from” a prevailing defendant and that language therefore answers the question at hand. NI’s interpretation (making full repayment of any cash satisfaction mandatory) ignores the express language of RAP 12.8 as well as the common law of restitution – which is to be used as an aid in applying RAP 12.8. “Thus, the historical background of RAP 12.8 indicates that the purpose of the ‘in appropriate circumstances, provide restitution’ language is to encourage both practitioners and courts to look to the common law of restitution in applying or construing RAP 12.8”. *Ehsani*

v. McCullough Family Partnership, 160 Wn.2d, 586, 591 (2007).

There was no hearing at the trial court level. However, the *only* evidence offered as to the “measureable increase in the recipient’s wealth” or the “increase in the [recipients’] net assets” was offered by Appellants. CP 76-89. *See* Restatement (First) of Restitution § 1 comment d.; Restatement (First) of Restitution § 49 (2). Respondents’ argument that applying the common law of restitution (as already dictated by the Washington Supreme Court) – specifically the “net benefit” rule - would make for “poor policy” or require the trial court to engage in “fact finding” is without merit. A primary job of trial courts is to engage in fact finding. Simply failing to engage in fact finding because it is inconvenient is in contravention of the trial court’s duties to apply the common law of restitution in enforcing RAP 12.8 and is an abuse of discretion.

Further, because the trial court’s decision imposed a restitution obligation on Appellants greater than the evidence of the benefit actually received by them, it is unsupported by the evidence and is an abuse of discretion.

- 1. Appellants should have been given a credit for income taxes they were required to pay as a result of Defendants’ voluntary satisfaction of the judgment.**

Respondents’ argue that the trial court’s refusal to enter a finding

regarding plaintiffs' taxes is "tantamount to a finding that [Appellants] failed to meet their burden..." Resp. Br. at p. 18. As previously discussed, however, there was never a hearing of evidence upon which to base a finding. To the extent this Court considers that failure a "negative factual finding", such a negative is unsupported by the evidence. Appellants each presented concrete evidence (in the form of declarations) as to the exact additional tax burden imposed on them by receipt of the funds from NI. CP 77, 81, 84. Although Respondents submitted a declaration from a CPA that Declaration fails to specifically address whether there was a net benefit to each Appellants' estate, or the fact that were the IRS to permit Appellants some form of credit, the IRS certainly wouldn't reimburse Appellants for the value of the money paid to the IRS over the past four years. As this CPA witness did not testify (and was therefore not subject to cross-examination), there is no evidence contradicting the Appellants allegation as the actual benefit to their estates. Failure to give the Appellants a credit for these amounts leaves them "worse off...than if the transaction with the claimant had never taken place." Restatement (First) of Restitution § 142, Comment f.

- 2. Appellants should have been given a credit for attorney fees they were required to pay as a result of NI's satisfaction of the judgment.**

It is undisputed that the Appellants never received the amounts paid by NI for attorney fees. NI misstates the record when it claims that Appellants “chose to pay their lawyers to pursue a wage claim that was ultimately without merit.” Once the judgment was obtained and paid, Appellants had no choice in the matter anymore than they had a choice to pay their income taxes. Because receipt of these funds did not increase the Appellants net assets, it should not be assessed against their estate in the form of restitution. *See* Restatement of Restitution § 49(2)

3. Prejudgment interest is not appropriate when a court must exercise its equitable discretion to determine an appropriate amount of restitution because the sum is not “liquidated.”

Nowhere in the language of RAP 12.8 does it provide for the award of prejudgment interest on amounts ultimately reversed by the trial court. Further, as previously discussed, RAP 12.8 is governed by the common law of restitution, and is an *equitable* consideration. *See Sac Downtown Ltd. Partnership v. Kahn*, 123 Wn.2d 197, 205 (1994)(“restitution [under RAP 12.8] is an equitable remedy.”); Restatement (First) of Restitution § 74 (restitution is not required if it would be “inequitable”). Because restitution (even of reversed money judgment awards) is not a matter of right, any restitution award by a trial court constitutes an exercise of discretion. As the trial court must exercise discretion, any sum ultimately awarded is in reliance

on the court's discretion and not a basis for assessing prejudgment interest. *Prier v. Refrigeration Eng'g. Co.*, 74 Wn.2d 25, 32 (1968). *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn.App. 86, 95 (Div. 2 1980). See also *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn.App. 537, 549 (Div. 1 1994)(decision based on equitable discretion is unliquidated, precluding prejudgment interest).

4. Prejudgment interest, if awardable at all, should only be awarded at the “use value” rate of money received by an innocent recipient.

The authorities cited by NI and Westerdal are inapposite because they are based on a “wrongful” withholding of money (or a breach of duty) by a party. In this case, the Appellants did not breach any duty or commit any wrongful act. They were rightful judgment creditors and should not be punished.

A person who takes advantage of a judgment in his favor is **not in any sense a wrongdoer** unless the judgment is void or was obtained by improper means, and he should not be penalized because of a mistake made by the court. On the other hand, one who pays a judgment is performing a legal duty and should not suffer; upon reversal, it is his right to be put back as nearly as may be in the position he would have occupied had no judgment been rendered. **The situation is substantially the same as in cases where there has been a transfer by mistake without fault on the part of transferor or transferee and the results of the cases, as indicated in the notes below, reach results analogous to those reached in the mistake cases.**

Restatement (First) of Restitution § 74 (1937) (Reporters' Notes)(emphasis added). Nonetheless, Respondents seek to obtain a twelve percent return on monies paid in satisfaction of the judgment because they chose not to supersede it. Such a return (at 12%) constitutes a rate twenty four times the highest rate of interest earned by the Appellants on any of the sums received. CP 77, 81. Such a windfall is exactly the type of thing criticized by the Washington Supreme Court in *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 48:

Equally important is RAP 8.1(a) which “provides a means of delaying the enforcement of a trial court decision in a civil case”, *i.e.*, by supersedeas. RAP 8.1(b). If defendants' theory prevails, the judgment debtor need not post a supersedeas bond or other security. The debtor would know that he would get the most favorable of either the sale proceeds or market value plus interest. In effect the notice of appeal would be a substitute for supersedeas. That is not the purpose or intent of RAP 7.2(c) and RAP 8.1.

Like the defendants in *A.N.W. Seed*, Respondents in this case made a tactical decision to avoid placing (or paying for) a supersedeas bond or cash undertaking. They should not be rewarded with such a windfall interest rate.

The maximum “prejudgment” interest Respondents are entitled to is the “use” value of the funds received, as established in the trial court based on evidence actually presented.

C. The restitution judgment should not have been entered jointly against all Appellants because they each had distinct

claims and received distinct sums.

Respondents fail to materially address Appellants argument that they should not have had a judgment for restitution entered against them jointly. It is undisputed that the trial court's findings (after the trial) specifically delineated NI and Westerdal's liability to each of the Appellants. CP 26. Net amounts were specifically paid to each Appellant based on those findings. The trial court's judgment making each Appellant jointly liable for restitution of amounts received by others leaves them worse off than if the payment had never taken place. *See* Restatement (3d) of Restitution § 50(3). Appellants timely objected to this form of the judgment. CP 101-106. Nonetheless, the trial court entered this overbroad relief.

III. ARGUMENT IN RESPONSE TO CROSS APPEAL

A. Prejudgment interest at twelve percent (12%) is inequitable and should not be awarded against Appellants-Respondents under RAP 12.8 using the equitable remedy of restitution.

“Restitution under RAP 12.8 is an equitable remedy and ‘trial courts have broad discretionary power to fashion equitable remedies.’ A trial court’s determination whether to award restitution under RAP 12.8 is reviewed for abuse of discretion.” *Ehsani v. McCullough Family Partnership*, 160 Wn.2d 586, 589 (2007)(quoting *In re Foreclosure of Liens*, 123 Wn.2d 197, 204 (1994)). As discussed in Section C above, prejudgment interest should not be awarded at all because the sums ultimately awarded

are not liquidated and are subject to the trial court's application of discretion.

Nonetheless, to the extent any prejudgment interest is awarded it should not be awarded at the windfall rate of twelve percent (12%) – which would constitute a windfall for defendants who lose at trial and gamble on appeal. The only evidence before the trial court was that the “use value” of the money paid varied between .018% and .5% during the pendency of the appeal. CP 77, 81. An award at twelve percent would not be equitable.

B. RCW 19.52.020 does not apply to payments made in satisfaction of lawful judgments because they are not “loans” or “forbearances” of money.

Additionally, RCW 19.52.020 expressly applies to every “loan or forbearance of money”. RCW 19.52.020(1). The payment of the judgment was clearly not a loan – it was a legal obligation that was not superseded. Further, the payment of the judgment was not a forbearance at the time of payment, as Respondents had no legal right to any reimbursement until this Court reversed the lawfully entered judgment.¹ As the Supreme Court has previously held. “[i]t is the law in this state that, in the absence of any contract to the contrary, interest on money becomes due and payable only when the money becomes due and payable.” *Washington Fish & Oyster Co*

¹ Forbearance is defined as “The act of refraining from enforcing a right, obligation or debt.” Black’s Law Dictionary Seventh Edition) p. 656.

v. *G.P. Halferty & Co.*, 44 Wn.2d 646, 661 (1954). It is undisputed that the money paid in satisfaction of the judgment was not “due and payable” until the Respondents’ appeal was successful and the judgment was reversed.

Bailie, cited by Respondents, involved recovery of money against the defendants based on “wrongful” retention of money owed another. In that case, the Court of Appeals held that the plaintiff should be compensated based on the “use value” of the money. *Bailie Communications Ltd. v. Trend Business Systems, Inc.*, 61 Wn.App. 151, 162 (Div. 1 1991). The Court specifically noted that RCW 19.52.010 “is not the basis on which the cases have provided for prejudgment interest.” *Id.* at fn. 4. The undisputed evidence provided to the trial court was the “use value” of the money paid in satisfaction of the judgment was no more than .5% per annum. If any prejudgment rate is awarded, it should be this rate.

RAP 12.8 does not expressly provide for prejudgment interest, and certainly doesn’t mandate the application of RCW 19.52.020. Tellingly, Respondents have failed to cite a single case applying RCW 19.52.020 to a restitution award under RAP 12.8 (and counsel for Appellants is aware of none).

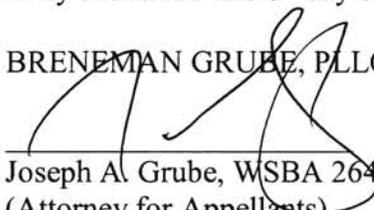
IV. CONCLUSION

When a judgment debtor voluntarily satisfies a judgment pending appeal (rather than obtaining supersedeas relief), RAP 12.8 must be applied in conjunction with the common law of restitution, including the Restatement (First) of Restitution § 74. Fundamentally, the (former) judgment creditors should not be put in a worse off position than if they had never prevailed in the first place. Awarding prevailing appellants twelve percent interest on any amounts reversed will promote unnecessary appellate litigation by incentivizing parties to pay judgments to solvent plaintiffs (rather than superseding them), appeal them, and then seek windfall returns against formerly prevailing plaintiffs.

Appellants respectfully request this Court: (1) reverse the judgment as to the award of prejudgment interest (\$35,713.52); (2) reverse the judgment as to the amount of federal taxes paid (\$44,618); (3) reverse the judgment as to the attorney fees paid (\$97,860); (4) remand to the trial court for an entry of judgment as to each Plaintiff with respect to the individual amounts received; and (5) remove Jay Westerdal as a judgment creditor.

Respectfully submitted this 8th day of September, 2014

BRENEMAN GRUBE, PLLC



Joseph A. Grube, WSBA 26476
(Attorney for Appellants)

CERTIFICATE OF SERVICE

I, Joseph A. Grube, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Breneman PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On September 8, 2014, I caused a copy of the foregoing BRIEF, to be served on the following parties:

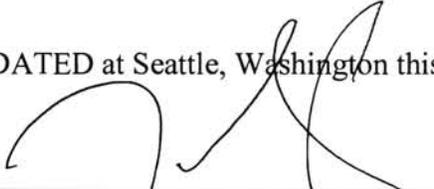
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I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 8th day of September, 2014.



Joseph A. Grube, WSBA #26476

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STATE OF WASHINGTON
JAMES R. HARRIS
CLERK OF SUPERIOR COURT