

2015

**David and Ruth M. Fuller and Fuller's Appliance Parts and Service, LLC, Appellants, vs. Denise Bohne and Western States Insurance Agency, Appellees**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DAVID AND RUTH M. FULLER AND  
FULLER'S APPLIANCE PARTS AND  
SERVICE, LLC,

Appellants,

vs.

DENISE BOHNE AND WESTERN  
STATES INSURANCE AGENCY,

Appellees.

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Case No. 20150146-CA

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APPELLANTS' OPENING BRIEF

---

On Appeal from the Third Judicial District Court, Salt Lake County  
Case No. 100901093, Judge Deno Himonas

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ORAL ARGUMENT REQUESTED

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ORAL ARGUMENT REQUESTED

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**ADDITIONAL PARTIES BELOW**

In addition to the parties listed in the caption, the following parties to the proceedings below were dismissed before final judgment:

Auto-Owners Insurance Company

Safeco Insurance (also referred to below as Safeco Insurance of Los Angeles, California; Safeco Insurance Company of Los Angeles, California; and Safeco Insurance Company of America)



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### STATEMENT OF JURISDICTION

Appellate jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-4-103(2)(j) as this is an appeal from a final district court judgment that was transferred here from the Supreme Court.

### STATEMENT OF ISSUES RAISED ON APPEAL

This appeal raises three issues. The need to resolve the second and third issues is dependent in each instance on the outcome of the previous issue. If the Court reverses the district court's judgment based on the first issue, it need not reach the second; and if it reverses on the second, it need not reach the third.

1. The district court abused its discretion by declining to enforce the parties' stipulation to apply a 10% prejudgment interest rate after:
  - a. The parties agreed to the rate in a court-approved stipulated jury instruction to which all objections were waived;
  - b. The court withdrew the instruction upon the express agreement the court would make the calculation automatically; and
  - c. The court articulated the calculation would be made using the approved and agreed 10% rate, with no objection from any party.
2. The district court incorrectly failed to apply the 10% prejudgment interest rate of Utah Code Ann. § 15-1-1 to negligence-based choses in action, contrary to the controlling case law of this Court and the Supreme Court.

3. The district court abused its discretion by applying a low 2015 post-judgment interest rate when prejudgment interest began running in 2007.

### **STANDARDS OF REVIEW**

1. “Normally, ‘a district court’s decision to enforce a stipulation is reviewed for an abuse of discretion.’” *State v. Beckstrom*, 2013 UT App 186, ¶ 12 n.5, 307 P.3d 677 (quoting *Prinsburg State Bank v. Abundo*, 2012 UT 94, ¶ 10, 296 P.3d 709).

2. The application of the legal rate in Utah Code Ann. § 15-1-1 as prejudgment interest for negligence-based property damage chases in action is a legal question reviewed for correctness. *See Francis v. National DME*, 2015 UT App 119, ¶ 21, 350 P.3d 615 (“When our review requires us to examine statutory language, we look first to the plain meaning of the statute and then review [the] district court’s interpretation of a statute for correctness.”) (construing Utah Code Ann. § 15-1-1) (citation and quotations omitted).

3. If the district court had discretion to decide the appropriate rate of interest to use, review of discretionary decisions is for abuse of that discretion. *See Mercado v. Hill*, 2012 UT App 44, ¶ 8, 273 P.3d 385.

### **PRESERVATION BELOW**

The issues presented were preserved in the trial court. (R. 1599-1600, 1631, 1689, 1702, 1711, 1742-47, 1750-51, 1759-67, 1772-81, 1792-97, 1799-1933, 1950-51; 1969, at 68-73; 1971; 1973; Addendum Exhibits 1-8.)

### **RELEVANT STATUTORY PROVISION**

The following statutory provision is implicated by the second issue raised in this appeal, if the Court reaches that issue:

Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

Utah Code Ann. § 15-1-1(2) (2013). Prior versions of the statute are attached as Addendum Exhibit 9.

### **STATEMENT OF THE CASE**

This appeal asks the Court to apply the proper rate of prejudgment interest to a jury award for property damage based on negligence. The defendants stipulated to using the 10% statutory legal interest rate, then reneged once the verdict went against them. The district judge let the defendants out of their stipulation, then applied a 2.27% post-judgment rate when entering final judgment.

This brief discusses the proper prejudgment interest rate by addressing successive dependent issues presented for review. If the Court reverses on any issue presented, it need not address any succeeding issue.

The first issue is whether this Court should enforce a stipulation reached between the parties that a 10% prejudgment interest rate applied to the prejudgment interest award. This stipulation was entered after the parties had already agreed to a jury instruction containing that rate. The instruction was

withdrawn on the express agreement that the court would automatically calculate prejudgment interest if the jury awarded property damages. The court articulated on the record the parties' understanding that the 10% calculation would be made by the court, and no party objected. The jury then awarded property damages as contemplated by the stipulation and ruling. The district court nevertheless declined to enforce the rate agreed to by stipulation. This Court should enforce the stipulation by reversing and remanding for entry of a judgment applying the agreed 10% rate.

If, however, the Court declines to enforce the stipulation for whatever reason, it should nevertheless conclude that the applicable rate for prejudgment interest in this case is the statutory legal rate of 10% from Utah Code Ann. § 15-1-1. Both this Court and the Supreme Court hold that this rate applies to negligence-based claims like those on which the jury awarded property damages in this case. Thus, if the Court reaches this issue, the Court should reverse and remand for entry of a judgment applying the 10% statutory prejudgment interest rate.

If the Court decides not to enforce the stipulation and also determines not to use the statutory legal rate of interest, the Court should reverse and remand for use of an appropriate rate of interest reflective of the forbearance of payment in this case. The district court used a low 2015 post-judgment interest rate without any explanation or justification. The interest rate should be reflective at

least of the rates in place when interest began running, which were significantly higher than the one used by the district court. The district court also eschewed case law using a “middle ground” rate. Case law using a post-judgment interest rate does not apply here, and the district court exceeded its discretion in applying it.

Under any of these approaches, this Court should reverse and remand.

#### **COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

This case went to trial on the plaintiffs’ claims for failure of the defendant insurance agents to put in place adequate insurance coverage for them. (R. 1230-36; 1969, at 87-131.) The plaintiffs suffered six-figure property damage in a fire, only to discover their agents had put in place a mere \$3,000 of insurance despite their request for full coverage. (R. 1230-36, 1864, 1930; 1969, at 128; Pls.’ Trial Exs. 18, 21-24.) The plaintiffs sued in contract and tort. (R. 1230-36.)

On the first day of trial, the parties submitted stipulated jury instructions that included an instruction on prejudgment interest. (R. 1599-1600, 1631.) The rate agreed to in the instruction was 10%. (R. 1631.) The district court approved the instruction and included it in the final set to be given to the jury. (R. 1689, 1702; 1969, at 68, 70.)

Before the instruction was given, the defendants asked to withdraw the instruction and replace it with a stipulation that prejudgment interest would be awarded on the same basis as a matter of course by the district court if the jury



returned a verdict for the plaintiffs on its claim for personal property damage. (R. 1969, at 70-73.) The plaintiffs agreed. (R. 1969, at 72-73.) The district judge accepted the stipulation, articulated specifically that the 10% calculation would be used, and stated his approval of the amount. (R. 1969, at 72-73.) No party objected to this ruling. (R. 1969, at 73.) The jury then returned a verdict for the plaintiffs awarding damages for the value of lost property based on agent negligence and negligent misrepresentation. (R. 1733-34.)

After trial, the plaintiffs moved for entry of judgment on the verdict to include prejudgment interest of 10%. (R. 1742-47.) Notwithstanding their prior stipulation, the defendants opposed the motion on grounds they had not stipulated to such an award. (R. 1759-67.) They also argued for the first time that a different interest rate should apply, though they did not propose any different rate. (R. 1763-65.)

Following a hearing on the matter, the district court issued a memorandum decision stating that no stipulation had been reached with respect to an absolute award of prejudgment interest. (R. 1792-97; 1971.) The court then asked for simultaneous supplemental briefing on an award of prejudgment interest in the absence of a stipulation. (R. 1796; 1972, at 2-3.) In its supplemental brief, the defendants proposed for the first time that the court use Utah's post-judgment interest rate as the prejudgment interest rate in this case. (R. 1808-10.)

At the hearing following the submission of supplemental briefs, the district court, acting *sua sponte*, partially reversed its prior memorandum decision after listening to the recorded stipulation from the trial. (R. 1973, at 1-12.) The court ruled that the parties had in fact reached a binding stipulation with respect to the award of prejudgment interest, and ordered it to run from June 13, 2007. (R. 1973, at 12-13.) The court declined, however, to use the 10% rate previously agreed to by the parties and approved by the court. (R. 1973, at 20.) Instead, the court decided to apply the 2015 post-judgment interest rate of 2.27%. (R. 1973, at 20-21.) The court gave no explanation for this choice. (R. 1973, at 20.) The court then entered judgment for the plaintiffs using this rate for the prejudgment award. (R. 1950-51.)

The plaintiffs have appealed the district court's interest rate determination. (R. 1954-55.) This is the sole focus of this appeal. The defendants have not cross-appealed with respect to any portion of the judgment.

### **STATEMENT OF FACTS**

Plaintiffs are David and Ruth M. Fuller, husband and wife, and their wholly owned small business, Fuller's Appliance Parts and Service, LLC, a Utah limited liability company (collectively the "Fullers"). (R. 1230.) The Fullers purchased insurance on their home, business, and vehicles through Denise Bohne (pronounced "Bonnie") and Western States Insurance Agency of Spanish

Fork, Utah (“Western States”). (R. 1230-32.) They sought full coverage for all of their personal and business property. (R. 1231; 1969, at 91.)

On February 3, 2007, a fire destroyed the Fullers’ home in Springville, Utah, where their business was located. (R. 1232.) The Fullers made claim on the business insurance coverage that Bohne and Western States had purportedly put in place for them, only to find they were significantly underinsured. (Pls.’ Trial Exs. 21-24, 26.) After receiving a check for \$3,000 as the sum total of the insurance coverage in place, the Fullers sued Bohne and Western States. (R. 1, 1230, 1864; 1969, at 128; Pls.’ Trial Ex. 18.)

The Fullers demonstrated at trial, *inter alia*, that Bohne and Western States (hereafter collectively “Western States” or the “Western States defendants” unless otherwise indicated) had placed the Fullers’ signatures on insurance applications without the Fullers’ knowledge and had used them to obtain coverage different in kind and amount than that which the Fullers had requested. (R. 1969, at 96-102, 114-15; Pls.’ Trial Exs. 1, 58-61; Defs.’ Trial Ex. 29.) The Fullers sought damages for breach of the defendants’ duties as insurance agents, breach of contract, breach of the implied covenant of good faith and fair dealing, and negligent misrepresentation. (R. 1230-36, 1733-34.) The damages alleged included the value of business equipment, inventory, and tools lost in the fire, and prejudgment interest on this lost personal property. (R. 1230-36, 1702, 1733-34; 1969, at 68-73; Pls.’ Trial Exs. 21-24.) The Fullers also claimed lost

rental value from the loss of use of their home. (R. 1734; R. 1969, at 128-29; Pls.' Trial Ex. 56.)

The Fullers contemporaneously catalogued and detailed their property damages in inventories that were submitted at trial as Plaintiff's Trial Exhibit 22 (Personal Property Inventory) and supported further by Plaintiffs' Trial Exhibits 21 (Proof of Loss), 23 (Inventory of Parts), and 24 (Appliances for Sale). All property damages related to lost equipment, tools, and inventory. (Pls.' Trial Exs. 21-24.)

On the first day of trial, the parties stipulated to certain legal instructions to be given to the jury. (R. 1599-1600.) These included Instruction No. 29, which provided as follow:

**Prejudgment Interest**

The Fullers seek recovery of prejudgment interest as part of their loss. In Utah, prejudgment interest may be awarded in situations where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time. If you find for the Fullers on their claim of prejudgment interest, you should award them 10% annually on the value of their proven loss from the date of the fire to the date of your verdict.

(R. 1631 & Addend. Ex. 2.) Western States agreed this was an accurate statement of the law and stipulated to its contents. (R. 1969, at 68, 70, 1702 & Addend. Exs. 3-4.) The district court approved the instruction, included it in the final instructions, and was prepared to give it to the jury. (R. 1969, at 70, 1702; Addend. Exs. 3-4.)

Shortly before the jury was instructed, Western States asked the court to withdraw this instruction and have prejudgment interest decided by the trial court. (R. 1969, at 70-72 & Addend. Ex. 4.) When the Fullers balked at this request, Western States, under questioning from the court, confirmed the addition of prejudgment interest to an award of property damages would be automatic if the jury in fact awarded personal property damages. (R. 1969, at 71-72.) The offer was given in exchange for removing a third line from the special verdict form allowing the jury to award the Fullers prejudgment interest in addition to property damages and rent damages. (R. 1734; 1969, at 69-73.) The Fullers accepted this offer and the trial court agreed to this approach. (R. 1969, at 72-73.) The court then articulated on the record the understanding that the interest would be calculated by the court at 10% per annum, as per the previously stipulated jury instruction, and that the court was “fine” with this amount. (R. 1969, at 73.) No party objected to the court’s decision. (R. 1969, at 73.)

The relevant portions of the transcript reflect first the specific stipulation between the parties to the substance and content of the final jury instructions, including Instruction No. 29, which contained the 10% interest rate as the rate to be applied in the case:

THE COURT: So this is a full and complete set? Yes?

MR. BARRETT [Counsel for Western States]: It is, Your Honor.



MR. CHRISTIANSEN [Counsel for the Fullers]: Yes, Your Honor.

(R. 1969, at 70; *see also* R. 1689-1710.) Then, after stipulating to the instructions, Western States spontaneously proposed withdrawing Instruction No. 29 and having the court simply apply prejudgment interest automatically if property damages were awarded. (R. 1969, at 70-71.) The record reflected the offer, acceptance, and district court approval, and articulation of the stipulation to apply the 10% rate with no objection from any party:

MR. BARRETT: Your Honor, if we can, we were having discussion about whether the special verdict form should allow, in addition to a damage line for property as well as a damage line for rent, whether it should also have prejudgment interest. And during the break, I was able to look at the MUJI, Model Utah Jury Instructions, Second Edition, special verdict form CV 1899, and it is in the context of a fraud instruction, which is a variation of the negligent misrepresentation, so I realize it's not particularly analogous, but in this, it indicates that counsel should specify the type of damages, in this case economic and non-economic. Our case, there are no non. And damages so the judge can calculate prejudgment interest. Your Honor, I would prefer that that remain the situation here.

THE COURT: Let me ask Mr. Christiansen. So, I mean, you're asking for it, but I - my experience has always been the opposite. Where I'm - if there is a dispute, I can - I mean, if there's no dispute -

MR. CHRISTIANSEN: We've got an instruction in on it.

THE COURT: We can strike the instruction.

MR. CHRISTIANSEN: Well, but I want the jury to decide whether they're - whether the plaintiffs are entitled to prejudgment interest. You're not saying the Court would make that determination.

THE COURT: Well, are you - is there any argument about whether

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MR. BARRETT: No -

THE COURT: -- they're entitled to prejudgment interest?

MR. BARRETT: No, Your Honor.

THE COURT: All right.

MR. BARRETT: If there's a property damage -

MR. CHRISTIANSEN: Okay.

MR. BARRETT: - there's going to be prejudgment interest -

THE COURT: Right, so you're - it - your - they're -

MR. CHRISTIANSEN: Then I'm okay with that.

THE COURT: Right. Exactly.

MR. CHRISTIANSEN: (Inaudible).

THE COURT: I didn't - I didn't - it's - we're on the same page. I don't see that there's a disagreement about whether they're entitled to it or not. What I'll do is, it's in there, and when we get to it, instruct them to just strike it out, that the Court will - well, just strike that out, that that's no longer a part of the instructions. And you can tell them that.

MR. CHRISTIANSEN: Okay. Can we take that instruction out completely from the jury?

THE COURT: Just rip out instruction 29.

MR. CHRISTIANSEN: Thank you, Your Honor.

THE COURT: And I'll tell them that we're skipping that, that was a potential we skipped over. How's that?

MR. CHRISTIANSEN: Okay. Excellent. Thank you.

THE COURT: All right, so take it out - look, part of me - it's a simple calculation, so I really didn't care much, because it's a 10 percent

calculation and you can do it in your head. I also don't think as I said, there's any – it's – the amount is fine. But as a technical matter, this is the better approach.

MR. CHRISTIANSEN: Thank you, Your Honor.

THE COURT: Yep. Okay, so jury instruction 29 is withdrawn.

(R. 1969, at 70-73 & Addend. Ex. 5; *see also* R. 1711.)

After deliberations, the jury returned a verdict for the Fullers and against both defendants jointly and severally. (R. 1733-34 & Addend. Ex. 6; R. 1969, at 64-65.) The jury found Bohne and Western States had breached their duties as agents and made negligent misrepresentations to the Fullers that had caused them damage. (R. 1733-34.) The jury awarded \$101,585 to the Fullers for the value of their lost personal property. (R. 1734.) The jury did not award any rental damages. (R. 1734.)

After trial, the Fullers moved for entry of judgment on the verdict. (R. 1742-47.) Consistent with the prior stipulation reached with Western States, the Fullers included prejudgment interest of 10% from 2007 to the time of entry of the judgment. (R. 1745-46, 1751.)

At this point, notwithstanding its prior stipulation, Western States opposed inclusion of prejudgment interest in the judgment. (R. 1763-65.) The Western States defendants argued (1) they had not stipulated; (2) no prejudgment interest was appropriate; and (3) the 10% rate did not apply. (R. 1763-65.)

The district court held a hearing that included addressing this issue. (R. 1971.) The district judge observed: "I have a specific recollection of sitting here as we were going through that, that it struck me that there was a stipulation, and that I was a little surprised, actually, Mr. Barrett, that that wasn't – that you were just saying, fine, it applies to everything." (R. 1971, at 14-15.) The district judge further observed: "I need to go back and listen to the tapes at this portion," referring to the recordings of the trial colloquy. (R. 1971, at 14.) Western States' counsel argued that it had not been his intent to stipulate to a 10% rate to be applied to all claims on the property damages and that the jury's findings on the tort claims left "a little bit of a muddy water." (R. 1971, at 14.)

On January 6, 2015, the district court issued a memorandum decision ruling that the stipulation did not conclusively decide the prejudgment interest issue. (R. 1792-97 & Addend. Ex. 7.) Citing the "prejudgment interest statute," Utah Code Ann. § 15-1-1, as well as the common law, the court ruled that prejudgment interest was in fact awardable for negligence claims and that Western States had conceded as much at the hearing. (R. 1795 n.4.) The Court also acknowledged the effect of the law incorporated into Jury Instruction No. 29, which awards prejudgment interest "where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time." (R. 1796.) Nevertheless, the court ruled that while "some of those determinations may be made based on the jury's verdict," "some of those

determinations have yet to be made.” (R. 1796.) The Court therefore asked for simultaneous supplemental briefing to be able to make all such remaining determinations. (R. 1796; 1972, at 2-3.)

The parties submitted simultaneous supplemental briefs. (R. 1799, 1829.) The court then held a hearing following supplemental briefing. (R. 1973.) At the hearing, the court on its own motion partially reversed its prior written decision, concluding that the parties had in fact stipulated to the automatic inclusion of prejudgment interest if the jury were to find for the Fullers on property damage. (R. 1973, 1-12.) The district judge indicated that he had gone back and listened again to the recording of the trial colloquy: “It appears to me, having gone back and listened to the tape very carefully, Mr. Barrett, you did stipulate to the availability [of prejudgment interest]. And to the extent that your arguments go to the lack of availability, I think that they’ve been stipulated away.” (R. 1973, at 1-2.) The court replayed portions of the trial colloquy recording in chambers in the presence of counsel and reaffirmed this preliminary ruling. (R. 1973, at 7-12.)<sup>1</sup> The court determined that “there was a stipulation as to the entitlement of prejudgment interest, and that it was based on that stipulation that Mr. Christiansen withdrew instruction 29.” (R. 1973, at 12.) The court concluded that

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<sup>1</sup> Although the transcript suggests this was a telephonic hearing, the hearing actually took place in open court and involved counsel and the court recessing to the judge’s chambers together to listen to portions of the prior trial recording. (R. 1973, at 7.)



“to the extent anything in my memorandum decision is inconsistent with . . . this ruling, I’m vacating that portion of the memorandum decision.” (R. 1973, at 12.)

The district judge then took the question of the proper prejudgment interest rate under advisement and scheduled a conference call later that day to announce his ruling. (R. 1973, at 18.) During the subsequent conference call (R. 1973, at 19), the judge announced his ruling without elaboration: “I am convinced that the post judgment rate is appropriate, not the 10 percent rate in this matter.” (R. 1973, at 20 & Addend. Ex. 8.) The court then awarded the 2015 post-judgment interest rate of 2.27% as prejudgment interest. (R. 1973, at 20-21.)<sup>2</sup>

The district court entered judgment on the verdict on February 24, 2015. (R. 1950-51 & Addend. Ex. 1.)<sup>3</sup> The judgment included prejudgment interest of 2.27% from June 13, 2007, to the date of entry of the judgment. (R. 1951.) The Fullers timely appealed the interest rate decision. (R. 1954.) Bohne and Western States have not cross-appealed any portion of the judgment.

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<sup>2</sup> See Utah Code Ann. § 15-1-4(3)(a); <http://www.utcourts.gov/resources/intrates/interestrates.htm>.

<sup>3</sup> Judgment was entered by the Honorable Sandra N. Peuler, as Judge Himonas had by that point stepped down from the trial bench to take his seat on the Supreme Court. (R. 1950.)

## SUMMARY OF THE ARGUMENT

This Court should reverse and remand with an order that an amended judgment be entered in favor of the Fullers with prejudgment interest calculated at 10% per annum. The district court's post-trial rulings with respect to this issue were erroneous.

First, the district court abused its discretion by refusing to fully enforce the parties' stipulation. The parties stipulated to, and the district court approved, the use of the 10% prejudgment interest rate in connection with the agreed jury instructions. Western States therefore waived any objection to the use of a different rate. Furthermore, the parties agreed to withdrawal of the jury instruction in exchange for an automatic calculation by the court in the event the jury awarded property damages – which the jury in fact awarded. The court articulated the agreed understanding on the record that the calculation would take place using the 10% rate agreed to by the parties. There was no objection to this articulation because that in fact reflected the parties' understanding; any objection was therefore waived. The lower court should have held the Western States defendants to their agreement when they reneged after losing the jury verdict. The court abused its discretion by failing to do so. Stipulations will be enforced by the courts, act as an estoppel against a party seeking to change its mind, and are conclusive of all matters necessarily included in the stipulation.

This Court should reverse the decision below and fully enforce the parties' stipulation.

If the Court reverses based on Western States' stipulation and waiver, it need not reach any further issue. Otherwise, the Court should address the applicability of the 10% prejudgment interest rate in Utah Code Ann. § 15-1-1. Under a long line of cases beginning with the Supreme Court's decision in *Fell v. Union Pacific RR*, 88 P. 1003 (Utah 1907), and continuing on with *Uinta Pipeline Corp. v. White Superior Co.*, 546 P.2d 885 (Utah 1976), and through to the present, the Utah appellate courts hold that the rate for prejudgment interest in non-personal-injury negligence cases is the legal rate currently found in Utah Code Ann. § 15-1-1(2). The use of that rate has been affirmed by this Court as recently as five months ago in *Francis v. National DME*, 2015 UT App 119, 350 P.3d 615. Language found in two Supreme Court decisions in other contexts neither overrules *Fell* nor provides binding or persuasive contrary direction to the longstanding jurisprudence of this state. Nor do federal cases cited by Western States. If the Court reaches this issue, it should reverse and remand for entry of an amended judgment using the 10% statutory rate in Section 15-1-1.

Lastly, if the Court does not enforce the parties' stipulation and also determines not to apply the legal rate, the Court should nevertheless reverse and remand. The district court chose to apply the post-judgment interest rate applicable in 2015 to interest that began to run in 2007. The court gave no

rationale for its decision. This is a significant discount off the prevailing rate at the time prejudgment interest began to run. It also ignores “middle ground” rates used by the federal courts and opts instead for a low rate used in case law interpreting and applying statutes not at issue here. If the Court does not reverse on other grounds, the Court should reverse and remand with instructions to apply a rate that articulates the reasons why and approximates the loss to the Fullers based on their forbearance on the money they lost.

### **ARGUMENT**

#### **I. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO ENFORCE THE PARTIES’ ENTIRE STIPULATION ON PREJUDGMENT INTEREST, INCLUDING THE AGREED 10% RATE.**

Prior to instructing the jury, the parties stipulated to the instructions to be given, and the court approved the law. This included Jury Instruction No. 29, which read:

#### **Prejudgment Interest**

The Fullers seek recovery of prejudgment interest as part of their loss. In Utah, prejudgment interest may be awarded in situations where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time. If you find for the Fullers on their claim of prejudgment interest, you should award them 10% annually on the value of their proven loss from the date of the fire to the date of your verdict.

(R. 1631, emphasis added.) Western States agreed this was an accurate statement of the law and stipulated to its contents. (R. 1969, at 68, 70, 1702.) The district court approved and was prepared to give the instruction. (R. 1969, at 70, 1702.)

As the jury instructions were about to be given, Western States suggested that prejudgment interest should be awarded by the judge and need not be a part of the jury's deliberations. (R. 1969, at 70-71.) Western States sought ostensibly to remove an opportunity for the jury to award more damages to the Fullers and to eliminate an additional line from the special verdict form that was to be included for that purpose. (R. 1969, at 68-70.) The Fullers initially resisted this request and sought to have the jury instructed as agreed. (R. 1969, at 71-72.) At that point, however, Western States offered to stipulate that the prejudgment interest that would otherwise be instructed to the jury would simply be added on to the amount awarded by the verdict. (R. 1969, at 72.) It was only after receiving confirmation from Western States and the court that this would happen in an automatic fashion, as offered by Western States via stipulation, that the Fullers agreed. (R. 1969, at 72-73.) As evidenced by the colloquy at trial, the Fullers in no way would have agreed otherwise. (R. 1969, at 68-73.) The district court articulated the understanding that the rate would be automatically applied at 10%, and no party objected. (R. 1969, at 73.)

Western States subsequently sought to renege on this stipulation and catch the Fullers in a "gotcha." The Western States defendants argued that they did not agree to prejudgment interest, that no prejudgment interest should be awarded and that, if it was, it should be at some other rate than that agreed to in Jury Instruction No. 29. (R. 1763-65.)

The district court originally agreed with Western States. (R. 1795-96.) However, upon further review, the district court confirmed that Western States had in fact stipulated to an award of prejudgment interest as the Fullers had argued. (R. 1973, at 1-12.) At that point, the lower court should have enforced the stipulation by its terms, including the agreed 10% rate. Instead, the court enforced only part of the stipulation and overlooked the rate previously agreed to by the parties and approved by the judge himself. This ruling should be reversed for three independent reasons.

*First*, Western States waived any objections to the rate by stipulating to the substance of Jury Instruction No. 29. “Generally, if a party fails to object to a jury instruction, that party waives any objection thereto.” *Walker v. Hansen*, 2003 UT App 237, ¶ 17, 74 P.3d 635. Western States stipulated to the instruction containing the 10% rate and thereby waived any objection to it. Nothing about the subsequent colloquy with the Court “undid” that waiver with respect to the agreed rate. Indeed, there was no discussion whatsoever about potentially using a different rate in withdrawing the instruction. The Fullers were entitled to rely on the fact that this was a settled issue and that any objection had been waived.

*Second*, the parties reached an express stipulation on the record, in open court, that the prejudgment interest standard reflected in the instruction would be enforced as per the instruction. The district court approved the stipulation,

articulated that the interest calculation would be automatic, articulated the usage of the 10% rate, and approved the rate itself:

THE COURT: Well, are you – is there any argument about whether

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MR. BARRETT: No –

THE COURT: -- they're entitled to prejudgment interest?

MR. BARRETT: No, Your Honor.

THE COURT: All right.

MR. BARRETT: If there's a property damage –

MR. CHRISTIANSEN: Okay.

MR. BARRETT: – there's going to be prejudgment interest –

...

THE COURT: ... I don't see that there's a disagreement about whether they're entitled to it or not. ...

...

THE COURT: ... [I]t's a simple calculation, so I really didn't care much, because it's a 10 percent calculation and you can do it in your head. I also don't think as I said, there's any – it's – the amount is fine. ...

MR. CHRISTIANSEN: Thank you, Your Honor.

THE COURT: Yep. Okay, so jury instruction 29 is withdrawn.

(R. 1969, at 71-73.)

The Supreme Court and this Court both hold that such a stipulation settles the issue and should not be subject to later collateral attack:

“A stipulation is an admission which may not be disregarded or set aside at will.” Generally, stipulations are binding on the parties and the court. Thus, a stipulation entered into by the parties and accepted by the court “acts as an estoppel upon the parties thereto and is conclusive of all matters necessarily included in the stipulation.” . . . [S]uch contract if lawful has . . . all the binding effect of findings of fact and conclusions of law made by the court.” Further, while “[a] court may modify its findings, . . . it cannot change or modify a contract of the parties.”

Thus, when a court adopts a stipulation of the parties, the issues to which the parties have stipulated become “settled” and “not reserved for future consideration.” . . .

*Prinsburg State Bank v. Abundo*, 2012 UT 94, ¶¶ 13-14, 296 P.3d 709 (citations omitted). *Accord State v. Beckstrom*, 2013 UT App 186, ¶ 9, 307 P.3d 677 (citing and quoting *Prinsburg State Bank*).

Unless a party shows by timely motion that the stipulation was “entered into inadvertently” or that it should be set aside “for justifiable cause,” the stipulation will be enforced. *Prinsburg State Bank*, 2012 UT 94, ¶ 14; *Beckstrom*, 2013 UT App 186, ¶ 11. The Western States defendants made no such showing below. They did not move to set aside the stipulation at all, let alone on a timely basis. Instead, they allowed the Fullers to rely on the stipulation, withdraw Instruction No. 29, submit the case to the jury, obtain a verdict, and move for entry of judgment based on the verdict, all in reliance on the stipulation and prior court ruling. At that point, they then opposed the entry of judgment based on what should have been the settled issue of the rate, not by moving to set aside the stipulation but rather by arguing *they had never entered into the*



*stipulation*. (R. 1763-65.) They failed to meet the criteria set forth by both of this State's appellate courts that must be met before a party can get out of a binding stipulation.

The 10% interest rate was "necessarily included in the stipulation" and therefore conclusive of the issue. The rate had already been settled by stipulation and order. The parties were merely adjusting the manner by which the stipulated rate would be implemented. There was absolutely *no* discussion about using a different rate, undoing the prior stipulation with a new stipulation, or throwing the matter back open for debate and possible different outcome. Had there been, the Fullers would never have agreed to it. As it stands, Western States subsequently played fast and loose with the stipulation, taking advantage of the circumstances to seek and obtain a different result. This was at the expense of the Fullers, who engaged honestly and openly in a discussion about a requested *procedural* change to awarding prejudgment interest – not a *substantive* change to the award – only to be told by the district court thereafter that they had lost substantial ground as a result.<sup>4</sup> This Court should reverse that error, which was an abuse of the district court's discretion under the circumstances here presented. The lower court's failure to acknowledge or apply the *Pringsburg/Beckstrom* criteria for enforcing a

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<sup>4</sup> The defendants' bait-and-switch approach cost the Fullers approximately one-third the value of the total judgment. (R. 1745-46, 1750-51, 1950-51.)

stipulation exceeded the permitted range of discretion. *See Wilson v. IHC Hospitals, Inc.*, 2012 UT 43, ¶ 52 n.15, 289 P.3d 369 (“A trial court abuses its discretion if it commits legal error.”); *Rivera ex rel. Rivera v. State Farm Mut. Auto. Ins. Co.*, 2000 UT 36, ¶ 7 n.2, 1 P.3d 539 (a trial court abuses its discretion if its ruling “exceeded the range of discretion allowed for the particular act under review”).<sup>5</sup>

Despite the Fullers’ earnest attempts to enforce the stipulation, the trial judge waxed and waned on how clearly he could remember the substance of the stipulation at the time he was initially called upon to enter a final judgment.<sup>6</sup> The court first thought it was clear: “I have a specific recollection of sitting here as we were going through that, that it struck me that there was a stipulation, and that I was a little surprised, actually, Mr. Barrett, that that wasn’t – that you were just saying, fine, it applies to everything.” (R. 1971, at 14-15.) Notwithstanding this “specific recollection,” the court subsequently ruled that there had been no absolute stipulation on prejudgment interest. (R. 1795-96.) Three weeks later, the court suggested it had listened to a portion of the trial recording and recognized there had in fact been a stipulation (R. 1973, at 1-12),

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<sup>5</sup> “Abuse of discretion” does not imply that the trial court *intentionally* violated applicable standards, *see Rivera*, 2000 UT 36, ¶ 7 n.2, and the Fullers do not suggest any such thing here.

<sup>6</sup> No written transcript had yet been made of the proceedings, so the judge was working from memory, aided by the briefing of the parties and the digital recording from the trial. (R. 1795-96; 1971, at 14-15; 1973, at 1-12.)

but failed to comprehend and implement the totality of the stipulation. This was reversible error.

The Fullers had diligently worked jointly with Western States before trial even began to agree to the substance of stipulated jury instructions, and the prejudgment rate had been a settled issue by the first trial day. (R. 1318, 1599, 1631.) The district court specifically approved the rate, both when approving the jury instruction (R. 1702; 1969, at 70) and again when approving the stipulation: “[I]t’s a simple calculation, . . . it’s a 10 percent calculation and you can do it in your head. . . . [T]he amount is fine.” (R. 1969, at 73.) The 10% rate issue was “settled” and “not reserved for future consideration.” *Prinsburg State Bank v. Abundo*, 2012 UT 94, ¶ 14, 296 P.3d 709. Western States’ “admission” was “binding,” and the Western States defendants should have been “estopped” from challenging the issue further. *See id.* ¶ 13.

*Third*, Western States failed to timely object to the use of the 10% rate at the time of the stipulation. This Court should reject the belated objection to the 10% rate. If the Western States defendants believed the effect of their stipulation was something other than what the court said it was – “a 10 percent calculation and you can do it in your head” – they had the obligation to raise a timely objection at that point. *See 438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801. They did not. Instead, their silence equaled consent and they waived any objection after the Fullers relied on their agreement – even though the

district court later agreed to revisit the issue. *Cf. United States v. Wardell*, 591 F.3d 1279, 1309-10 (10<sup>th</sup> Cir. 2009) (untimely objection insufficient even if raised subsequently in district court).

On this record, and given the governing law, the district court abused its discretion by undoing the waiver to the substance of the initial instruction, refusing to fully enforce the stipulation, and ignoring the waiver of the use of the articulated rate. This Court should reverse the imposition by the district court of any rate other than the 10% rate agreed to by the parties. The Court should remand the case to the district court with instructions to enter an amended judgment containing a prejudgment interest rate of 10%. The Court need not reach the second or third issues in this brief.

## **II. THE DISTRICT COURT INCORRECTLY REFUSED TO USE THE LEGAL RATE FOR PREJUDGMENT INTEREST OF 10%.**

If for whatever reason this Court does not recognize the Western States defendants' waiver of a challenge to the 10% rate or enforce the parties' stipulation as agreed, the Court should nevertheless hold that the 10% legal rate is the appropriate prejudgment rate required to be used here.

### **A. The District Court Incorrectly Failed to Apply the Governing Rule from *Fell v. Union Pacific RR* and *Uinta Pipeline Corp.***

The district court's failure to apply the 10% legal rate in Utah Code Ann. § 15-1-1(2) ignores and conflicts with controlling precedent. *See Fell v. Union Pac. RR*, 88 P. 1003, 1007 (Utah 1907); *Uinta Pipeline Corp. v. White Superior Co.*, 546

P.2d 885, 887-88 (Utah 1976). This Court's own recent case law suggests the statute applies when awarding prejudgment interest for a "chose in action" in the absence of a contrary agreement. See *Sundial Inc. v. Villages at Wolf Hollow Condo. Homeowner's Ass'n, Inc.*, 2013 UT App 223, ¶ 8, 310 P.3d 1233. This is but one in a long line of cases correctly interpreting this statute. These and related cases will be discussed further herein.

The statute reads as follows:

Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

Utah Code Ann. § 15-1-1(2). This Court "look[s] first to the plain meaning of the statute and then review[s] [the] district court's interpretation of a statute for correctness." *Francis v. National DME*, 2015 UT App 119, ¶ 21, 350 P.3d 615 (citation and quotations omitted).

Section 15-1-1(2) embodies the "legal rate" of interest. *Sundial*, 2013 UT App 223, ¶ 8. This section or its substantively similar predecessors have been in place in Utah since the late 1800s. See *Fell v. Union Pac. RR*, 88 P. 1003, 1007 (Utah 1907) (citing Revised Statutes § 1241 (1898)); Addend. Ex. 9 (tracing statute's history from 1898 to the present).<sup>7</sup>

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<sup>7</sup> Pre-1953 versions of the statute were obtained electronically from the Utah Government Digital Library ([digitallibrary.utah.gov](http://digitallibrary.utah.gov)) through the portal of the Utah Courts website ([utcourts.gov/lawlibrary/research/utah.asp](http://utcourts.gov/lawlibrary/research/utah.asp)). For a history

From the beginning, the Supreme Court has held that the statute “is general, allowing interest in all cases at the legal rate, in the absence of an agreement” if prejudgment interest is to be awarded. *Fell*, 88 P. at 1007. Over time, the rate within the statute has changed, but the substance and application have remained consistently the same. See *Uinta Pipeline*, 546 P.2d at 887 (noting the “landmark” *Fell* case “has been followed in Utah many times”). The most recent rate change went from 6% to 10% effective May 14, 1981. See *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105, 108-09 (Utah 1986); Utah Code Ann. § 15-1-1(3); Addend. Ex. 9, at 13-14.

In the *Sundial* decision, this Court followed the longstanding interpretation of this jurisdiction in reading the statute to mean that unless parties stipulate to a different rate of interest by contract, the statutory rate of 10% set forth in Utah Code Ann. § 15-1-1 applies to the forbearance of monies owed on a “chose in action.” See *Sundial*, 2013 UT App 223, ¶ 8. Specifically, the Court’s plain-language interpretation of the statute is that “‘the legal rate of [prejudgment] interest for ... any ... chose in action shall be 10% per annum.’” *Id.* (quoting Utah Code Ann. § 15-1-1(2)).

A “chose in action” is “‘a claim or debt upon which a recovery may be made in a lawsuit.’” *Id.* (quoting *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 1999

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of territorial laws on interest, see Utah Code Ann. § 15-1-1 compiler’s note, attached as Addendum Exhibit 9, at 12.

UT 49, ¶ 9, 980 P.2d 208 (quoting *Barron's Law Dictionary* 71 (3d ed. 1991))). The negligence-based tort claims in this case are undoubtedly choses in action, as was the unjust enrichment claim advanced in *Sundial*. (R. 1233, 1235, 1733-34.) The “legal rate” prescribed by Utah Code Ann. § 15-1-1 is therefore the rate to be used when awarding prejudgment interest in such matters, unless the parties agree to a different rate. *See, e.g., Fell v. Union Pac. RR*, 88 P. 1003, 1007 (Utah 1907) (prejudgment interest at statutory legal rate awarded in negligence case resulting in damage to property); *Error v. Western Home Ins. Co.*, 762 P.2d 1077, 1080 (Utah 1988) (noting prejudgment interest of 10% awarded by trial court on damages and expenses for rebuilding home after insurer failed to pay policy coverage for fire); *Christenson v. Commonwealth Land Title Ins. Co.*, 666 P.2d 302, 308 (Utah 1983) (prejudgment interest at agreed contract rate of 10% awarded on negligent misrepresentation claim); *Vali Convalescent & Care Insts. v. Division of Health Care Fin.*, 797 P.2d 438, 445 (Utah Ct. App. 1990) (noting Section § 15-1-1 establishes the rate if a plaintiff is entitled to prejudgment interest).

The rule identified by this Court in *Sundial* traces its roots back to the Supreme Court’s seminal decision in *Fell v. Union Pacific RR*, 88 P. 1003 (Utah 1907). *Fell* was an action filed against a railroad for damage to livestock. The defendant’s negligence caused the death of certain sheep in transit and the shrinkage in weight of others. *See id.* at 1003. The Supreme Court affirmed the district court judge in concluding that the plaintiff was entitled to recover

prejudgment interest. *See id.* at 1005-07. The Court then concluded that prejudgment interest was properly awarded at the statutory legal rate on property damages caused by negligence. *See id.* The Court observed that “[o]ur statute (section 1241, Rev. St. 1898) is general, allowing interest in all cases at the legal rate, in the absence of an agreement.” *Id.* at 1007.

In 1922, the Supreme Court noted that “[t]he doctrine laid down in [*Fell* and related case *Kimball v. Salt Lake City*, 90 P. 395 (Utah 1907)] has been the law of this jurisdiction for more than 15 years, and has been followed many times by this court. Both the bench and the bar of this state should therefore be well acquainted with those decisions and should regard the question as settled.” *Bingham Coal & Lumber Co. v. Board of Educ.*, 211 P. 981, 984 (Utah 1922). By the time of its decision in *Uinta Pipeline Corp. v. White Superior Co.*, 546 P.2d 885 (Utah 1976), the Court observed that the “landmark” *Fell* case “ha[d] been followed in Utah many times.” *Uinta Pipeline*, 546 P.2d at 887 (collecting cases).<sup>8</sup>

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<sup>8</sup> *See, e.g., Kimball v. Salt Lake City*, 90 P. 395, 397 (Utah 1907) (awarding prejudgment interest at the legal rate for damage to real property); *San Pedro, L.A. & S.L.R. Co. v. Board of Educ.*, 99 P. 263, 267 (Utah 1909) (damage to real property); *Wheatley v. Oregon Short Line RR*, 162 P. 86, 87 (Utah 1916) (damage to personal property); *Wilson v. Salt Lake City*, 174 P. 847, 850-51 (Utah 1918) (quantum meruit); *Baker Lumber Co. v. A.A. Clark Co.*, 178 P. 764, 770-71 (Utah 1919) (municipal obligation); *St. Joseph Stock Yards Co. v. Love*, 195 P. 305, 311 (Utah 1921) (wrongful attachment); *Bingham Coal & Lumber Co. v. Board of Educ.*, 211 P. 981, 984 (Utah 1922) (breach of contract); *Gillespie v. Blood*, 17 P.2d 822, 825 (Utah 1932) (action on recovery of bonds).



In the 1976 decision of *Uinta Pipeline Corp. v. White Superior Co.*, 546 P.2d 885 (Utah 1976), the plaintiff sued after the defendant's negligent conduct resulted in property damages. *See id.* at 886. The Supreme Court affirmed a jury verdict for the plaintiff, then turned to the question of prejudgment interest on the award. *See id.* at 886-87. Citing *Fell*, the Court observed that "prejudgment interest is allowable for the destruction or damage to personal property." *Id.* at 887. After concluding the plaintiff was entitled to prejudgment interest on the award, the Court "remanded with directions to increase the amount of judgment by the amount of interest accrued from date of damage to date of judgment calculated at the legal rate." *Id.* at 888 (emphasis added). The rule in *Fell* and *Uinta Pipeline* has continued to be followed since and remains good law down to the present day.<sup>9</sup>

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<sup>9</sup> *See, e.g., Jack B. Parson Constr. Co. v. State*, 552 P.2d 107, 109 (Utah 1976) (citing *Uinta Pipeline* and *Fell* in awarding prejudgment interest for breach of contract "in conformity with the prior decisions of this court"); *Bjork v. Apr. Indus., Inc.*, 560 P.2d 315, 317 (Utah 1977) (breach of contract); *Anderson v. State Farm Fire & Cas. Co.*, 583 P.2d 101, 104 (Utah 1978) (breach of insurance contract); *Lignell v. Berg*, 593 P.2d 800, 809 (Utah 1979) (breach of contract); *Canyon Country Store v. Bracey*, 781 P.2d 414, 422 (Utah 1989) (lost profits; prejudgment interest denied under *Fell* test) ("This Court has repeatedly stated the law in Utah as it applies to prejudgment interest"); *Smith v. Linmar Energy Corp.*, 790 P.2d 1222, 1226 (Utah Ct. App. 1990) (damage to real property; prejudgment interest denied under *Fell* test); *Lefavi v. Bertoch*, 2000 UT App 5, ¶ 24, 994 P.2d 817 (tort and contract claims); *Kraatz v. Heritage Imports*, 2003 UT App 201, ¶¶ 64, 90, 71 P.3d 188 (breach of contract; remanding for imposition of prejudgment interest at the "appropriate statutory rates"); *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, ¶ 17, 82 P.3d 1064 (tort and contract claims); *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶¶ 50-55, 210 P.3d 263 (breach of contract); *Stevensen 3rd E., LC v.*

Under the *Fell* decision and its considerable progeny, the “general statute” now codified as Section 15-1-1 provides the “legal rate” to apply when awarding prejudgment interest if the parties have not otherwise agreed to a different rate. *See Fell*, 88 P. at 1007; *Sundial*, 2013 UT App 223, ¶ 8. The statute has consistently been interpreted this way. *See, e.g., Consolidation Coal Co. v. Utah Division of State Lands & Forestry*, 886 P.2d 514, 529 (Utah 1994) (Bench, J., concurring and dissenting) (“Utah law establishes the rate of prejudgment interest ‘[e]xcept when parties to a lawful contract agree on a specified rate’”) (quoting Utah Code Ann. § 15-1-1 (1992)) (additional citation and quotation omitted), *abrogated on other grounds by State ex rel. Sch. & Institutional Trust Land Admin. v. Mathis*, 2009 UT 85, 223 P.3d 1119. Simply put, Section 15-1-1 is “applicable to prejudgment interest generally.” *Id.* (Bench, J., concurring and dissenting). Indeed, the district court in the instant case referred to Section 15-1-1 as the “prejudgment interest statute,” and the Western States defendants conceded below the predicate that “prejudgment interest may be awarded in negligence actions to recover for damages to property.” (R. 1795 n.4.) This Court holds that once that predicate is established, the legal rate applies. *See Vali Convalescent & Care Insts. v. Division of Health Care Fin.*, 797 P.2d 438, 445 (Utah Ct. App. 1990)

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*Watts*, 2009 UT App 137, ¶ 55, 210 P.3d 977, 991 (breach of fiduciary duty; prejudgment interest denied under *Fell* test).

(noting if plaintiff “is entitled to interest on some valid basis § 15-1-1 establishes the *rate* of interest to which it is entitled).<sup>10</sup>

This Court should apply the 10% rate in Section 15-1-1(2). It applies on its face. It applies per *Fell* and *Uinta Pipeline* and a host of other decisions. It applies also because the parties specifically agreed to use a 10% interest rate for these choses in action in their court-approved stipulation – which is a “lawful contract” whereby they agreed to a specified rate. See Utah Code Ann. § 15-1-1(2) (“Unless parties to a lawful contract specify a different rate of interest . . .”); *Prinsburg State Bank v. Abundo*, 2012 UT 94, ¶ 13, 296 P.3d 709 (referring to a stipulation between litigants as an enforceable “contract”); *supra* Part I. The district court’s refusal to use the statutory legal rate is reversible error under the law and the facts of this case.

**B. The District Court Incorrectly Looked to Inapposite Cases.**

As noted, the *Fell* line of decisions applying the legal rate as the prejudgment interest rate has been the law in Utah since 1907. This Court has continued that line of decisions by looking to the statutory 10% rate in Utah

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<sup>10</sup> The *Fell* rule applies to property damage cases caused by negligence, but not to personal injury cases. See *Bjork v. April Indus., Inc.*, 560 P.2d 315, 317 (Utah 1976) (reciting the common law rule prohibiting prejudgment interest in personal injury cases). The Utah Legislature statutorily abrogated the common law prohibition against prejudgment interest for personal injury damages by enacting legislation now codified at Utah Code Ann. § 78B-5-824. That section authorizes prejudgment interest on personal injury judgments and sets a special calculable rate that currently may not exceed 10%. No party to this case has argued that Section 78B-5-824 applies here.

Code Ann. § 15-1-1(2) as the applicable legal rate for prejudgment interest on choses in action such as those in this case. The district court's decision would break the line of cases and call into question the framework for awarding prejudgment interest in Utah. This Court should put a halt to any such attempted diversion.

1. *Supreme Court language from other contexts does not govern.*

The district judge apparently hesitated to follow the *Fell* decision because of "individualized dicta" from one Supreme Court case that was later invoked in a second Supreme Court case dealing with prejudgment interest for statutory damages. (R. 1973, at 13-16.) The holdings from those cases do not control the circumstances here, and neither should any dicta expressed therein.

To understand that dicta, this Court needs to understand the two Supreme Court cases invoked (*Consolidation Coal* and *Wilcox*); a Supreme Court precursor to those two cases (*SCM Land*); and a decision by this Court from earlier this year discussing the Supreme Court's case law in context (*National DME*). Each will be discussed next, in chronological order.

In *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105 (Utah 1986), the Supreme Court used the legal rate in Section 15-1-1 to add prejudgment interest to an award for breach of a lease agreement. *See id.* at 108-09. The dispute in the case was whether to apply Section 15-1-1's statutory interest rate in effect at the time of the breach (10%) or in effect at the time the contract was entered (6%). *See id.*

There was no dispute, however, whether Section 15-1-1 supplied the proper prejudgment rate. The Court determined that the rate in effect at the time the contract was entered was the proper one and ruled accordingly. *See id.* at 109.

Next, in *Consolidation Coal Co. v. Utah Division of State Lands & Forestry*, 886 P.2d 514 (Utah 1994), *abrogated by State ex rel. Sch. & Institutional Trust Land Admin. v. Mathis*, 2009 UT 85, 223 P.3d 1119, the Supreme Court determined that a higher rate than the statutory legal rate should apply to a coal consortium's breach of a lease agreement with the State's School & Institutional Trust Land Administration. Instead of applying Section 15-1-1's then-prevailing statutory legal rate of 6%, the Court instead applied a rate prescribed by State regulations governing the use of State lands, which went as high as 15%. *See Consolidation Coal*, 886 P.2d at 524-25 & n.15. The Court reached its decision based on "the specific constitutional requirement that the State obtain full value for its school trust lands, in conjunction with the legislature's broad grant of authority to the [State] and our case law indicating that the [State] has such further implied powers as are reasonably necessary to carry out its constitutional duties." *Id.* at 527. The Court further noted that the terms of the lease made it "expressly subject to the laws of Utah," including the State interest rate regulations upon which the Court relied. *Id.* at 528.

While writing for the majority in *Consolidation Coal*, Chief Justice Zimmerman dropped a footnote in which he expressed in dicta a personal view

that the legal rate in Section 15-1-1 should not apply as the prejudgment rate in all breach of contract matters, which he thought the Court's *SCM Land* decision had seemed implicitly to suggest and which he found to be reflected as well in Court of Appeals jurisprudence:

...  
The author of this opinion has serious reservations about the initial correctness and therefore the continued vitality of *SCM Land* and any other case that purports to tie prejudgment interest rates in all contract cases to the section 15-1-1 rate in effect at the time the contract was signed. See, e.g., *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 731-32 (Utah Ct. App. 1990). The plain language of section 15-1-1 seems to indicate that the section was intended to apply only to a "loan or forbearance" of "money, goods or chose in action." Utah Code Ann. § 15-1-1. In other words, it provides a default interest rate when the parties have failed to specify an interest rate for "the loan or forbearance of any money, goods, or chose in action that is the subject of their contract." *Id.* The subject of the present contract is the sale of mineral rights, not a loan or forbearance. This was also the case in *SCM Land*. That opinion adopted its view of section 15-1-1's applicability without discussing the limiting language of that section. Nevertheless, because the State has failed to raise this issue and its resolution is not necessary for a disposition of this case, we decline to address it.

*Consolidation Coal Co*, 886 P.2d at 525 n.13.

Judge Bench from this Court, sitting by designation in *Consolidation Coal*, filed a concurring and dissenting opinion in which he challenged what he called Justice Zimmerman's "individualized dicta" as contrary to established case law in Utah:

Chief Justice Zimmerman's individualized dicta attacking this well-established line of cases is unfounded. Justice Zimmerman suggests that because the contracts were for the sale of goods (mineral rights), they are not a "loan or forbearance." Justice Zimmerman misapprehends the

purpose of section 15-1-1 and prejudgment interest. Prejudgment interest is designed to compensate the nonbreaching party that finds itself, by virtue of the breach, in the position of loaning money or forbearing what is owed by the breaching party. *See* 22 Am.Jur.2d *Damages* § 82 (1988); *see also* *L & A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 630 (Utah 1980) (prejudgment interest represents interest on amount awarded as damages due to party's failure or delay in paying amount under contract); *Fitzgerald v. Critchfield*, 744 P.2d 301, 304 (Utah Ct.App.1987) (prejudgment interest is that interest owed on overdue debt from date debt became overdue until entry of judgment). Therefore, because of the underpayment of royalties by Consol, the State found itself in the position of loaning or forbearing money it was owed.

*Id.* at 529 n.1 (Bench, J., concurring and dissenting). Judge Bench also pointed out that "Utah law establishes the rate of prejudgment interest '[e]xcept when parties to a lawful contract agree on a specified rate.'" *Id.* at 529 (Bench, J., concurring and dissenting) (quoting *Trail Mountain Coal Co. v. Division of State Lands & Forestry*, 884 P.2d 1265, 1273 (Utah Ct. App. 1994), *aff'd in part, rev'd in part*, 921 P.2d 1365 (Utah 1996), (quoting Utah Code Ann. § 15-1-1 (1992)). He further noted that Section 15-1-1 is "applicable to prejudgment interest generally." *Id.* ((Bench, J., concurring and dissenting).

Then, in *Wilcox v. Anchor Wate*, 2007 UT 39, 164 P.3d 353, the Supreme Court determined Section 15-1-1's legal rate did not apply to a statutory voidable preference recovery. The liquidator of an insolvent insurance company sued under the Utah Insurers Rehabilitation and Liquidation Act (the "Liquidation Act") to void a preferential \$3.5 million payment. *See id.* ¶ 1. The Liquidation Act did "not specify the rate of prejudgment interest applicable to

judgment obtained under its voidable preference provisions.” *Id.* ¶ 42. The Court held that, “when filling in gaps or interpreting ambiguous provisions of the Liquidation Act, we look to the preference provisions of federal bankruptcy law, which have the same purpose as the preference provisions of the Liquidation Act.” *Id.* ¶ 47; *see also id.* ¶ 11 (noting same). The Court therefore concluded that, “when calculating the prejudgment interest on remand, the district court should use the rate applied by the majority of federal courts to judgments obtained in federal preference actions.” *Id.* ¶ 47. The rate used by the majority of federal courts in that instance was the federal post-judgment interest rate. *See id.* ¶ 47 n.55 (collecting cases).

In reaching its decision, the Supreme Court rejected the application of the 10% legal rate in Section 15-1-1(2) to voidable preference actions under the Liquidation Act. *See id.* ¶¶ 42-46. The Court looked to Justice Zimmerman’s individualized dicta in *Consolidation Coal* to do so:

The theoretical underpinning behind section 15-1-1 is that the parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of money, goods, or causes of action that are the subject of their contract. Only when the parties to a contract fail to specify a rate of interest does the default rate specified in section 15-1-1(2) apply. But this case is not a contract action. There was no contract between Anchor Wate and the Liquidator and therefore no opportunity for the parties to agree upon an applicable rate of interest. The Liquidator’s judgment is not grounded on any voluntary undertaking by Anchor Wate. Rather, it is the result of the statutory power given the Liquidator as he attempts to fulfill his statutory mandate of achieving an equitable distribution of SAIC’s estate. And there is nothing to suggest that the default interest rate specified in section 15-1-1(2) is consistent with this statutory mandate.



This court has previously expressed the view that the interest rate specified in section 15-1-1(2) does not necessarily even apply in all contract cases. In *Consolidation Coal Co. v. Utah Division of State Lands & Forestry*, we suggested, albeit in dicta, that we had “serious reservations about ... [cases] that purport[ ] to tie prejudgment interest rates in all contract cases to the section 15-1-1 rate” because this section was meant to apply only to loans or forbearances in contract actions.

Just as the default rate specified in section 15-1-1(2) does not automatically extend to all judgments obtained in contract cases, it does not automatically apply to all judgments based on statute where the legislature has failed to specify the applicable rate. And in this case, we conclude that the more appropriate prejudgment interest rate is the one applicable to preference claims under federal bankruptcy law.

*Id.* ¶¶ 44-46. The Court found good policy reasons for its approach in the context of the Liquidation Act’s statutory voidable preference action:

Application of the federal rate will adequately compensate the estates of insolvent insurers for the time value of money without creating an incentive for insurance liquidators to delay prosecution of voidable preference claims in order to obtain returns greater than they could have reasonably expected to earn in the market. It will also more adequately take into account the practical reality of defendants in preference actions that, like Anchor Wate, dispose of the proceeds obtained from the estate of the insolvent insurer in the ordinary course of business prior to the liquidation of the insurer or the initiation of a preference claim by the Liquidator. Such defendants lack the ability to invest the proceeds at all. Under such circumstances, application of the default rate specified in section 15-1-1(s) could be entirely punitive and, in fact, may unjustly enrich other creditors at the expense of the preference defendant. In the event that the Utah legislature prefers a rate of interest different from the federal rate, it may amend the Liquidation Act to specify the applicable rate.

*Id.* ¶ 48.

Most recently, in an opinion handed down earlier this year, *Francis v. National DME*, 2015 UT App 119, 350 P.3d 615, this Court recognized the intersection of argument based on the *Consolidation Coal/Wilcox* dicta with the holdings of *Sundial* and its predecessors. *See id.* ¶¶ 39-42. In *National DME*, the trial court awarded 10% prejudgment interest under Section 15-1-1 for breach of contract. *See id.* ¶ 18. This Court affirmed. *See id.* ¶ 44. However, because of inadequate briefing by the appellant, the Court did not resolve the alleged competing interpretations of Section 15-1-1 based on *Consolidated Coal/Wilcox*, Judge Bench's concurring and dissenting opinion in *Consolidated Coal*, and the *Sundial* line of cases. *See id.* But in affirming the 10% award, the Court made several observations that obtain here.

First, the Court noted that its recitation of Section 15-1-1's language in *Sundial* "implies that choses of action qualify for the statutory rate regardless of whether a loan or forbearance is involved." *Id.* ¶ 41. The Court suggested that under this interpretation, "'loan or forbearance' applies only to the word 'money.'" *Id.* That is the interpretation reflected in the *Fell* line of cases from 1907 forward, including the 2013 *Sundial* opinion.

Second, the Court observed that, although the question presented in *National DME* was not presented to other courts, "section 15-1-1 has been applied in other cases involving a chose in action instead of a loan or forbearance." *Id.* (citing *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7,

¶¶ 50–55 & n.20, 210 P.3d 263 (affirming the trial court’s application of section 15–1–1 to a breach of contract claim); *Mont Trucking, Inc. v. Entrada Indus., Inc.*, 802 P.2d 779, 782 (Utah Ct. App. 1990) (same); *Fitzgerald v. Critchfield*, 744 P.2d 301, 304 (Utah Ct. App. 1987) (same)); *see also id.* ¶ 43 (“The question of whether an action must specifically be a ‘loan or forbearance’ was not at issue in either *Consolidation Coal* or *Sundial*.”).

Third, this Court observed: “We have found no case that squarely addresses the correct interpretation of the phrase ‘loan or forbearance of any money, goods, or chose in action.’” *Id.* ¶ 43 (quoting Utah Code Ann. § 15–1–1(2)). The Court likewise found no need to do so in *National DME*, and so affirmed the trial court’s imposition of a 10% statutory rate in that case. *See id.* ¶ 44.

If this Court reaches the question, it should hold to the *Sundial* reading of the statute: “the legal rate of [prejudgment] interest for . . . any . . . chose in action shall be 10% per annum.” *Sundial*, 2013 UT App 223, ¶ 8 (quoting Utah Code Ann. § 15-1-1(2)). The failure of a tortfeasor to timely compensate a plaintiff for losses incurred is analogous to the loan or forbearance of money in a contract case. As Judge Bench observed with respect to a contract breach, “[p]rejudgment interest is designed to compensate the nonbreaching party that finds itself, by virtue of the breach, in the position of loaning money or forbearing what is owed by the breaching party.” *Consolidation Coal*, 886 P.2d at

529 n.1 (Bench, J., concurring and dissenting). The same rationale applies to someone who is owed fixed property damages as a result of a tort. By delaying payment on an amount calculable by facts and figures, the tortfeasor is obtaining the benefit of the plaintiff's money as if it were a loan or in the nature of forbearance on money owed. The interest rate in Section 15-1-1 applies to all such forbearance "[e]xcept when parties to a lawful contract agree on a specified rate." *Id.* at 529 (Bench, J., concurring and dissenting) (citations and quotations omitted); *see also Iron Head Constr. Inc. v. Gurney*, 2009 UT 25, ¶ 10, 207 P.3d 1231 (noting prejudgment interest "serves to compensate a party for the depreciating value of the amount owed over time," which "would have been paid to plaintiffs" in satisfaction of their claim but for the defendants' breach of duty) (citations omitted).

In addition to the compelling points set forth in the analysis from Judge Bench in *Consolidation Coal*, from this Court in *Sundial*, and from this Court again in *National DME*, the Supreme Court's asides in *Consolidation Coal* and *Wilcox* are readily and persuasively distinguished.

First, Justice Zimmerman's personal view, expressed in *obiter dicta*, was just that. It was not a holding and did not purport even to express the view of a majority of the Court. It was offered up without briefing or argument from either side, and it failed to take into consideration *Fell* or its substantial subsequent history and application. As Judge Bench pointed out in his

dissenting and concurring opinion, Justice Zimmerman's musings were directly contrary to long-established Utah law and misapprehended the nature and purpose of the prejudgment interest statute. *See Consolidation Coal*, 886 P.2d at 529 n.1 (Bench, J., concurring and dissenting). His view carries little weight here.

Second, *Consolidation Coal* itself was unique. The Court concluded that the then-prevailing statutory legal rate of 6% was insufficient given the State's constitutional and statutory mandates to obtain "full value" from its lands. *See Consolidation Coal*, 886 P.2d at 527. The Court thus felt compelled by what it found to be different controlling law to use a *higher* rate. *See id.* at 524-25 & n.15. Since the time it was first handed down, *Consolidation Coal* itself has been abrogated, rendering it even more unhelpful to the discussion here. *See State ex rel. Sch. & Institutional Trust Land Admin. v. Mathis*, 2009 UT 85, 223 P.3d 1119.

Third, like *Consolidation Coal*, the *Wilcox* case was a policy-driven decision implementing a remedial statutory mandate and statutory goals. On the strength of its own established authority, the Court's interpretation of the Liquidation Act looked to federal bankruptcy law rather than to Section 15-1-1. *See Wilcox*, 2007 UT 39, ¶¶ 11, 47. The Court relied heavily on the substantial policy reasons behind using the federal post-judgment interest rate as a majority of federal bankruptcy courts did. *See id.* ¶¶ 47-48. *Wilcox* did not involve a tort chose in action, let alone a negligence claim involving property damages like *Fell* or *Uinta Pipeline*.

Fourth, *Wilcox* bent the *Consolidation Coal* dicta to its own purposes. In doing so, the Court arguably stretched the earlier case's gratuitous statements beyond acceptable tolerance limits. The Supreme Court recognized Justice Zimmerman's observations in *Consolidation Coal* as *obiter dicta* but then applied them as if they were holding. See *Wilcox*, 2007 UT 39, ¶¶ 45-46. The problem with this approach is that the individualized dicta was unbriefed and untested in the first instance. It was not the law of the land and should not have been when appropriated by the *Wilcox* Court. As this Court correctly recognized in *National DME*, the Supreme Court has not been squarely presented with the question presented here. See *National DME*, 2015 UT App 119, ¶ 41. The Court in *Wilcox* was not – that case was a statutory claim that lent no discussion at all to common law choses in action. See *Wilcox*, 2007 UT 39, ¶¶ 42-48. In fact, two years after *Wilcox* the Supreme Court affirmed an award of 10% prejudgment interest using the traditional application of Section 15-1-1. See *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶¶ 50-55 & n.20, 210 P.3d 263.

Lastly – and perhaps most importantly – neither of the Supreme Court cases containing equivocal language purported to overrule *Fell* or *Uinta Pipeline*, or even address them. Those cases remain controlling law and dictate the result here. The doctrine of *stare decisis* required the district court to follow binding appellate precedent, and its failure to do so here calls for correction of error. See *Eldridge v. Johndrow*, 2015 UT 21, ¶ 20 & n.3, 345 P.3d 553.

If the Court needs to reach this issue, the Court should conclude that the statutory legal rate applies to prejudgment interest on this property damage award. That was the holding of *Fell*, which has never been overruled. That is the result in a long line of cases since *Fell*, including case law that post-dates *Wilcox*. That is the correct holding here.

2. *Federal court cases do not govern.*

In their supplemental briefing below, the Western States defendants argued that, besides the *Consolidation Coal/Wilcox* pairing, “[o]ther Utah courts” have declined to apply Section 15-1-1’s rate to prejudgment interest in non-contract settings. (R. 1808.) Western States then cited, not to Utah courts at all, but rather to federal courts exercising discretionary prerogative in setting a prejudgment interest rate under federal case law. (R. 1808.)

The Western States defendants pointed to Judge Waddoups’ short Memorandum Decision and Order in *Klein v. Patterson*, No. 2:11-cv-723-CW, 2013 WL 5445949 (D. Utah, Sept. 30, 2013) (unpublished). *Patterson* was a fraudulent transfer action in which the court-appointed receiver recovered a judgment against a third party. *See id.* at \*1. Judge Waddoups first awarded prejudgment interest under Utah Code Ann. § 15-1-1(2) based on the receiver’s oral suggestion that “the section applies not just to contracts, but more broadly to a chose in action.” *Id.* He then reversed himself and ruled that “[w]hile the statute does refer to a chose in action, it does so within the context of “a lawful

contract.” *Id.* The judge decided that a fraudulent transfer is not within the realm of contract law, and he found no other Utah statute or federal law providing a prejudgment interest rate for a fraudulent transfer judgment. *See id.*

Consequently, he relied on a prior Tenth Circuit receivership decision ruling that “the prejudgment interest ‘calculation rests firmly within the sound discretion of the trial court.’” *Id.* (citing *Wing v. Gillis*, No. 12-4071, 2013 U.S.App. LEXIS 10174, at \*16, 2013 WL 2169321, 525 Fed. Appx. 795 (10th Cir. May 21, 2013) (unpublished)). The Tenth Circuit’s Order and Judgment in *Gillis* had ruled that prejudgment interest was proper in a fraudulent transfer case “[u]nder fairness and equity principles” because it “compensates for the loss of use of the money” and avoids “a windfall [to the defendant] in the form of an interest-free loan.” *Gillis*, 525 Fed. Appx. at 801 (quoting *William A. Graham Co. v. Haughey*, 646 F.3d 138, 145 (3<sup>rd</sup> Cir. 2011)). Following the Tenth Circuit’s lead, Judge Waddoups used a 5% rate, which *Gillis* ruled was a matter of discretion because there was “no federal statute setting forth an appropriate rate of prejudgment interest.” *See Patterson, supra*, at \*2; *Gillis*, 525 Fed. Appx. at 801.

These two unpublished federal decisions are not binding upon this Court. Indeed, the Tenth Circuit’s Order and Judgment is not even binding precedent in the Tenth Circuit. *See Gillis, supra*, at footnote “\*”. More importantly, though, they are not persuasive. Judge Waddoups apparently ruled without the benefit of briefing from the parties. He did not cite to *Fell*, *Uinta Pipeline*, or any state



court case law. He did not consider the holdings of any Utah appellate court. Instead, he latched onto language from *Gillis* that the rate was a matter of discretion.

Unfortunately, the law in *Gillis* got lost in translation. (This is perhaps why unpublished orders and judgment are not binding precedent.) *Gillis* itself had cited to the published decision of *Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063 (10<sup>th</sup> Cir. 2008). See *Gillis*, 525 Fed. Appx. at 801. That case held quite clearly that “the law governing compensatory damages also governs prejudgment interest.” *Morrison Knudsen*, 532 at 1077 (rejecting the “‘smorgasbord approach’ created by allowing parties to pick and choose prejudgment interest law”) (citing *Johnson v. Cont’l Airlines Corp.*, 964 F.2d 1059, 1064 (10<sup>th</sup> Cir. 1992)). Thus, Utah law, not federal law, determines the applicable rate for prejudgment interest under a Utah state law cause of action. Nowhere does Utah law suggest that the awarding of prejudgment interest or the application of the proper rate for state common law choses in action is a matter of equitable discretion or of federal law.

To the contrary, the Tenth Circuit has previously recognized the viability of the *Uinta Pipeline/Fell* line of cases in determining prejudgment interest under Utah law. See *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1255 (10<sup>th</sup> Cir. 1988), *overruled on other grounds as recognized by Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1231 (10<sup>th</sup> Cir. 1996). As already briefed at length, those Utah cases

hold that the “legal rate” applies. *See supra* Part II.A. The “legal rate” is found in Utah Code Ann. § 15-1-1(2). *See Sundial*, 2013 UT App 223, ¶ 8.

If this Court is nevertheless persuaded by the two unpublished federal decisions the Western States defendants cited, then the Court should use a 10% rate as a matter of equitable discretion. There is authority for this approach as well in the federal court case law. *See Krum v. Hartford Life & Acc. Co.*, 942 F. Supp. 2d 1171, 1186 (D. Utah 2013) (Shelby, J.) (awarding prejudgment interest of 10% for improperly denied ERISA benefits under Utah Code Ann. § 15-1-1). Moreover, the equities of this case call for it. This case would have been over long ago if the Western States defendants had stuck to their prior agreements made on the record. Their bait-and-switch argument was a litigation tactic that added insult to the Fullers’ injuries already suffered at their hands. The Fullers are now going on their ninth year of seeking redress for the harm caused by Denise Bohne and Western States. The equities point to using the rate that was originally agreed to by the parties, which the Western States defendants subsequently wriggled out of by their legal maneuvering. *See also infra* Part III (discussing appropriate rates in the event court discretion is invoked).

3. *A statute granting equitable discretion does not govern.*

The other “Utah court” the Western States defendants pointed to below as using its discretion was this Court. (R. 1809.) Western States argued that in *Peterson v. Jackson*, 2011 UT App 113, ¶¶ 56-58, 253 P.3d 1096, this Court

“affirmed the trial court’s equitable decision to use the post-judgment rate in § 15-1-4 to calculate prejudgment interest in the statutory dissolution of a privately held corporation.” (R. 1809.) However, the statute at issue in *Peterson*, Utah Code Ann. § 16-10a-1434, specifically provided that prejudgment interest “may be allowed at the rate and from the date determined by the court to be equitable.” This Court therefore affirmed the use of the post-judgment rate in Section 15-1-4 as “rational” and not an abuse of discretion. *Id.* ¶ 58. No such statute exists here. *Peterson* does not stand for the broad proposition that Utah courts decide the prejudgment interest rate as a matter of equity for common law choses in action. The viable *Fell* decision and its progeny are decidedly to the contrary.

In sum, this Court should reject the case law invoked that falls outside the contours of *Fell* and its progeny. Based on a correct application of the law, the Court should reverse.

**III. THE DISTRICT COURT ABUSED ITS DISCRETION BY APPLYING THE 2015 POST-JUDGMENT INTEREST RATE TO PREJUDGMENT INTEREST ACCRUING SINCE 2007.<sup>11</sup>**

Finally, if this Court rejects all of the Fullers’ arguments to this point, the Court should nevertheless reverse and remand with instructions. The district

---

<sup>11</sup> This issue was preserved below by the Western States defendants’ raising and arguing it and by the district court’s ruling on it. *See Gressman v. State*, 2013 UT 63, ¶ 45, 323 P.3d 998 (holding issues, not arguments, are preserved for appellate review); R. 1808-10; R. 1973, at 19-21.

court abused its discretion by applying the 2015 post-judgment interest rate to prejudgment interest accruing since 2007. The lower court gave no rationale for this decision; it simply announced it. (R. 1973, at 19-21.) This was an abuse of the court's discretion. See *Johnston v. Labor Comm'n*, 2013 UT App 179, ¶ 15, 307 P.3d 615, *cert. denied*, 317 P.3d 432 (Utah 2013) (requiring a reasonable basis for a discretionary decision to be upheld on appeal, and noting remand is appropriate if one is not clear from the record).

As already argued, the Court should have used the rate agreed to between the parties in the first place. See *supra* Part II.B.2. The Western States defendants' change of heart cost the Fullers additional time and expense and continues to do so. The most equitable rate to apply, if equitable discretion comes into play, would be the 10% rate stipulated to before trial began and again during the course of trial. The trial court exceeded its discretion when it went away from that rate under these circumstances.

Alternatively, the district court's decision failed to take into account when the interest began running. The difference between interest rates in 2007 and 2015 was substantial: in 2007 it was 6.99% per annum; in 2015 it was 2.27%.<sup>12</sup> To apply the 2015 rate simply because that is when the judgment entered is wholly arbitrary. If prejudgment interest is to be applied using a post-judgment rate, it

---

<sup>12</sup> See <http://www.utcourts.gov/resources/intrates/interestrates.htm>.

should at least be the rate in effect at the time the prejudgment interest began running.

The district court's ruling failed to appreciate that the purpose of awarding prejudgment interest is to replace what was lost in the interim period after the wrongful conduct or breach:

"[A]n award of prejudgment interest simply serves to compensate a party for the depreciating value of the amount owed over time and, as a corollary, deters parties from intentionally withholding an amount that is liquidated and owing." *Trail Mountain Coal Co. v. Utah Div. of State Lands & Forestry*, 921 P.2d 1365, 1370 (Utah 1996). "Plaintiffs are entitled to damages for the loss of use of the money that, but for the [defendant]'s breach and ensuing delay, would have been paid to plaintiffs in satisfaction of their . . . claim." *Kraatz v. Heritage Imps.*, 2003 UT App 201, ¶ 75, 71 P.3d 188 (alterations in original) (citing *Castillo v. Atlanta Cas. Co.*, 939 P.2d 1204, 1212 (Utah Ct.App.1997)).

*Iron Head Constr. Inc. v. Gurney*, 2009 UT 25, ¶ 10, 207 P.3d 1231. That cannot be accomplished in this case by using a low rate that came into effect years after the tortious conduct and bears no resemblance to market rates at the time.

Even the cases Western States cited from the federal courts declined to use the post-judgment rate. See *Patterson, supra*; *Gillis, supra*. Each of those applied a 5% rate as a "middle ground" between the positions taken by the litigants as a matter of fairness and equity. By failing to do the same here, the district judge below eschewed even the cases the Western States defendants presented to him.

Lastly, the post-judgment interest rate used in the *Wilcox* decision was decided in that context as a matter of statutory interpretation by looking to

analogous federal bankruptcy law. See *Wilcox*, 2007 UT 39, ¶¶ 11, 47-48. If what the district court did here was follow *Wilcox*'s lead on the appropriate rate, that decision was misguided: the instant case presents none of the statutory or policy issues presented in *Wilcox*.

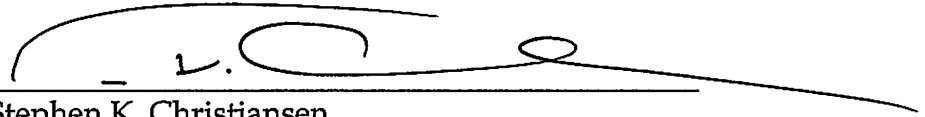
If the Court reaches this point in the analysis, it should reverse and remand for further proceedings to determine an interest rate that is fair and equitable under all the circumstances. The lower court's use of the 2015 post-judgment interest rate was an abuse of discretion under all the circumstances. See *Johnston*, 2013 UT App 179, ¶ 15; *Gullickson v. Gullickson*, 2013 UT App 83, ¶ 39, 301 P.3d 1011 (a court abuses its discretion when it fails "to exercise sound, reasonable, and legal decision-making") (quoting *Black's Law Dictionary* 11 (9<sup>th</sup> ed. 2009)).

### CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision and remand with an order that prejudgment interest should be applied using the 10% legal rate agreed to by the parties and dictated by statute. If the Court disagrees, it should nevertheless reverse the district court's decision and remand with an order to consider and articulate the appropriate interest rate that should apply under all the circumstances of this case.

DATED this 26<sup>th</sup> day of October, 2015.

STEPHEN K. CHRISTIANSEN, ATTORNEY AT LAW

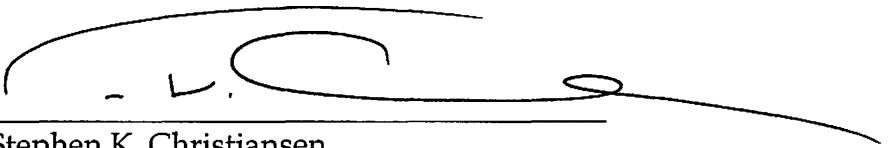
A handwritten signature in dark ink, consisting of a large, sweeping 'S' followed by a smaller 'K' and a circular flourish, ending in a long horizontal line.

Stephen K. Christiansen  
*Attorney for Appellants*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 13,989 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

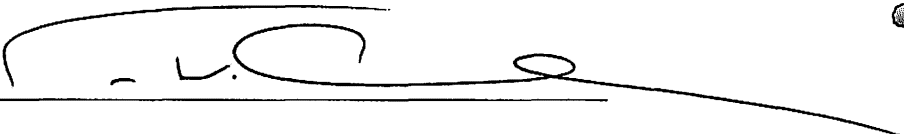
DATED this 26<sup>th</sup> day of October, 2015.

  
\_\_\_\_\_  
Stephen K. Christiansen

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of October, 2015, I caused two (2) true and correct copies of the within and foregoing document, together with a CD of the brief in searchable PDF, to be sent via U.S. mail, first class postage prepaid, upon the following counsel of record:

Joseph P. Barrett  
BARRETT LAW, P.C.  
699 East South Temple, Suite 370  
Salt Lake City, Utah 84102

  
\_\_\_\_\_



# **Addendum Exhibit 1:**

**Final Judgment**

The Order of Court is stated below:

Dated: February 24, 2015  
11:21:59 AM

/s/ SANDRA N. PEULER  
District Court Judge



Stephen K. Christiansen (6512)  
311 South State Street, Suite 250  
Salt Lake City, Utah 84111  
Telephone: 801.716.7016  
Facsimile: 801.716.7017  
[steve@skclawfirm.com](mailto:steve@skclawfirm.com)

Attorney for Plaintiffs

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY STATE OF UTAH

---

DAVID AND RUTH M. FULLER AND  
FULLER'S APPLIANCE PARTS AND  
SERVICE, LLC,

Plaintiffs,

vs.

DENISE BOHNE AND WESTERN STATES  
INSURANCE AGENCY,

Defendants.

JUDGMENT

Civil No. 100901093

Honorable Deno Himonas

---

This case having been tried to a jury, and the jury having returned a verdict in favor of the plaintiffs and against the above-named defendants on October 30, 2014, and the Court now being fully advised,

JUDGMENT is hereby ENTERED in favor of plaintiffs David Fuller, Ruth M. Fuller, and Fuller's Appliance Parts and Service, LLC, and against defendants Denise Bohne and Western States Insurance Agency, Inc., jointly and severally, as follows:

1. Damages of \$101,595.00 pursuant to the verdict of the jury, representing the full amount of property damages awarded to plaintiffs; *plus*

001950

2. Pre-judgment interest at the post-judgment statutory rate in effect January 1, 2015 (2.27% per annum) on \$101,595.00 from June 13, 2007, through the date of entry of the Judgment; *plus*
3. Costs of \$3,198.17 pursuant to plaintiffs' Verified Memorandum of Costs; *less*
4. Recovery of \$2,000.00 from former defendant Auto-Owners Insurance Company pursuant to a prior settlement of claims; *plus*
5. Post-judgment interest at the statutory rate from the date of entry of the Judgment until the Judgment is paid in full.

<<END OF TEXT OF JUDGMENT>>

<<JUDGE'S APPROVAL APPEARS AT TOP OF DOCUMENT>>

APPROVED AS TO FORM:

/s/ Joseph P. Barrett  
Counsel for Denise Bohne and  
Western States Insurance Agency, Inc.  
*(Electronic signature affixed by filing  
attorney with authorization)*

**Addendum Exhibit 2:**

**Stipulated Jury Instruction No. 29**

### **JURY INSTRUCTION NO. 29**

The Fullers seek recovery of prejudgment interest as part of their loss. In Utah, prejudgment interest may be awarded in situations where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time. If you find for the Fullers on their claim of prejudgment interest, you should award them 10% annually on the value of their proven loss from the date of the fire to the date of your verdict.

**Addendum Exhibit 3:**  
**Final Jury Instruction No. 29**

**JURY INSTRUCTION NO. 29**

**Prejudgment Interest**

The Fullers seek recovery of prejudgment interest as part of their loss. In Utah, prejudgment interest may be awarded in situations where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time. If you find for the Fullers on their claim of prejudgment interest, you should award them 10% annually on the value of their proven loss from the date of the fire to the date of your verdict.

# **Addendum Exhibit 4:**

## **Transcript of Stipulation and Ruling on Prejudgment Interest**



IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT  
Third Judicial District

APR 16 2015

SALT LAKE COUNTY

By

Deputy Clerk

DAVID FULLER, et al.,

: Case No. 100901093

Plaintiffs,

: Appellate Court Case No. 20150146

vs.

DENISE BOHNE, et al.,

Defendants,

: With Keyword Index

JURY TRIAL OCTOBER 30, 2014

BEFORE

JUDGE DENO HIMONAS

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

FILED  
UTAH APPELLATE COURTS

AUG 26 2015

ORIGINAL

1969

360-0000-1

## APPEARANCES

For the Plaintiffs:

STEPHEN K. CHRISTIANSEN  
Attorney at Law

For the Defendants:

JOSEPH P. BARRETT  
Attorney at Law

\* \* \*

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1 MR. BARRETT: In addition, Your Honor, there was a  
2 mid-trial motion on rent, in addition - you said pretrial in  
3 your colloquy. There was also a trial ruling - a trial  
4 motion-

5 THE COURT: The motion to dismiss.

6 MR. BARRETT: At the close -

7 THE COURT: At the close of the case. Right.

8 MR. BARRETT: Correct.

9 THE COURT: You can finish up with the verdict form  
10 afterwards. What I really need are the instructions to bring  
11 the jury in.

12 MR. BARRETT: They're done. I think they've been  
13 sent-

14 THE COURT: Then let's bring -

15 MR. BARRETT: - they -

16 THE COURT: - give me the instructions, let's get  
17 (inaudible) -

18 MR. BARRETT: They've been sent to you as  
19 stipulated. It went, so I don't know if you got it.

20 (Inaudible conversation)

21 MR. CHRISTIANSEN: Your Honor, may I raise one more  
22 thing along the lines of what we've been talking about?

23 THE COURT: Yeah.

24 MR. CHRISTIANSEN: The way we're putting this case  
25 to the jury there really are three broad categories of damage

1 items. And they are business property damage, prejudgment  
2 interest, and lost rent. And I would propose that we have  
3 separate lines for each of those, because that's the way that  
4 I've presented the case. If we're going to break out the  
5 two, we might as well break out the three.

6 MR. BARRETT: So the question is whether prejudgment  
7 interest needs to be separated?

8 MR. CHRISTIANSEN: Yes.

9 (Inaudible conversation)

10 MR. BARRETT: Can I have a moment just to take a  
11 look?

12 (Inaudible conversation)

13 MR. CHRISTIANSEN: No. I'm not asking for  
14 prejudgment interest on the rent. It's based only on the  
15 personal property.

16 MR. BARRETT: Okay. Prejudgment interest wouldn't  
17 necessarily be based upon what's (inaudible) property.

18 (Inaudible conversation)

19 MR. CHRISTIANSEN: Right, and we've instructed on  
20 that, and I'll argue on that, but -

21 MR. BARRETT: So I'm not sure the jury decides -

22 MR. CHRISTIANSEN: Well, if we tell them there's  
23 three - these three different areas of damages, but then they  
24 only have two lines to deal from, it's going to confuse them.  
25 I don't want to have to be resorting to saying, collapse

1     these two -

2             THE COURT: That's fine.

3             MR. BARRETT: I'm not opposed.

4             THE COURT: Yeah, that's fine.

5             MR. CHRISTIANSEN: Okay. Very good. Thank you,

6     Your Honor.

7             THE COURT: Line them up. Jen's going to make -- we

8     need -- how many copies do we need? Nine, 10, 11 copies when

9     they're done.

10            (Inaudible conversation)

11            THE COURT: Do I have to make any changes to this?

12            MR. BARRETT: We have interlineated (inaudible) 22B.

13            (Inaudible conversation)

14            THE COURT: So this is a full and complete set?

15     Yes?

16            MR. BARRETT: It is, Your Honor.

17            MR. CHRISTIANSEN: Yes, Your Honor.

18            THE COURT: Can you seal my signature here, and

19     (inaudible). Might as well image it. Give me 11 copies.

20            CLERK: Just these ones, right?

21            THE COURT: Yep.

22            (Inaudible conversation from 11:56:38 to 12:02:50)

23            THE COURT: Okay. Go ahead.

24            MR. BARRETT: Your Honor, if we can, we were having

25     discussion about whether the special verdict form should

1 allow, in addition to a damage line for property as well as a  
2 damage line for rent, whether it should also have prejudgment  
3 interest. And during the break, I was able to look at the  
4 MUJI, Model Utah Jury Instructions, Second Edition, special  
5 verdict form CV 1899, and it is in the context of a fraud  
6 instruction, which is a variation of the negligent  
7 misrepresentation, so I realize it's not particularly  
8 analogous, but in this, it indicates that counsel should  
9 specify the type of damages, in this case economic and non-  
10 economic. Our case, there are no non. And damages so the  
11 judge can calculate prejudgment interest. Your Honor, I  
12 would prefer that that remain the situation here.

13 THE COURT: Let me ask Mr. Christiansen. So, I  
14 mean, you're asking for it, but I - my experience has always  
15 been the opposite. Where I'm - if there is a dispute, I can  
16 - I mean, if there's no dispute -

17 MR. CHRISTIANSEN: We've got an instruction in on  
18 it.

19 THE COURT: We can strike the instruction.

20 MR. CHRISTIANSEN: Well, but I want the jury to  
21 decide whether they're - whether the plaintiffs are entitled  
22 to prejudgment interest. You're not saying the Court would  
23 make that determination.

24 THE COURT: Well, are you - is there any argument  
25 about whether -

1 MR. BARRETT: No -

2 THE COURT: - they're entitled to prejudgment  
3 interest?

4 MR. BARRETT: No, Your Honor.

5 THE COURT: All right.

6 MR. BARRETT: If there's a property damage -

7 MR. CHRISTIANSEN: Okay.

8 MR. BARRETT: - there's going to be prejudgment  
9 interest -

10 THE COURT: Right, so you're - it - your - they're -

11 MR. CHRISTIANSEN: Then I'm okay with that.

12 THE COURT: Right. Exactly.

13 MR. CHRISTIANSEN: (Inaudible).

14 THE COURT: I didn't - I didn't - it's - we're on  
15 the same page. I don't see that there's a disagreement about  
16 whether they're entitled to it or not. What I'll do is, it's  
17 in there, and when we get to it, instruct them to just strike  
18 it out, that the Court will - well, just strike that out,  
19 that that's no longer a part of the instructions. And you  
20 can tell them that.

21 MR. CHRISTIANSEN: Okay. Can we take that  
22 instruction out completely from the jury?

23 THE COURT: Just rip out instruction 29.

24 MR. CHRISTIANSEN: Thank you, Your Honor.

25 THE COURT: And I'll tell them that we're skipping

1     that, that was a potential we skipped over.   How's that?.

2                 MR. CHRISTIANSEN: Okay.   Excellent.   Thank you.

3                 THE COURT: All right, so take it out - look, part  
4     of me - it's a simple calculation, so I really didn't care  
5     much, because it's a 10 percent calculation and you can do it  
6     in your head.   I also don't think, as I said, there's any -  
7     it's - the amount is fine.   But as a technical matter, this  
8     is the better approach.

9                 MR. CHRISTIANSEN: Thank you, Your Honor.

10                THE COURT: Yep.   Okay, so jury instruction 29 is  
11     withdrawn.

12                MR. CHRISTIANSEN: Your Honor, at what point are you  
13     going to remove the alternate?

14                THE COURT: After it's been - I can't remove him  
15     until it's been submitted.   He won't deliberate with them.  
16     Under the rules, he'll be excused beforehand.   I think that  
17     that's right.   It's slightly different in the criminal  
18     context, so let's just make sure that's that's right.   So, an  
19     alternate juror who does not replace a principal juror shall  
20     be discharged when the jury retires to consider its verdict,  
21     unless the parties stipulate otherwise and the Court approves  
22     the stipulation.   I don't see any reason why we would keep  
23     him, and he -

24                (Inaudible conversation)

25                THE COURT: Let him go back to his life as quickly



**Addendum Exhibit 5:**  
**Withdrawn Jury Instruction**  
**No. 29**

JURY INSTRUCTION NO. 29

**Prejudgment Interest**

The Fullers seek recovery of prejudgment interest as part of their loss. In Utah, prejudgment interest may be awarded in situations where the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time. If you find for the Fullers on their claim of prejudgment interest, you should award them 10% annually on the value of their proven loss from the date of the fire to the date of your verdict.

W/D

# **Addendum Exhibit 6:**

## **Special Verdict Form**

OCT 30 2014

SALT LAKE COUNTY

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

Deputy Clerk *KL*

SALT LAKE COUNTY, STATE OF UTAH

DAVID AND RUTH M. FULLER AND  
FULLER'S APPLIANCE PARTS AND  
SERVICE, LLC,

Plaintiffs,

vs.

DENISE BOHNE AND WESTERN STATES  
INSURANCE AGENCY,

Defendants.

**SPECIAL VERDICT**

Civil No. 100901093

Honorable Deno Himonas

1. Breach of Agency Duties: Have the Fullers proved this claim against Denise Bohne and/or Western States by a preponderance of the evidence? Yes X No \_\_\_\_\_

(If you marked "Yes" go to Question 1.a. If you marked "No" go to Question 2.)

a. Were the Fullers also at fault? Yes X No \_\_\_\_\_ (Go to 1.b.)

b. What are the percentages of fault allocated to each party?

Denise Bohne/  
Western States 60 %

Ruth Fuller 0 %

David Fuller 0 %

Fullers' Appliance 40 %

Total 100% (Go to Question 2.)

2. Breach of Contract: Have the Fullers proved this claim against Denise Bohne and/or Western States by a preponderance of the evidence? Yes \_\_\_\_\_ No X

(Go to Question 3.)

3. Promissory Estoppel: Have the Fullers proved this claim against Denise Bohne and/or Western States by a preponderance of the evidence? Yes \_\_\_\_\_ No X

(Go to Question 4.)

4. Negligent Misrepresentation: Have the Fullers proved this claim against Denise Bohne and/or Western States by a preponderance of the evidence? Yes X No \_\_\_\_\_

(If you marked "Yes" to any of Questions 1 through 4, please go to Question 5. Otherwise, stop here and have your foreperson sign and date the form and inform the bailiff you have reached a verdict.)

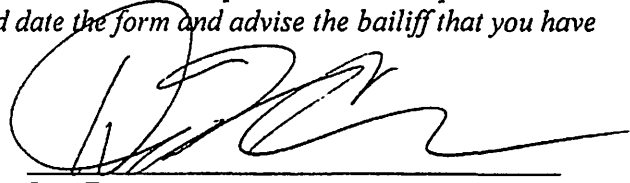
5. What amount, if any, would fairly compensate the Fullers for any harm caused by the defendants?

Property Damages: \$ \$101,595

Rent Damages: \$ \$0

(When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.)

10/30/2014  
Date

  
Jury Foreperson  
Daniel M. Ciambora

# **Addendum Exhibit 7:**

**Memorandum Decision,  
Dated 1/6/15**

<b>In the Third Judicial District Court, Salt Lake County, State of Utah</b>	
<b>DAVID FULLER, et al.,</b>  <b>Plaintiffs,</b>  <b>vs.</b>  <b>DENISE BOHNE, et al.,</b>  <b>Defendants.</b>	<div>By _____</div> <div><b>MEMORANDUM DECISION</b></div> <div>Case No. 100901093</div> <div>Hon. Deno G. Himonas</div>

JAN 06 2015  
SALT LAKE COUNTY  
KL  
Deputy Clerk

This case was tried to a jury in October 2014. The jury entered a verdict in Plaintiffs' favor on two of Plaintiffs' claims. Currently before the Court is Plaintiffs' Motion for Entry of Judgment. In the motion, Plaintiffs ask the Court to enter judgment in the full amount of damages, plus prejudgment interest. As set forth below, I agree with Plaintiffs that they are entitled to a judgment in the full amount awarded by the jury. However, because additional briefing on the question of prejudgment interest is required, I reserve ruling on that portion of Plaintiffs' motion until briefing on that issue has been completed.

#### BACKGROUND

In this action, Plaintiffs alleged that Defendants<sup>1</sup> Denise Bohne and Western States Insurance Agency, Inc. (Western States) failed to obtain full insurance for property damage that Plaintiffs had requested when they obtained a new insurance policy. Plaintiffs also alleged that Defendants incorrectly stated that the policy issued to Plaintiffs contained the requested coverage. Based on those allegations, Plaintiffs brought this lawsuit against Defendants, asserting causes of action for (1) breach of agency duties (the agency claim), (2) breach of contract, (3) promissory estoppel, and (4) negligent misrepresentation (the misrepresentation claim).

At trial, the parties agreed to a series of jury instructions, including one instruction that dealt with an award of prejudgment interest. However, the parties agreed to withdraw that instruction because the amount of prejudgment interest, if any, would be awarded by the Court. Defendants also requested a special verdict form. The Court granted that request and the parties stipulated to a special verdict form that was given to the jury. On the form, the jury was asked to allocate fault on the agency claim. The form did not, however, make any similar allocation request with respect to the remaining claims.

The jury ultimately determined that Plaintiffs proved their agency and misrepresentation claims but had failed to prove the breach of contract and promissory estoppel claims. The jury also found that the total amount of damages to compensate Plaintiffs for their loss would be

<sup>1</sup> Plaintiffs' claims against other defendants in this action were resolved prior to trial. Therefore, I refer to Bohne and Western States collectively as "Defendants" in this Memorandum Decision.

\$101,595.00. Pursuant to the instructions on the special verdict form, the jury allocated a portion of the fault to Plaintiffs on the breach of agency duties claim, allocating 60 percent of the fault to Defendants and 40 percent of the fault to Plaintiffs. The jury was not asked to allocate any fault on the misrepresentation claim and there is nothing in the form to suggest what fault, if any, the jury would have allocated to Plaintiffs on that claim.

#### ANALYSIS

Plaintiffs now ask the Court to enter judgment in their favor in the full amount of damages awarded, plus prejudgment interest. Defendants contend that the judgment requested by Plaintiffs is improper for three reasons: (1) there was insufficient evidence to establish one of the necessary elements of negligent misrepresentation, (2) the jury's allocation of fault to Plaintiffs on the agency claim should also apply to the misrepresentation claim, and (3) prejudgment interest is not appropriate in this case. I address each of these arguments in turn.

##### *I. The Sufficiency of the Evidence*

Turning to the first argument, Defendants argue that Plaintiffs failed to prove their misrepresentation claim because Plaintiffs did not show that Defendants had a financial stake in the transaction at issue, which is a necessary element of a claim for negligent misrepresentation. *See generally Atkinson v. IHC Hospitals, Inc.*, 798 P.2d 733, 737 (Utah 1990) ("Negligent misrepresentation . . . occurs when [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions . . . ." (alteration in original) (internal quotation marks omitted)). Specifically, Defendants claim that because the additional coverage would have allowed Defendants to receive a greater commission on the sale of the insurance policy, the failure to provide the requested coverage was actually detrimental to Defendants' financial interest. Based on the evidence presented at trial, I disagree.

At a minimum, there was evidence presented that Defendants had a financial interest in the transaction because it resulted in Plaintiffs electing to purchase or renew their policy through Defendants. While it is true that Defendants' failure to add the additional coverage might have resulted in slightly reduced commissions compared to a policy that included the coverage, the fact remains that Defendants did receive a commission for the insurance policy that Plaintiffs purchased. The commission from that purchase would clearly be greater than receiving no commission if Plaintiffs had elected to purchase a different insurance policy from somebody else.<sup>2</sup> Therefore, it is apparent that there was evidence that Defendants had a financial or pecuniary interest in the transaction involving Plaintiffs' decision to purchase or renew their insurance policy.

##### *II. Whether Allocation Should Apply to Both Claims*

Next, Defendants assert that the jury's allocation of fault on the agency claim also applies to the misrepresentation claim, and therefore, Plaintiffs' damages award should be reduced by 40 percent on both the agency and misrepresentation claims. In support of that argument,

---

<sup>2</sup> Indeed, businesses may often offer promotions involving significant discounts on one item or service in order to promote purchases of other items or maintain relationships with existing clientele. While the sale of the discounted item or service may, standing alone, result in a loss to the business, that discount may lead to more profitable sales on other items or over the long run as the business maintains its relationship with customers.



Defendants claim that if the allocation does not apply to both claims, there would be an inconsistency in the special verdict form that would nullify the jury's verdict. Plaintiffs disagree, arguing that the agency and misrepresentation claims are independent causes of action, each of which is subject to a separate allocation. Therefore, Plaintiffs maintain, the verdicts are reconcilable because it would be reasonable for the jury to allocate fault to Plaintiffs on one claim and not the other.

As a preliminary matter, I am not convinced that there is any need to reconcile the verdicts because the jury simply did what it was instructed to do when it allocated fault on one claim but not the other. The special verdict form only asked the jury to allocate fault on the agency claim, and the jury did so. Defendants did not request any allocation of fault on the misrepresentation claim and the special verdict form did not include any instruction or option to allocate fault among the parties on that claim. Thus, when the jury did not allocate fault on the misrepresentation claim, the jury was simply following the instructions on the special verdict form. If fault was supposed to be allocated on the misrepresentation claim, Defendants should have sought to submit that request to the jury in the first instance, rather than attempting to infer that the jury intended such an allocation after the jury rendered its verdict.

Nevertheless, even assuming that there is some conflict between the jury's allocation of fault to Plaintiffs on one claim but not the other, I agree with Plaintiffs that there is a reasonable basis for the jury's verdict. Where there is a possible inconsistency in a special verdict, courts do "not presume inconsistency," but instead "seek to reconcile the answers if possible. When reviewing claims that a jury verdict is inconsistent, [courts] must accept any reasonable view of the case that makes the jury's answers consistent. Accordingly, a jury's verdict will be sustained, even in the face of possible inconsistency, if the judgment can be read harmoniously." *Tooele Associates Ltd. P'ship v. Tooele City*, 2012 UT App 214, ¶ 10, 284 P.3d 709, 713 *cert. denied sub nom. Tooele Assoc. v. Tooele City*, 293 P.3d 376 (Utah 2012) (citation and internal quotation marks omitted). Stated another way, if a court is "[g]iven the choice of two competing reasonable alternatives, [the court is] bound to adopt the construction of the verdict that does not nullify the jury's answers." *Id.* (first alteration in original) (internal quotation marks omitted).

Here, Defendants claim that the allocation of fault on the agency claim but not the misrepresentation claim would result in an inconsistent verdict because the same allocation of fault would apply to both claims. However, as explained above, inferring an intent to allocate fault on both claims would effectively nullify what the jury actually decided; namely, to allocate fault to Plaintiffs only on the agency claim. Moreover, while it is possible that the jury intended to apply the same allocation of fault to both claims, there is nothing in the record to indicate that the jury intended to allocate fault on both claims, nor is there anything to indicate what percentage of fault would be allocated to Plaintiffs on the misrepresentation claim. Thus, any conclusion regarding the jury's intent regarding those questions would be based almost entirely on speculation.

Furthermore, as Plaintiffs state, the most reasonable way to resolve any inconsistency in the jury's verdict and give effect to all of the jury's answers on the special verdict form is to assume that because the two claims involve distinct legal theories, a different allocation of fault

applies to the misrepresentation and agency claims. Such a conclusion is supported by the facts of this case and the different theories presented in the instructions given to the jury.

As set forth in the jury instructions, the jury could only find for Plaintiffs on the negligent misrepresentation claim if Defendants made a false statement to Plaintiffs that Defendants should have known was not true and Plaintiffs reasonably relied on Defendants' statement. With respect to the agency claim, Plaintiffs could prevail under several theories, including that Defendants failed to follow Plaintiffs' instructions, that Defendants failed to provide important information, or that Defendants failed to exercise reasonable care in performing their duties.<sup>3</sup> Based on the evidence presented in this case and these different theories, it is reasonable to assume that the jury had separate factual bases for its findings on the two claims that would warrant allocation of fault to Plaintiffs solely on the agency claim.

For example, the jury could have found that Defendants did not exercise reasonable care or failed to follow Plaintiffs' instructions in obtaining the requested coverage. Under such a theory, the jury may have concluded that Plaintiffs bore some of the fault for the loss because Plaintiffs had a duty to investigate any remaining questions and verify that the requested coverage was in effect. In contrast, the jury may have declined to allocate fault to Plaintiffs on the misrepresentation claim because Plaintiffs reasonably relied on an affirmative—albeit false—statement by Defendants. Inasmuch as the reasonableness of Plaintiffs' reliance on Defendants' statement would already be established, it would logically follow that Plaintiffs had no duty to further investigate the veracity of Defendants' statement regarding the requested coverage. In that case, it would be entirely reasonable for the jury to conclude that fault should not be allocated to Plaintiffs on the misrepresentation claim.

Given these different theories for the two claims and the evidence presented at trial, it is clear that there was a reasonable basis for the jury to make different allocations of fault on the two claims. Because that is the only way to reconcile any inconsistencies in the verdict without nullifying at least one of the jury's answers on the special verdict form, I must presume that the jury did not intend to allocate fault to Plaintiffs on the misrepresentation claim. Therefore, Plaintiffs are entitled to a judgment of in the full amount of damages, which is \$101,595.00.

### *III. Prejudgment Interest*

Turning finally to the question of prejudgment interest, Defendants contend that an award of prejudgment interest would be improper because the Court has not made the determinations necessary for an award of prejudgment interest.<sup>4</sup> In response, Plaintiffs assert that Defendants stipulated to an award of prejudgment interest when the parties agreed to withdraw the prejudgment interest instruction from the jury instructions.

---

<sup>3</sup> Nothing on the special verdict form required the jury to identify which of these theories served as the basis for the jury's verdict on the agency claim.

<sup>4</sup> In their memorandum opposing Plaintiffs' motion, Defendants seemingly argued that prejudgment interest might be inappropriate because the prejudgment interest statute, *see* Utah Code Ann. § 15-1-1, only applies to contractual claims and Plaintiffs' property damage claims were based on theories of negligence. However, at oral argument, Defendants acknowledged that prejudgment interest may be awarded in negligence actions to recover for damages to property. *See generally Yali Convalescent & Care Institutions v. Div. of Health Care Fin.*, 797 P.2d 438, 445 (Utah Ct. App. 1990) (stating that a right to prejudgment interest exists independent of the prejudgment interest statute).

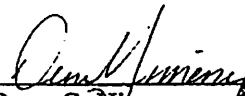
From the record before me, it appears that Defendants did not stipulate to an absolute award of any prejudgment interest that Plaintiffs requested. Rather, in withdrawing the jury instruction on that issue, the parties agreed that the Court should make the final determination regarding prejudgment interest after the conclusion of the trial and add that amount to the final judgment.

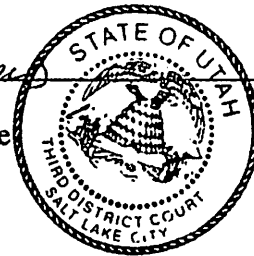
In order to determine whether prejudgment interest applies, and if so, what the amount of interest is, I must make several subsidiary determinations, including whether the damage is complete, whether the damages can be measured using facts and figures, and whether the amount of loss can be fixed as of a particular time. While some of those determinations may be made based on the jury's verdict, Defendants correctly point out that some of those determinations have yet to be made. Given the parties' agreement that the Court should make the final determination of prejudgment interest, I believe that further briefing on the prejudgment issue would be appropriate. Consequently, I reserve ruling on that issue and Plaintiffs' motion until briefing is completed.

In accordance with the foregoing, the parties should submit their supplemental briefs on the prejudgment interest issue within five (5) business days of the date of this ruling. I will hear argument on that issue at 2:00 p.m. on the 21<sup>st</sup> of January.

DATED this 6<sup>th</sup> day of January, 2015

THIRD DISTRICT COURT

  
Deno G. Nimonas  
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100901093 by the method and on the date specified.

MAIL: JOSEPH P BARRETT 699 E SOUTH TEMPLE STE 370 SALT LAKE CITY, UT  
84102

MAIL: STEPHEN K CHRISTIANSEN 311 S STATE ST STE 250 SALT LAKE CITY UT  
84111

01/06/2015

/s/ KRISTENE LATERZA

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk

**Addendum Exhibit 8**  
**Transcript of Ruling on**  
**Prejudgment Interest Rate**

**FILED DISTRICT COURT**  
**Third Judicial District**

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE

APR 16 2015

SALT LAKE COUNTY, STATE OF UTAH

By

SALT LAKE COUNTY

Deputy Clerk

DAVID FULLER, et al.,

: Case No. 100901093

Plaintiffs,

: Appellate Court Case No. 20150146

vs.

DENISE BOHNE, et al.,

Defendants,

: With Keyword Index

TELEPHONIC ARGUMENT JANUARY 29, 2015

BEFORE

JUDGE DENO HIMONAS

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

FILED  
UTAH APPELLATE COURTS

AUG 26 2015

**ORIGINAL**

1973

W 90-000001

## APPEARANCES

For the Plaintiffs:

STEPHEN K. CHRISTIANSEN  
Attorney at Law

For the Defendants:

JOSEPH P. BARRETT  
Attorney at Law

For Auto Owners:

RICK GLAUSER  
Attorney at Law

\* \* \*

## INDEX

### ORAL ARGUMENT

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Mr. Christiansen

Mr. Glauser

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### RULINGS

18, 21, 26

1 I'm going to stick with the June date.

2 Mr. Barrett, again, I think that the correct  
3 analysis - economic analysis would be, when is the date of  
4 that check to be received? What is the best estimate of the  
5 date of that check, when that check would be deposited, and  
6 interest would be able to accrue on that amount. And that is  
7 why I believe that it's - the June date is the one that most  
8 closely approximates it. In addition, I think that the lower  
9 rate is - well, strike that. I'm going to wait on the lower  
10 rate. I want to go back and take a look at a couple of  
11 additional decisions. So, let's say 2:30, conference call?

12 MR. CHRISTIANSEN: Do you want us to call you, or  
13 should we -

14 THE COURT: Jen will organize it, but we'll chat at  
15 2:30.

16 MR. CHRISTIANSEN: Very good.

17 THE COURT: Okay, thank you.

18 MR. BARRETT: Thank you, Your Honor.

19 (Whereupon a recess was taken from 9:28:23 to  
20 2:17:28 regarding this case)

21 THE COURT: Hello?

22 MR. CHRISTIANSEN: Good afternoon, Your Honor.

23 MR. BARRETT: Hi, Judge.

24 THE COURT: All right, this is - it's the Fuller  
25 matter, I have Mr. Barrett and Mr. Christiansen?



1 MR. CHRISTIANSEN: Yes.

2 MR. BARRETT: Yes.

3 THE COURT: Okay. I have spent some more time  
4 considering the question of the appropriate rate in this  
5 matter, and re-reviewed some of the authorities. I am  
6 convinced that the post judgment rate is appropriate, not the  
7 10 percent rate in this matter.

8 I think it was 2.16 percent, Mr. Barrett? What was  
9 it?

10 MR. BARRETT: 2.13, Judge.

11 THE COURT: 2.13. So, that leaves the question, I  
12 think, of costs. Mr. Christiansen, what were the cost - are  
13 there - is there any objection to the amount of the costs,  
14 Mr. Barrett?

15 MR. BARRETT: (Inaudible) -

16 MR. CHRISTIANSEN: Your Honor - before we leave the  
17 post judgment interest rate, can we just hone in on that for  
18 a minute? The actual post judgment interest rate that's in  
19 place right now is 2.27 percent. That's what's on the court  
20 website, and it's tied to federal rate. I think what might  
21 have happened in the 2.13 percent is, there's a rate that's  
22 published a few days into January that's the 2.13, but the  
23 rule is that you apply what was in place January 1, and that  
24 carries over from something that was in late December -

25 THE COURT: I - Mr. Barrett?

1 MR. BARRETT: Yes - yes, Your Honor. I think that I  
2 looked at the rate when I prepared the brief, so that may be  
3 true.

4 THE COURT: So, the -

5 MR. CHRISTIANSEN: I'm sure -

6 THE COURT: Let's put it this way, then. The -  
7 whatever the current post judgment interest rate is will be  
8 the - will operate as the prejudgment rate, and I appreciate  
9 that clarification, Mr. Christiansen. So, now, with res -

10 MR. CHRISTIANSEN: As of today.

11 THE COURT: As of today.

12 MR. CHRISTIANSEN: (Inaudible) I remember, it's a  
13 federal reserve rate plus two percent.

14 THE COURT: Yeah, I - you know, it's -

15 MR. CHRISTIANSEN: (Inaudible) talking about.

16 THE COURT: - I mean, we're talking about some minor  
17 decimal points here, but nevertheless, let's make - it is a  
18 known commodity, let's use the known commodity.

19 Costs. Are there - is there any objection to the  
20 request of costs?

21 MR. BARRETT: I don't believe so, Your Honor. I  
22 didn't file an objection to the costs. I assume (inaudible)  
23 correctly, that they weren't significant, and they're subject  
24 to the offset of the settlement with the other party, if I  
25 remember, Steve, is that correct?

# **Addendum Exhibit 9:**

## **Utah Interest Statutes**

**1898**  
**Utah Revised Statutes § 1241**

attorney to collect the same, if there be any estate, and to pay it into the county treasury. [96, p. 571\*.

Bills must be certified by county attorney, § 879. Fees of jurors and witnesses, §§ 989, 1000.

## TITLE 31.

### INTEREST.

**1241. Agreement governs. Eight per cent in absence of agreement.** It shall be lawful to take eight per cent interest per annum, when the amount of interest has not been specified or agreed upon. But parties may agree in writing for the payment of any rate of interest whatever, on money due or to become due on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, which shall be specified in the judgment. [90, p. 18.

An agreement to pay interest on a note which provides for "interest at the rate of two per cent per month from date," does not extend beyond the time said note becomes due and payable by its terms. *Perry v. Taylor*, 1 U. 61. An account stated carries interest from the day of its liquidation. *Godbe v. Young*, 1 U. 55. Affirmed, *Young v. Godbe*, 82 U. S. 502. If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time, by way of compensation for the delay in payment. *Young v. Godbe*, 82 U. S. 502. The rule for computing interest when there have been partial payments, is to apply the payment to the discharge of the interest due, and if the payment exceeds the interest, the surplus goes toward discharging the principal; if the payment be less than the interest, the surplus of the interest due must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied toward discharging the principal. *Perry v. Taylor*, 1 U. 63. Where the evidence in the record is not sufficient to justify the computation of interest upon an account current, by monthly

rests, it is error to allow such computation. *Jones v. Gallagher*, 11 U. 128; 33 P. 417. In an action for damages for a tort where the jury returns a verdict for damages and for interest thereon; held, that there is no authority for the granting of interest. *Nichols v. U. P. Ry. Company*, 7 U. 510; 27 P. 893. Where there is a statute providing a specific rate of interest, such rate is the measure of damages, otherwise the damage is to be established by proof. *Perry v. Taylor*, 1 U. 63; *Godbe v. Young*, 1 U. 55. Where a purchaser agrees to pay into court the purchase price of a mine concerning which the vendor has litigation, the former will be liable for interest during the time he withholds the money. *Wasatch Mining Co. v. Crescent Mining Co.*, 7 U. 8; 24 P. 586. 161 U. S. 317. In a state where there is a statute making usury penal but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due. *Bernheisel v. Firman*, 89 U. S. 170. For discussion of the validity of a contract tainted with usury, see last case. Without the authority of a statute it is error for a judgment to direct that the judgment bear interest. *Rocco v. Knott*, 3 U. 451; 24 P. 757.

## TITLE 32.

### INTOXICATING LIQUORS.

**1242. License necessary.** No person shall manufacture, sell, barter, deal out, or otherwise dispose of any spirituous, vinous, malt, or other intoxicating liquors, without first obtaining from the board of county commissioners of the county, or city council of the city, or board of trustees of the town in which he intends to do business, a license therefor, as hereinafter provided. [C. L. § 2156\*.

Powers granted to city council, § 206, sub. 41. Powers granted to town trustees, § 392, sub. 6.

Powers granted to board of county commissioners, § 511, sub. 11.

**1243. Id. Who may grant. Petition. Bond.** The boards of county commissioners in their respective counties, and the city councils in their

**1907**  
**Compiled Laws of Utah § 1241**

## TITLE 38.

## INTEREST.

**1241. Legal rate of interest.** The legal rate of interest upon the loan or forbearance of any money, goods, or things in action shall be eight per cent per annum. But nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the taking effect of this title. Am'd '07, p. 43.

Judgment to include interest, § 3353.

The usury law of 1907 was taken almost verbatim from the statutes of New York.

**Usurious bond and mortgage enforced.** In a state where there is a statute making usury penal but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due.

*Bernheisel v. Firman*, 80 U. S. 170; not reported in Utah reports.

**Interest to maturity of note.** An agreement to pay interest on a note which provides for "interest at the rate of two per cent per month from date," does not extend beyond the time said note becomes due and payable by its terms.

*Perry v. Taylor*, 1 U. 63.

**An account stated carries interest** from the day of its liquidation.

*Godbe v. Young*, 1 U. 55; affirmed 82 U. S. 562.

**Interest on judgment is statutory.** Without the authority of a statute it is error for a judgment to direct that the judgment bear interest.

*Reece v. Knott*, 3 U. 451; 24 P. 757.

**Rule of partial payments.** The rule for computing interest when there have been partial payments is to apply the payment to the discharge of the interest due, and if the payment exceeds the interest, the surplus goes toward discharging the principal; if the payment be less than the interest, the surplus of the interest due must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied toward discharging the principal.

*Perry v. Taylor*, 1 U. 63.

**Compound interest.** In a decree of foreclosure of trust deed, compound interest is not allowable,

and the decree should allow interest only on the principal at the stipulated rate of 18 per cent.

*Stevens Imp. Co. v. South Ogden L. B. & I. Co.*, 20 U. 207; 58 P. 843.

Where the evidence in the record is not sufficient to justify the computation of interest upon an account current, by monthly rests, it is error to allow such computation.

*Jones v. Galligher*, 9 U. 120; 33 P. 417.

## INTEREST AS DAMAGES:

If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time, by way of compensation for the delay in payment.

*Young v. Godbe*, 82 U. S. 562.

Where a purchaser agrees to pay into court the purchase price of a mine concerning which the vendor has litigation, the former will be liable for interest during the time he withholds the money.

*Wasatch Mining Co. v. Crescent Mining Co.*, 7 U. 8; 24 P. 586; affirmed 151 U. S. 317.

Where interest is recoverable as damages for delay in payment, it is a matter largely in the discretion of the court.

*Culmer v. Caine*, 22 U. 216; 61 P. 1008.

In tort for unliquidated damages, plaintiff held entitled to interest from time of bringing action.

*Woodland v. U. P. Ry.*, 27 U. 543; 26 P. 208; decided 1891 but not reported.

In tort for unliquidated damages, interest on the damages assessed from the date of the commencement of the action up to the date of the verdict is not recoverable.

*Lester v. Highland Boy G. M. Co.*, 27 U. 470; 76 P. 341.

*Nichols v. U. P. R. R. Co.*, 7 U. 510; 27 P. 693.

**1241x. Maximum rate. Exceptions.** The parties to any contract may agree in writing for the payment of interest, for the loan or forbearance of any money, goods, or things in action, not to exceed twelve per cent. per annum; *provided*, that on loans of money only to the amount of \$100 or less, it may be agreed in writing to take or receive as interest on said loan not to exceed \$1 for the first month only of said loan, but thereafter no greater interest shall be contracted for, taken or received than is allowed in this section. This proviso shall not be construed so as to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of evading the provisions of this title. '07, p. 43.

Prior to adoption of §§ 1241-1241x11, an agreement for any rate of interest was lawful in Utah.

**1241x1. Id.** No person, association, or corporation shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum or greater value for the loan or forbearance of any money, goods, or things in action, than is prescribed in § 1241x. '07, p. 43.

**1917**  
**Compiled Laws of Utah § 3320**



**3316. Continuation of benefits.** In the event of the termination of membership in the society by the person responsible for the support of any child, on whose account a certificate may have been issued, as provided herein, the certificate may be continued for the benefit of the estate of the child, provided the contributions are continued, or for the benefit of any other person responsible for the support and maintenance of such child, who shall assume the payment of the required contributions.

### TITLE 53. INTEREST.

**3320. (1241.) Legal rate of interest.** The legal rate of interest upon the loan or forbearance of any money, goods, or things in action shall be eight per cent per annum. But nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the taking effect of this title. Am'd '07, p. 43.

Judgment to include interest, § 7050.  
The usury law of 1907 was taken almost verbatim from the statutes of New York.

Interest on small loans, § 4384.  
Public funds to draw interest, § 4500.  
In a state where there is a statute making usury penal but not declaring the contract void, a usurious bond and mortgage may be enforced for the amount actually due.

Bernhelsel v. Firman, 89 U. S. 170; not reported in Utah reports.

An agreement to pay interest on a note which provides for "interest at the rate of two per cent per month from date," does not extend beyond the time said note becomes due and payable by its terms.

Perry v. Taylor, 1 U. 63.  
An account stated carries interest from the day of its liquidation.

Godbe v. Young, 1 U. 55; affirmed 82 U. S. 562.

Without the authority of a statute it is error for a judgment to direct that the judgment bear interest.

Reece v. Knott, 3 U. 451; 24 P. 767.

The rule for computing interest when there have been partial payments is to apply the payment to the discharge of the interest due, and if the payment exceeds the interest, the surplus goes toward discharging the principal; if the payment be less than the interest, the surplus of the interest due must not be taken to augment the principal, but interest continues on the former principal until the period when the payments taken together exceed the interest due, and then the surplus is to be applied toward discharging the principal.

Perry v. Taylor, 1 U. 63.

In a decree of foreclosure of trust deed, compound interest is not allowable, and the decree should allow interest only on the principal at the stipulated rate of 18 per cent.

Stevens Imp. Co. v. South Ogden L. B. & I. Co., 20 U. 267; 68 P. 843.

Where the evidence in the record is not sufficient to justify the computation of interest upon an account current, by monthly rests, it is error to allow such computation.

Jones v. Gallagher, 9 U. 126; 33 P. 417.

Where a note provides for interest in regular instalments and the maker defaulted, he is liable for interest on the sums in default at the rate of 8 per cent.

Jensen v. Lichtenstein, 45 U. 320; 145 P. 1036.

Recovery for money loaned denied as unreasonable, where there has been repaid a sum

amounting to principal and 15 per cent per annum interest.

Carter v. West, 38 U. 381; 113 P. 1025.

Engert v. Chadwick, 40 U. 239; 120 P. 323.

In an action against a city, for extras under a contract, interest should be allowed at least from the time the claim was presented.

Wilson v. S. L. City, 61 U. —; 173 P. —.

#### INTEREST AS DAMAGES:

If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time, by way of compensation for the delay in payment.

Young v. Godbe, 82 U. S. 562.

Where a purchaser agrees to pay into court the purchase price of a mine concerning which the vendor has litigation, the former will be liable for interest during the time he withholds the money.

Wasatch Mining Co. v. Crescent Mining Co., 7 U. 8; 24 P. 586; affirmed 161 U. S. 317.

Where interest is recoverable as damages for delay in payment, it is a matter largely in the discretion of the court.

Culmer v. Calne, 22 U. 216; 61 P. 1008.

In tort for unliquidated damages, plaintiff held entitled to interest from time of bringing action.

Woodland v. U. P. Ry., 27 U. 543; 26 P. 238; decided 1891 but not reported.

In tort for unliquidated damages, interest on the damages assessed from the date of the commencement of the action up to the date of the verdict is not recoverable.

Leater v. Highland Roy G. M. Co., 27 U. 470;

76 P. 341.

Nichols v. U. P. R. R. Co., 7 U. 510; 27 P. 693.

Damages for injury to a shipment while in transit is the amount of loss, with interest, from the time of delivery; the fact that the damages are unliquidated not being by itself reason for not allowing interest.

Fel v. U. P. Ry. Co., 32 U. 101; 88 P. 1003.

Interest on damages for land condemned should be computed from the time the company takes possession.

S. P., L. A. & R. L. R. Co. v. Bd. of Education, 32 U. 101; 88 P. 263.

Where interest is a legal consequence of a demand without stipulation it may be recovered, though not claimed in the pleadings, and interest is allowed in a tort, where personal property is destroyed, from the date of the destruction.

Wheatley v. O. S. L., 49 P. 105; 162 P. 86.

**3321. (1241x.) Maximum rate. Exceptions.** The parties to any contract may agree in writing for the payment of interest, for the loan or forbearance of any money, goods, or things in action, not to exceed twelve per cent per annum; *provided*, that on loans of money only to the amount of \$100 or less it may be agreed in writing to take or receive as interest on said loan not to exceed \$1 for the first month only of said loan, but thereafter no greater

**1933**

**Utah Revised Statutes § 44-0-1**

## TITLE 44

### INTEREST

#### 44-0-1. Legal Rate.

The legal rate of interest for the loan or forbearance of any money, goods or things in action shall be eight per cent per annum. But nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the 14th day of May, 1907.

(C. L. 17, § 3320.)

#### 44-0-2. Maximum Rates.

The parties to any contract may agree in writing for the payment of interest for the loan or forbearance of any money, goods or things in action, not to exceed, except as otherwise provided by law, twelve per cent per annum; *provided*, that on loans of money only, to the amount of \$100 or less, it may be agreed in writing to take or receive as interest on such loan not to exceed \$1 for the first month only of such loan, but thereafter no greater interest shall be contracted for, taken or received than is allowed in this section. This proviso shall not be construed to allow or permit the splitting up of transactions for the loan of money into small amounts for the purpose of evading the provisions of this title.

(C. L. 17, § 3321.)

Rate of interest allowed: On Small Loans, 7-8-5; To Industrial Loan Corporations, 7-6-3; To Pawnbrokers, 70-0-2.

12% per annum and 1% per month, the same. *Brown v. Johnson*, 134 P. 590, 43 U. L. 29 A. L. R. 1109.

#### 44-0-3. Calculated by the Year.

Whenever in any statute or deed, or written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is mentioned and no period of time is stated, interest shall be calculated at the rate mentioned by the year.

(C. L. 17, § 3326.)

#### 44-0-4. Interest on Judgments.

Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum.

(C. L. 17, § 3330.)

Interest to be included in judgment entered, 104-44-16.

This section has no application except to personal judgments. *Sidney Stevens Imp. Co. v. So. Ogden L. B. & Imp. Co.*, 58 P. 843, 20 U. 267.

#### 44-0-5. Usury—Taking Excessive Interest a Misdemeanor.

No person shall, directly or indirectly, take or receive in services, money or other property, any greater sum or greater value for the loan or for-

bearance of any money, goods or things in action than is prescribed in section 44-0-2. Any person violating any of the provisions of this section is guilty of a misdemeanor. (C. L. 17, § 3322.)

#### 44-0-6. Id. Contracts Void.

All bonds, bills, notes, assurances, conveyances, stocks, pledges, mortgages and deeds of trust, and all other contracts and securities whatsoever, and all deposits of goods or other things whatsoever, whereon or whereby there shall be reserved or taken or secured, or agreed to be reserved or taken or secured, any greater sum or greater value for a loan or forbearance of any money, goods or things in action than is above prescribed shall be void. (C. L. 17, § 3324.)

#### 44-0-7. Id. Recovery of Payments—Limitation of Action.

Every person, or in the event of his death his personal representatives, who shall pay or deliver any greater sum or value than is allowed by this title to be received for or on any loan or forbearance, or who shall pay the principal or any part thereof of a usurious loan or forbearance, may recover from the person who shall have taken or received the same the amount of money so paid or value delivered, both of principal and interest, provided action is brought within one year after such payment or delivery. If such action is not brought within said one year and prosecuted with diligence, then the superintendent of public instruction may sue for and recover such sums, with costs, at any time within three years after said one year, for the use and benefit of the state district school fund, and the sum so collected shall be forthwith paid into said fund.

(C. L. 17, § 3323.)

Although this section gives the right of recovery to the borrower or his personal representatives, in view of 102-11-9 a surviving partner may maintain the action. *Cobb v. Hartenstein*, 152 P. 424, 47 U. 174.

#### 44-0-8. Id. Repayment of Consideration Not a Condition Precedent.

Whenever any borrower of money, goods or things in action shall file a complaint for the recovery of the money, goods or things in action taken or received in violation of this title, it shall not be necessary for him to pay or offer to pay any interest whatever on the sum or thing loaned; nor shall any court require or compel the payment or deposit of the principal sum or thing, or any part thereof, as a condition to the granting of relief to the borrower in any case of a usurious loan.

(C. L. 17, § 3325.)

**1943**  
**Utah Code Ann. § 44-0-1**

## TITLE 44

### INTEREST\*

44-0-1.	Legal Rate.	44-0-K.	Id. Repayment of Consideration Not a Condition Precedent.
44-0-2.	Maximum Rates.		
44-0-7.	Calculated by the Year.	44-0-O.	Id. Restraint on Usurious Contract — Return of Securities.
44-0-I.	Interest on Judgments.		
44-0-S.	Usury — Taking Excessive Interest a Misdemeanor.	44-0-10.	Id. Discounting Negotiable Paper.
44-0-F.	Id. Contracts Void.		
44-0-7.	Id. Recovery of Payments — Limitation of Action.		

\* General construction. The Usury Law does not operate retrospectively. *Brunswick Realty Co. v. University Inv. Co.*, 43 U. 15, 134 P. 608.  
 Purpose of usury laws. Usury laws are enacted primarily for the benefit of the borrower; the penalties are not primarily for purpose of punishing the lender. *Hospigioni v. Giralden Min. Co.*, 69 U. 41, 47, 282 P. 276.

#### 44-0-1. Legal Rate.

The legal rate of interest for the loan or forbearance of any money, goods or things in action shall be six per cent per annum. But nothing herein contained shall be so construed as to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before the 14th day of May, 1907.  
 (C. L. 17, § 3320.)

#### History.

As amended by L. 35, ch. 42, eff. June 15, substituting "six" for "eight" before "per cent," inserting "any penalty or interest charge which by law applies to delinquent or other taxes or to" after "affect," and substituting "obligations," in last line, for "obligation."

Prior to the 14th day of February, 1906, there was no territorial statute on the subject of interest in Utah. *Godbe v. Young*, 1 U. 56, 84, rev'd on another point in 16 Wall. (42 U. S.) 682, 21 L. Ed. 250. At that time it was enacted, "That it shall not be lawful to take more than 10 per cent interest per annum, when the amount of interest has not been specified or agreed upon." (Laws of Utah, 1868, ch. 13, p. 14.) But on the 18th day of February, 1869, this act was repealed and the following enacted, to-wit: "That it shall be lawful to take ten per cent interest per annum, when the amount of interest has not been specified or agreed upon." (Laws Utah, 1869, ch. 19, p. 17.) *Perry v. Taylor*, 1 U. 63, 65. The Act of 1860 became Comp. Laws 1876, § 350, and its provisions remained unchanged. (*Godbe v. Young*, 1 U. 56, rev'd on another point

in 16 Wall. (42 U. S.) 682, 21 L. Ed. 250) until it was repealed because of its negative character. *Perry v. Taylor*, 1 U. 63.

Subsequently the legal rate was changed to eight per cent in the absence of agreement (R. S. 1859, § 1841), and this was left unchanged by Comp. Laws 1907, § 1241.

#### Comparable provisions.

Cal. Gen. Laws, Act 3737 § 1 (57 on the \$100 for one year and at that rate for greater or less sum or for a longer or shorter time; parties may contract for payment and receipt of rate of interest not exceeding \$12 on the \$100 for one year, etc., whereupon such rate exceeding \$7 on the \$100 must be clearly expressed in writing); § 22 of Article XX of Cal. Const., see p. 1709 of 1920 Supp. of Const., seven per cent per annum, but parties may contract in writing for rate of interest not exceeding ten per cent per annum; provisions of this section supersede (see p. 1900) all provisions of Constitution and laws in conflict therewith).

Idaho Code, 1940 Supp., § 28-1904 (in absence of express contract in writing

**1953**  
**Utah Code Ann. § 15-1-1**

## TITLE 15

### CONTRACTS AND OBLIGATIONS IN GENERAL

- Chapter 1. Interest, 15-1-1, 15-1-3, 15-1-4 [15-1-2, 15-1-2a, 15-1-5 to 15-1-10 Repealed].
2. Legal Capacity of Children, 15-2-1 to 15-2-5.
  3. Interparty Agreements, 15-3-1 to 15-3-4.
  4. Joint Obligations, 15-4-1 to 15-4-7.
  5. Revolving Charge Agreements [15-5-1 to 15-5-8 Repealed].

## CHAPTER 1

### INTEREST

- Section 15-1-1. Legal rate.  
15-1-2. Repealed.  
15-1-2a. Repealed.  
15-1-3. Calculated by the year.  
15-1-4. Interest on judgments.  
15-1-5 to 15-1-10. Repealed.

**15-1-1. Legal rate.**—The legal rate of interest for the loan or forbearance of any money, goods or things in action shall be six per cent per annum. But nothing herein contained shall be so construed as to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before the 14th day of May, 1907.

History: L. 1907, ch. 46, § 1; C. L. 1907, § 1241; C. L. 1917, § 3320; R. S. 1933, 44-0-1; L. 1935, ch. 42, § 1; C. 1943, 44-0-1.

#### Compiler's Notes.

The 1935 amendment reduced the interest rate from 8% to 6%, inserted "any penalty or interest charge which by law applies to delinquent or other taxes or to," and substituted "obligations" for "obligation."

Prior to February 14, 1868, there was no territorial statute on the subject of interest in Utah. *Godbe v. Young*, 1 U. 55, reversed on another point in 15 Wall. (82 U. S.) 562, 21 L. Ed. 250. At that time it was enacted, "That it shall not be lawful to take more than 10 per cent interest per annum, when the amount of interest has not been specified or agreed upon." (Laws 1868, ch. 13, p. 15.) But on February 19, 1869, this act was repealed and the following enacted: "That it shall be lawful to take ten per cent interest per annum, when the amount of interest has not been specified or agreed upon." (Laws 1869, ch. 19, p. 17.) *Perry v. Taylor*, 1 U.

63. The Act of 1869 became Comp. Laws 1876, § 380, and its provisions remained unchanged. (*Godbe v. Young*, 1 U. 55, reversed on another point in 15 Wall. (82 U. S.) 562, 21 L. Ed. 250) until it was repealed because of its negative character. *Perry v. Taylor*, 1 U. 63.

Thus it will be seen that former rate was 10% per annum. *Openshaw v. Utah & N. Ry. Co.*, 6 U. 268, 21 P. 999.

Subsequently the legal rate was changed to 8% in the absence of agreement, R. S. 1898, § 1241. This section was repealed by Laws 1907, ch. 46, § 14, § 1 of which established the rate also at 8%. This was left unchanged by Comp. Laws 1907, § 1241.

#### Effective Date.

Section 2 of Laws 1935, ch. 42 provided that said act should take effect June 15, 1935.

#### Cross-References.

Finance charges for loans other than consumer or consumer related, 70B-3-605.

**1981**  
**Utah Code Ann. § 15-1-1**



## TITLE 15

### CONTRACTS AND OBLIGATIONS IN GENERAL

#### Chapter

- 15-1. Interest.
- 15-2. Legal capacity of children.
- 15-3. Interparty agreements.
- 15-4. Joint obligations.

#### CHAPTER 1

##### INTEREST

###### Section

- 15-1-1. Legal rate.
- 15-1-4. Interest on judgments.

**15-1-1. Legal rate.** The legal rate of interest for the loan or forbearance of money, goods or things in action shall be ~~six per cent~~ 10% per annum. But nothing herein contained shall be so construed as to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before the 14th day of May, 1907 1981.

**History:** L. 1907, ch. 46, § 1; C.L. 1907, 1935, ch. 42, § 1; C. 1943, 44-0-1; L. 1981, § 1241; C.L. 1917, § 3320; R.S. 1933, 44-0-1; L. 73, § 1.

**15-1-4. Interest on judgments.** Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of ~~eight per cent~~ 12% per annum.

**History:** L. 1907, ch. 46, § 11; C.L. 1907, § 1241X9; C.L. 1917, § 3330; R.S. 1933 & C. 1943, 44-0-4; L. 1981, ch. 73, § 2.

**Late payment of property division in divorce action.**

This section does not prohibit a district court from imposing an interest rate of more

than eight percent for late payment of ordered paid in a property division divorce action where the property division award is reasonable and equitable. *Pope (1978) 589 P 2d 752.*

#### CHAPTER 2

##### LEGAL CAPACITY OF CHILDREN

###### Section

- 15-2-1. Period of minority.

**1985**  
**Utah Code Ann. § 15-1-1**

judgment against owner because of owner's failure to furnish a bond to protect the materialman, materialman was entitled to prejudgment interest from the date of first notice to the owner for demand of payment, and not from the due date indicated on the invoice, where at time the debt was due, credit was being extended to the contractor by the materialman for already past-due debts. Triple I Supply, Inc. v. Sunset Rail, Inc. (1982) 652 P 2d 1298.

#### Substantial performance.

Doctrine of substantial performance is applicable to this bonding statute; where heating subcontract was substantially completed on December 23, 1968, fact that one minor item, a register representing .0011385 percent of the value of the subcontract, was not furnished until February 19, 1969 does not extend the limitation period for filing action on bond. Carlisle v. Cox (1973) 29 U 2d 136, 506 P 2d 60.

protect mechanics and materialmen, etc.

#### Performance bond.

This section provides no authority to award attorney fees to the prevailing party in an action between owners and surety on a performance bond not required by this chapter. Lignell v. Berg (1979) 593 P 2d 800.

## TITLE 15

### CONTRACTS AND OBLIGATIONS IN GENERAL

#### Chapter

- 15-1. Interest.
- 15-2. Legal capacity of children.
- 15-6. Prompt Payment Act.
- 15-7. Registered Public Obligations Act.

### CHAPTER 1

#### INTEREST

##### Section

- 15-1-1. Interest rates — Legal rate — Contracted rate.
- 15-1-4. Interest on judgments.

**15-1-1. Interest rates — Legal rate — Contracted rate.** (1) Except when parties to a lawful contract agree on a specified rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or [things] chose in action shall be 10% per annum. [But nothing herein contained shall] Nothing in this section may be [se] construed [as] to in any way affect any penalty or interest charge which by law applies to delinquent or other taxes or to any contract or obligations made before [the 14th day of] May 14, 1981.

(2) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action.

**History:** L. 1907, ch. 46, § 1; C.L. 1907, § 1241; C.L. 1917, § 3320; R.S. 1933, 44-0-1; L. 1935, ch. 42, § 1; C. 1943, 44-0-1; L. 1981, ch. 73, § 1; 1985, ch. 159, § 6.

#### Compiler's Notes.

The 1981 amendment increased the rate in the first sentence from 6% to 10%; and changed the date at the end of the last sentence from 1907 to 1981.

**15-1-4. Interest on judgments.** Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of 12% per annum.

**History:** L. 1907, ch. 46, § 11; C.L. 1907, § 1241X9; C.L. 1917, § 3330; R.S. 1933 & C. 1943, 44-0-4; L. 1981, ch. 73, § 2.

#### Compiler's Notes.

The 1981 amendment increased the interest rate from 8% to 12%.

**Late payment of property division in divorce action.**

This section does not prohibit a district court from imposing an interest rate of more

than eight percent for late payment of cash ordered paid in a property division in a divorce action where the property division award is reasonable and equitable. Pope v. Pope (1978) 589 P 2d 752.

#### Prejudgment interest.

Prejudgment interest is inappropriate as to awards for mental anguish and punitive damages. First Security Bank of Utah v. J.B.J. Feedyards, Inc. (1982) 653 P 2d 591.

**2013-Present**  
**Utah Code Ann. § 15-1-1**

# TITLE 15

## CONTRACTS AND OBLIGATIONS IN GENERAL

### Chapter

1. Interest.
2. Legal Capacity of Children.
3. Interparty Agreements.
4. Joint Obligations.
5. Revolving Charge Agreements [Repealed].
6. Prompt Payment Act.
7. Registered Public Obligations Act.
8. Utah Rental Purchase Agreement Act.
9. Uniform Athlete Agents Act.
10. Service Contracts Act.

## CHAPTER 1

### INTEREST

#### Section

- 15-1-1. Interest rates — Contracted rate —  
Legal rate.
- 15-1-2, 15-1-2a. Repealed.

#### Section

- 15-1-3. Calculated by the year.
- 15-1-4. Interest on judgments.
- 15-1-5 to 15-1-10. Repealed.

### 15-1-1. Interest rates — Contracted rate — Legal rate.

(1) The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.

(2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be 10% per annum.

(3) Nothing in this section may be construed in any way to affect any penalty or interest charge that by law applies to delinquent or other taxes or to any contract or obligations made before May 14, 1981.

History: L. 1907, ch. 46, § 1; C.L. 1907, § 1241; C.L. 1917, § 3320; R.S. 1933, 44-0-1; L. 1935, ch. 42, § 1; C. 1943, 44-0-1; L. 1981, ch. 73, § 1; 1985, ch. 159, § 6; 1989, ch. 79, § 1.

Cross-References. — Payment of interest as extending statute of limitations, § 78B-2-113.

Rate where unspecified in instrument, § 70A-3-118.

Time from which interest runs, § 70A-3-112.

Utah Consumer Credit Code, § 70C-1-101 et seq.