

2016

David and Ruth M. Fuller and Fuller's Appliance Parts and Service, LLC, Plaintiffs / Appellants, v. Denise Bohne, Insurance Agent, Western States Insurance Agency, Auto Owners Insurance Company, Safeco Insurance Company of Los Angeles, California, Defendants / Appellees

Utah Court of Appeals

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 IN THE UTAH COURT OF APPEALS

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

Plaintiffs / Appellants,

-v-

DENISE BOHNE, Insurance Agent,
WESTERN STATES INSURANCE
AGENCY, AUTO OWNERS
INSURANCE COMPANY, SAFECO
INSURANCE COMPANY OF LOS
ANGELES, CALIFORNIA,

Defendants / Appellees.

APPELLEES' BRIEF

Appellate Case No. 20150146-CA

Third District Court № 100901093

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

Joseph P. Barrett (8088)
BARRETT LAW, P.C.
699 East South Temple, Suite 370
Salt Lake City, UT 84102
Telephone: (801) 438-6704
Facsimile: (801) 438-6133
joseph@utahlawgroup.com
Attorney for Appellees

Stephen K. Christensen (6512)
CHRISTIANSEN LAW, PLLC
311 South State Street, Suite 250
Salt Lake City, Utah 84111
Telephone: (801) 716-7016
Facsimile: (801) 716-7017
steve@skclawfirm.com
Attorney for Appellants

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UTAH APPELLATE COURTS

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joseph@utahlawgroup.com
Attorney for Appellees

Stephen K. Christensen (6512)
CHRISTIANSEN LAW, PLLC
311 South State Street, Suite 250
Salt Lake City, Utah 84111
Telephone: (801) 716-7016
Facsimile: (801) 716-7017
steve@skclawfirm.com
Attorney for Appellants

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), because this is an appeal from a final district court judgment that was transferred from the Utah Supreme Court.

STATEMENT OF ISSUES

The district court appropriately exercised its discretion by awarding prejudgment interest of 2.27% per annum simple interest pursuant to Utah Code §15-1-4.

This appeal raises three issues:

1. Did the district court err when adhering to the Utah Supreme Court's decision in *Wilcox* by refusing to apply the contractual prejudgment interest rate set by Utah Code §15-1-1(2) to damages awarded by a jury only for tort claims?
(Section I)
2. If the parties did not stipulate to a prejudgment interest rate, did the district court exceed its discretion by applying Utah's post-judgment interest rate in this case after reviewing briefs describing controlling and persuasive Utah case law making that very choice? (Section I.C.)
3. Did the parties stipulate to a prejudgment interest rate, and if so, did the district court exceed its discretion by refusing to be bound by their mutual mistake of law regarding the applicable prejudgment interest rate? (Section II.)

STATUTORY PROVISIONS

The following versions of Utah Code Ann. §15-1-1 are implicated in this appeal.

First, the version of Utah Code Ann. §15-1-1 in effect at the time of the underlying events of this matter, which is the same as the present statute and reads as follows:

- (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.

Utah Code Ann. § 15-1-1 (2015) (enacted 1989).

Second, the immediately previous version of the §15-1-1, which read as follows:

- (1) Except when the 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 chose in action shall be 10% per annum. Nothing in this section may be construed 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 May 14, 1981.
- (2) The parties to a lawful contract may agree upon rate of interest for the loan or forbearance of money, goods, or chose in action.

Utah Code Ann. §15-1-1(2) (1985).

Third, the version of §15-1-1 prior to that, which read as follows:

The legal rate of interest for the loan or forbearance money, goods or things in action shall be 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, 1981.

Utah Code Ann. §15-1-1 (1981).

STATEMENT OF THE CASE

This appeal concerns the rate of prejudgment interest applicable to non-contract claims. As part of crafting proposed jury instructions and a special verdict form designed to assist the jury, the parties and the district court withdrew a proposed stipulated jury instruction (No. 29) before presenting it to the jury and reserved to the court calculations concerning prejudgment interest. After the jury decided that the Fullers failed to prove their contract claims, the district court addressed the question of prejudgment interest and the Fullers sought a prejudgment interest rate of 10% as provided by §15-1-1 for contract actions. After deciding that the parties had not stipulated to an interest rate, the district court determined that §15-1-1 did not apply to the claims of breach of agency duties or negligent misrepresentation. The court appropriately exercised its discretion in following persuasive Utah case law and applied Utah's post-judgment interest rate of 2.27% as provided by §15-1-4.

The district court correctly concluded that §15-1-1 does not apply in this matter. In addition, even if the parties had somehow stipulated to the prejudgment interest rate set by §15-1-1 in a proposed jury instruction that was not presented to the jury, the district court was required to disregard that instruction in order to avoid committing legal error. In the alternative, any such agreement was based on a mutual mistake, which would require the district court to reform accordingly, and any error was invited by the Fullers.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW

Plaintiff-appellants David Fuller, Ruth M. Fuller, and Fuller Appliance LLC (hereafter, “The Fullers”) sought compensation for damages allegedly suffered due to failure of defendant-appellees Denise Bohne and Western States Insurance Agency, Inc. (hereafter, “Western States”) to properly obtain business property insurance coverage on the Fullers’ behalf. On February 3, 2007, the Fullers’ suffered a fire at their home, which was also the location of Fullers’ Appliance business. After receiving a check for \$3,000 from the insurance coverage in place, the Fullers sued Western States. (R.1, 1230, 1864).

The Honorable Deno Himonas presided over a jury trial from October 27-30, 2014. R.1969. After the trial, the jury found that Western States was not liable for breach of contract or promissory estoppel. The jury returned a verdict finding Western States liable for negligent misrepresentation and breach of agency duties (attributing 60% comparative fault to Western States). R. 1733-34. The Fullers were found 40% liable for the breach of agency duties and were awarded a total of \$101,595 for property damages, and \$0 for rent damages. *Id.*

Prior to the jury verdict, the parties and the district court engaged in lengthy discussions in crafting proposed jury instructions and a Special Verdict form to assist the jury. R.1973:1-3, 68-74. For example, the court declined to include separate lines on the verdict form related to elements for each cause of action alleged by the Fullers. R.1973:1-3;12-17. Before the closing instructions were submitted to the jury, Western States requested and the court agreed that the district court calculate prejudgment interest, in keeping with Model Utah Jury Instruction CV 1899. R.1973:71. The district court had

already inquired about and discussed with both parties that a potential award of property damage would be subject to prejudgment interest, while a potential rent damages award would not. R.1973:68-69.

The district court itself was the first to suggest that Instruction No. 29, crafted to guide the jury about a prejudgment interest claim, be entirely withdrawn. R.1973:71. The parties and the district court ultimately agreed to remove the interest line from the Special Verdict form and to withdraw Jury Instruction No. 29 regarding a potential award on a prejudgment interest claim - hence, the jury was never presented with a claim for prejudgment interest. R.1973:73.

Questions about prejudgment interest resurfaced after the Fullers' Motion for Entry of Judgment, which included a request for 10% interest accruing from February 3, 2007. R.1742-47. Western States opposed that interest rate, based on the plain language of the statute and controlling case law. R.1759-67. Western States also opposed the date proffered by the Fullers for accrual of interest. *Id.* The Fullers never suggested that an accrual date was ever stipulated. *See, e.g.*, R.1742-47, 1772-81. Based on Western States' objection, the court reserved its decision on prejudgment interest until receiving supplemental briefing on the issue. R.1795-96. The district court also heard argument on the Motion on January 29, 2015. R.1934, 1973.

The district court stated that it reviewed the record of the discussions several times to determine if an interest rate had been stipulated. *See, e.g.*, R:1973:3,6. Based on the record and supplemental briefing addressing the statute and case law, the district court

concluded that while Western States had stipulated that interest would be applied to any property damage award, the rate had not been stipulated by the parties and the rate set by §15-1-1 did not apply to the claims awarded by the jury (as the contractual claims were not proven). *Id.*

Ultimately, the district court exercised its appropriate discretion, followed the example of controlling and persuasive Utah cases, and awarded the Fullers prejudgment interest calculated at the post-judgment statutory rate in effect on the date of its decision, January 1, 2015 (2.27% per annum) on \$101,595.00. R.1973:20-21. The district court decided that interest would accrue from June 13, 2007 through the date of entry of the judgment. R.1973:19. This appeal followed.

SUMMARY OF THE ARGUMENT

This appeal should be dismissed on the basis that: (I.) the district court did not abuse its discretion in deciding that Utah Code §15-1-1 did not establish a legally binding prejudgment interest rate in this case; and (II.) the parties did not appropriately stipulate to a particular prejudgment interest rate.

As analyzed further herein, the district court had a reasonable basis to conclude that §15-1-1 was not controlling for claims sounding in tort and correctly recognized that Utah Supreme Court precedent established in *Wilcox v. Anchor Wate*, 2007 UT 39, ¶45, 164 P.3d limited such application to a subset of contract claims.

Despite their creative arguments to the contrary, the parties verbal stipulation to withdraw proposed Jury Instruction No. 29 was not controlling upon the applicable

prejudgment interest rate. Rather, the parties reserved to the court various determinations concerning prejudgment interest (date of accrual and applicable rate) and the court appropriately concluded that it was empowered to make such calculations following the jury's verdict.

Therefore, this Court should affirm as an appropriate exercise of discretion, the district court's application of a prejudgment interest rate of 2.27% commencing from June 13, 2007, through the date of entry of judgment on February 24, 2015.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BECAUSE IT HAD A REASONABLE BASIS FOR DECIDING THAT §15-1-1 DID NOT APPLY IN THIS CASE.

In deciding that Utah Code §15-1-1 did not definitively establish the prejudgment interest rate for this case, the district court properly relied upon the language of §15-1-1 itself along with both controlling and persuasive case law. Standing alone, each of these factors provides a reasonable basis for the district court's discretionary application of the interest rate set by Utah Code §15-1-4. Its decision should therefore be affirmed.

A. The District Court Correctly Recognized that the Utah Supreme Court Limited §15-1-1 to a Subset of Contract Claims in Wilcox, the Court of Appeals Has Followed Wilcox, and §15-1-1 Does Not Apply to this Case.

Since the Supreme Court's unanimous decision in *Wilcox v. Anchor Wate*, 164 P.3d 353, 2007 UT 39, controlling Utah case law reflects that the current language of §15-1-1 does not apply to this case.

1. *The Supreme Court Limited § 15-1-1 to a Subset of Contract Claims in Wilcox, and Therefore §15-1-1 Does Not Set the Interest Rate in this Case.*

Utah Supreme Court precedent precludes the use of the interest rate in U.C.A. §15-1-1 in this matter. In deciding that §15-1-1 “was meant to apply only to loans or forbearances in contract actions” the Utah Supreme court has clearly distinguished the use of the interest rate found in §15-1-1 from this matter. *Wilcox v. Anchor Wate*, 2007 UT 39, ¶45, 164 P.3d 353, quoting *Consolidation Coal Co. v. Utah Division of State Lands & Forestry*, 886 P.2d 514, 525 n.13 (Utah 1994).¹ Since the prejudgment interest rate question posed by the Fullers has already been decided, Western States respectfully submits that this Court must adhere to the Supreme Court’s unanimous opinion in *Wilcox*.

Justice Zimmerman first explained the proper reading of the current language of §15-1-1 in dicta in *Consolidation Coal*:

“The author of this opinion has serious reservations about the initial correctness and therefore the continued vitality of. . .[any] 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. . . .[I]t 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.’”

Justice Zimmerman not only read the plain meaning of §15-1-1 as restricting its application to contract actions, he appropriately limited its application to a subset of

¹ Please note that Justice Zimmerman correctly read §15-1-1’s limitation to a “chose in action that is the subject of a contract,” rather than encompassing any chose in action. Plaintiffs’ prior arguments that §15-1-1 applies to any chose in action are not reflected in the plain language of §15-1-1, as Justice Zimmerman’s explanation clarifies and *Wilcox* expands upon. Rather, §15-1-1 relates only to a chose in action which is the subject of a contract. Therefore, as the present case does not relate to a loan or forbearance of any money, goods, or chose in action which is the subject of a contract between the Fullers and Defendants, §15-1-1 is inapposite.

contracts: those involving a “loan or forbearance of money, goods, or a chose in action that is the subject of their contract.” This statute does not—cannot— encompass any and all contracts, let alone all choses in action.²

The Fullers attempt to elide any mere “chose in action” with a “chose in action which is the subject of a contract.” The two, however, are markedly different. A chose in action is “a claim or debt upon which a recovery may be made in a lawsuit. It is not a present possession, but merely a right to sue.” *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 1999 UT 49, ¶9 quoting Barron's Law Dictionary 71 (3d ed.1991) (emphasis added). But §15-1-1 does not address each and every contract, nor any chose in action at all (whether a statutory claim as in *Wilcox* or a common law claim as in this case). It only governs contracts addressing a loan, forbearance, or chose in action. An example of a “chose in action which is the subject of a contract” is provided by *Time Finance Corp. v. Johnson Trucking Co.*, 458 P.2d 873 (Utah 1969). (reviewing the contractual assignment of a chose in action from one party to another). *Time Finance* addressed the destruction of insured property. “[T]he right to the [insurance] proceeds was a chose in action, which could be assigned as any other chose in action....” *Id.*, at 876 (emphasis added). The subject of the contract was the legal claim itself, rather than existing proceeds—the contract addressed who could pursue the potential recovery of

² This proffered reading by the Fullers swallows most of the text of §15-1-1(1) and (2) in one gulp, rendering those terms meaningless. Utah courts “are compelled to give the statutory language meaning and to assume that each term in the statute was used advisedly.” *Andreason v. Felsted*, 137 P.3d 1, 2006 UT App 188, ¶11, citing *Labelle v. McKay Dee Hosp. Ctr.*, 2004 UT 15, ¶ 16, 89 P.3d 113. “Thus, we construe statutory enactments in a way that ‘render[s] all parts thereof relevant and meaningful.’” *Id.*

proceeds.³

Snow not only addressed a chose in action; it held that “a legal malpractice claim, like any other chose in action, may ordinarily be acquired by a creditor through attachment and execution.” *Snow*, at ¶9. Moreover, *Snow* noted that a chose in action, as a claim of negotiable value even before adjudication, was at that time subject to execution under then-U.R.C.P. 69 (since repealed).⁴

Snow and *Time Finance* show that a chose in action is an interest that is transferrable by contract. Such contracts are specifically addressed by §15-1-1. Choses in action that are not the subject of a contract are not.

Wilcox exemplifies this distinction. *Wilcox*’s unanimous Supreme Court opinion not only confirmed Justice Zimmerman’s view that the scope of §15-1-1 is limited; it drew that limit even tighter. “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.” *Id.*, at ¶46.

As *Wilcox* was not a contract action, the *Wilcox* court declined to apply the interest rate in §15-1-1(2). Instead, being a statutory action (addressing state statutory bankruptcy preferences), it applied the federal bankruptcy preference interest rate as the

³ This is the critical distinction between the present case and *Sundial*.

⁴ *Snow*, at ¶9:” Rule 69 ...states that a sheriff shall ‘execute the writ [of execution] against the nonexempt property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient property; collecting or selling the choses in action and selling the other property in the manner set forth herein. Utah R. Civ. P. 69(f).”

most appropriate to those claims. *Id.*, at ¶47. That rate is the federal post-judgment interest rate. *Id.*

Wilcox limited the scope of §15-1-1 to a subset of contract actions and decided that neither contract nor statutory actions were automatically governed by §15-1-1. Based on the plain meaning of its terms, *Wilcox* decided that reflexive application of the current §15-1-1 is not allowed, even for contract cases. Moreover, as *Wilcox* decided that 15-1-1 speaks only to (some) contract claims, and the jury decided that no breach of contract occurred in the present case, §15-1-1 does not set the rate of prejudgment interest here.

Accordingly, this Court should affirm the district court's discretionary decision against applying §15-1-1(2).

2. *Court of Appeals Cases Decided Since Wilcox Generally Adhere to Wilcox.*

Cases decided after *Wilcox*, including some cited by the Fullers, highlight the limits on §15-1-1 described by the Supreme Court in *Wilcox*. For example, *Highlands at Jordanelle, LLC v. Wasatch County*, 2015 UT App 173 (the most recent decision addressing §15-1-1) applied §15-1-1 because “the lump-sum fees [at issue] in this context . . . more similar to a contract than to a tax, ...[and therefore] the trial court was correct to apply the statutory default interest rate for most contracts, ...i.e., 10% per year.” (emphasis added). The *Highlands* court, therefore, not only considered it a contract case, it also acknowledged that §15-1-1 only applies to “most” contracts. *Highlands* mirrors the scope of §15-1-1 decided by *Wilcox*.

Another recent Court of Appeals case cited by the Fullers, *David A. Francis v. National DME*, 350 P.3d 615, 2015 UT App. 119 is also consistent with *Wilcox*. The Fullers concede that *National DME* did not decide that §15-1-1 applies in all cases. Appt. Brief at 41-42. *National DME* only decided that it was “not convinced” that the district court erred in adhering to one of the interpretations of §15-1-1 presented to it. *National DME*, 2015 UT App. 119, ¶44. This was the result of inadequate briefing by the appellant in *National DME*, which was insufficient to allow the Court of Appeals “to adequately address the issue of interpretation on the case. . . [and] ‘we will not conduct that analysis on a party's behalf.’” *National DME* at ¶44, quoting *Nebeker v. Summit County*, 2014 UT App. 244, ¶ 27, 338 P.3d 203. *National DME* declined to reverse the district court’s decision to apply the 10% rate from §15-1-1 because any other conclusion was inadequately briefed. *National DME* therefore decided nothing at all about whether §15-1-1 applies to any other case, including this one.

The Fullers disserve the plain language of the statute, which is unambiguous. *Wilcox* did not consider §15-1-1 ambiguous. The post-*Wilcox* cases have not decided that §15-1-1 is ambiguous. The Court should therefore enforce the terms of §15-1-1 as they were unambiguously read and limited by *Wilcox*.⁵

⁵ *Sundial’s* recitation of §15-1-1 excluded material terms from the statute, impermissibly rendering the omitted text a nullity. Utah courts “are compelled to give the statutory language meaning and to assume that each term in the statute was used advisedly.” *Andreason v. Felsted*, 137 P.3d 1, 2006 UT App 188, ¶11, citing *Labelle v. McKay Dee Hosp. Ctr.*, 2004 UT 15, ¶ 16, 89 P.3d 113. “Thus, we construe statutory enactments in a way that ‘render[s] all parts thereof relevant and meaningful.’” *Id.* Utah courts also “avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative.” *Id.*

Wilcox's unanimous Supreme Court opinion tightly limited §15-1-1(2) to a fraction of all contract actions, and no more. "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." *Id.*, at ¶46. As *Wilcox* was not a contract action, the *Wilcox* court declined to apply the interest rate in §15-1-1(2).

Contrary to the Fullers' argument to the contrary, the 10% rate of §15-1-1(2) does not apply here. Under *Fell v. Union Pacific RR*, 88 P. 1003 (Utah 1907), the district court was only required to award prejudgment interest at the legal rate. *See id.* at 1007 ("Our statute (section 1241, Rev. St. 1898) is general, allowing interest in all cases at the legal rate, in the absence of an agreement.")⁶ If it ever did so, §15-1-1 no longer sets interest at

Sundial's abbreviated version of §15-1-1(2) reveals the problem: "the legal rate of [prejudgment] interest for ... any ... chose in action shall be 10% per annum." *Sundial*, 2013 UT App 223, ¶ 8. This excluded 20 of the 35 words in subsection two, including the entire introductory phrase and other relevant modifiers that constrict its application to contracts. The *Sundial* court effectively rewrote the statute to reflect its pre-1985 non-contractual terms, rather than reading §15-1-1 as it currently stands.

Sundial was not presented with the present question (of whether §15-1-1 sets the prejudgment interest rate for a non-contract damages award). The *Sundial* parties did not contest whether §15-1-1 would apply to a chose in action (unjust enrichment) that was not the subject of a contract claim. *See id.*, at ¶8. In addition, *Sundial* affirmed the denial of prejudgment interest for unjust enrichment. *See id.*, at ¶¶8-11.

Sundial sheds no light on the district court's or this Court's reading of §15-1-1 as to whether it covers anything other than a contract.

⁶ Section 1241 (Rev. 1898) is, indeed, far broader than the current statute. It reads as follows:

Agreement governs. Eight per cent in absence of agreement.

the legal rate “in all cases.” The current statute only sets the interest rate for agreements which do not themselves set an interest rate.

Using the post-judgment rate was within the district court’s discretion when awarding interest and within the bounds of controlling and persuasive precedent that mirrored the structure of Utah’s post-judgment interest statute, §15-1-4.⁷

The Fullers’ appeal should therefore be denied and the district court’s decision affirmed.

B. The District Court Correctly Construed §15-1-1 When Deciding that It Did Not Prescribe the Interest Rate for this Case.

The district court appropriately decided that §15-1-1 did not apply to the common law claims for which Western States were found liable by the jury in this case. Western States submits that this was the correct decision, based on the plain language of the statute (as well as under *Wilcox*), and was within the district court’s discretion.

“Normally, when interpreting statutory language, we first examine the statute’s plain language and resort to other methods of statutory interpretation only if the language

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 bear the interest agreed upon by the parties, which shall be specified in the judgment.

Section 1241 (Rev. 1898) thereby inverts the language of the current 15-1-1. Section 1241 begins with the general case—that 8% may be taken, without qualification. It then proceeds to the narrower circumstance—that parties may contract for any interest rate and that the judgment shall impose and reflect that rate. In contrast, §15-1-1 starts by presuming the existence of a contract, and narrows its scope from that point.

⁷ For detail, see § I.C., below.

is ambiguous.” *National DME*, 350 P.3d 615, 2015 UT App. 119, ¶44, quoting *State v. Masciantonio*, 850 P.2d 492, 493 (Utah Ct. App. 1993) (quotations omitted). Utah courts “are compelled to give the statutory language meaning and to assume that each term in the statute was used advisedly.” *Andreason v. Felsted*, 137 P.3d 1, 2006 UT App 188, ¶11, citing *Labelle v. McKay Dee Hosp. Ctr.*, 2004 UT 15, ¶ 16, 89 P.3d 113. “Thus, we construe statutory enactments in a way that ‘render[s] all parts thereof relevant and meaningful.’” *Id.* Utah courts also “avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative” or makes a statute “unreasonably confused or inoperable.” *Id.* Finally, when the “meaning of a statute can be discerned from its language, no other interpretive tools are needed.” *Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶15 and n.10, 267 P.3d 863, citing *Nelson v. Salt Lake Cnty.*, 905 P.2d 872, 875 (Utah 1995) (“When language is clear and unambiguous, it must be held to mean what it expresses, and no room is left for construction.”)

The complete text of §15-1-1 reads as follows:

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.

The text of §15-1-1 as a whole provides context for each of its subsections. First, §15-1-1(1) and (2) each begin with a condition predicate by addressing only the “parties

to a lawful contract.” This limiting condition alone moves the present case out of the scope of §15-1-1.

Second, the statute sets the “the legal rate of interest for the loan or forbearance of any money, goods, or chose in action.” §15-1-1(2). It does not set the “legal rate of interest” without qualification or in all circumstances. The Fullers adopt an ellipsed version of the statute created by *Sundial* (“the legal rate of [prejudgment] interest for ... any ... chose in action shall be 10% per annum”; 2013 UT App 223, ¶ 8) and hope that deleting 20 of the 35 words in §15-1-1(2) might preserve the meaning of the sentence and of the subsection within the context of §15-1-1 as a whole. Yet, *Wilcox* and *Highlands* both indicate that the Fullers’ suggested meaning is not plausible, as each confirms that §15-1-1 applies to a subset of contracts, and nothing more.⁸

Third, subsection one also requires a contract. Rather than the incomplete version promoted by *Sundial* and the Fullers, §15-1-1(1) may be properly shortened—without changing its intent—to read “The parties to a lawful contract may agree upon any rate of interest for . . . the subject of their contract.” Any of the contractual subjects listed in §15-1-1(1)—whether they are an exhaustive listing or not—are simply that: subjects of a contract, for which an interest rate may be set by said contract.

This parallels the substance and wording of subsection two: that “Unless parties to

⁸ Moreover, the Fullers conceded that Western States’ reading of §15-1-1 is plausible. Specifically, regarding Justice Zimmerman’s interpretation of §15-1-1 in *Consolidation Coal*, the Fullers stated that, “there’s no question you could read the statute that way.” R. 1973: 15 (18-19). “That way” is the interpretation proffered by Western States and adopted by the district court. In addition, it is clear from the district court’s decision declining to apply §15-1-1 that it adopted the Zimmerman/*Wilcox* reading of the statute, even if it did not expressly state its reasoning in that way.

a lawful contract specify a different rate of interest, the legal rate of interest . . . shall be 10% per annum.” As in §15-1-1(1), the inclusion of “the loan or forbearance of any money, goods, or chose in action” in §15-1-1(2) has a preceding requirement – that a contract exist in the first place. Rather than operating in a vacuum imagined by the Fullers, the interest rate provided by §15-1-1(2) simply acts as a gap-filler if none was provided by the very contract between the very parties’ mentioned in §15-1-1(1). Subsection two only has meaning for parties if subsection one first applies to them.

This interpretation is supported by controlling case law. In *Wilcox*, the Supreme Court refused to apply prejudgment interest per §15-1-1 specifically because no contract existed, and explained its reasoning as follows:

“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.”

Wilcox, at ¶44 (emphasis added).

The Fullers’ central case after *Fell—Uinta Pipeline Corp. v. White Superior Co.*, 546 P.2d 885 (Utah 1976)—only addressed the denial of interest and the refusal to instruct about interest. The *Uinta* opinion did not decide or address whether its version of §15-1-1 set the applicable rate.

Moreover, the relevant language of §15-1-1 in effect under *Uinta* was materially different than the present version of §15-1-1:

“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.”

15-1-1(1953), Appt. Brief Addendum, at 12.⁹

The word “contract” never appears in the statute in effect when *Uinta* was decided. In fact, as shown by the Fullers’ Opening Brief Addendum of predecessor statutes, the word “contract” did not appear at any time from 1907 (the year of *Fell*’s decision) until 1989. Appt. Brief Addend., at 3-12. As a result, the statutory language of §15-1-1 and its predecessors, from *Fell* through *Uinta* and *SCM Land Co. v. Watkins & Faber*, 732 P.2d 105 (Utah 1986), reflects a materially different legislative intent than the present legislative intent of §15-1-1 as enacted in 1989.¹⁰

This also makes clear that which the Fullers wish to obscure. As of 1994, *Consolidation Coal* was only the second Supreme Court case citing the 1989 language of §15-1-1. Far from expressing some aberrant view of an ancient statute, Justice Zimmerman was simply reading a recently and materially altered statute. It is therefore unsurprising that §15-1-1’s applicability and scope would differ from the preceding decades, and its changed relationship to *Fell* should be entirely expected and

⁹ 15-1-1 was again amended in 1981, with the only change being the rate of interest: “The legal rate of interest 'for the loan or forbearance money, goods or things in action shall be ~~six per cent~~ 10% per annum.” Appt. Brief Addend., at 14. (Strikeout and underline original).

¹⁰ The version enacted in 1985 is largely the same as the current version (passed in 1989), adding the qualification that it applies to contracts, and reads in relevant part as follows: “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.” Appt. Brief Addend., at 16. (Strikeout and underline original). Similarly, §15-1-1(2) was first enacted, and read: “The parties to a lawful contract may agree upon rate of interest for the loan or forbearance of money, goods, or chose in action.” Id. (Underline original).

reasonable.¹¹

Other cases cited by the Fullers are inapposite for other reasons. For example, *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, 210 P.3d 263, awarded a breach of contract. This fits squarely within *Wilcox*'s limits on §15-1-1, and therefore does not affect the present analysis.¹²

Ultimately, the lion's share of the Fullers' argument—addressing the history, intent, and case law surrounding the current §15-1-1's predecessor statutes—is not required, as the meaning of the current §15-1-1 is clear. Further, the Fullers' analysis is inapposite until 1989 at the earliest, as the plain language and intent of §15-1-1 from *Fell* through *Uinta* and *SCM* materially changed in 1989, and continued no further.

In sum, based on a plain reading of the current text of §15-1-1, the statute does not apply to this case. Should the Court consider the history and relevant case law, it should discount such before 1989, as the terms and intent of §15-1-1 materially changed at that time. It was no coincidence that Justice Zimmerman doubted in 1994 the ongoing validity

¹¹ It appears that *Nielsen v. O'Reilly*, 848 P.2d 664 (Utah 1992) (later abrogated by statute) was the only Supreme Court case addressing §15-1-1 in its current form prior to *Consolidation Coal*. Nielsen sued the uninsured drivers who collided with his vehicle and his own insurer, and at trial was awarded \$250,000 under his \$250,000 uninsured driver insurance policy coverage. While the *Nielsen* court did not expressly construe §15-1-1, it refused to award prejudgment interest under the post-1989 language of §15-1-1 because Nielsen did not allege a breach of contract (and because the terms of the insurance policy limited liability to the fixed amount of \$250,000, including interest).

¹² In addition, the *Encon* opinion mentions, without further detail or analysis, that the district court applied §15-1-1(2) to set the interest rate at 10% when calculating interest. *Encon* at n.20. The appeal to the Supreme Court never questioned whether that was the appropriate statute or rate, and so the *Encon* court had no reason to question that application nor any putative construction of 15-1-1. *Encon* sheds no light here.

of any case applying §15-1-1 beyond a contract; the statute had been greatly limited by the legislature only five years prior. That it took until 2009 for *Wilcox* to unanimously adopt his reading is of no import; it only matters that the Supreme Court finally voted and spoke on the question with one voice.

The district court correctly construed §15-1-1 when deciding that it did not provide the interest rate for the common law claims in this case, as the jury decided that no breach of contract occurred, nor decided that a contract ever existed. The Court should therefore affirm the district court's refusal to apply the 10% interest rate of §15-1-1.

C. Persuasive Utah Case Law Shows that the District Court's Application of the Post-Judgment Interest Rate Set by §15-1-4 Was Appropriate and Within its Discretion.

This Court should affirm the district court's decision to apply Utah's post-judgment rate of interest when calculating prejudgment interest. Persuasive Utah court decisions applying the post-judgment rate provided a reasonable basis for the district court to do so in this case.

Other Utah courts have recognized that §15-1-1 is not applicable for setting prejudgment interest rates for non-contract damages. Those courts, in exercising their equitable discretion, have adopted post-judgment interest rates (whether set by §15-1-4 or some other rate significantly lower than the 10% set by §15-1-1) as most appropriate for calculating prejudgment interest.

For example, in *Klein v. Patterson*, 2:11-cv-723-CW (D. Utah, September 30, 2013), Judge Waddoups decided that §15-1-1 did not apply to every chose in action, but

only to those which are the subject of a contract. “While the statute does refer to a ‘chose in action,’ it does so within the context of ‘a lawful contract.’ A fraudulent transfer does not fall under the realm of contract law. The court therefore concludes that section 15-1-1(2) is inapplicable.” *Id.* The *Klein* court then adopted the interest rate set in a persuasive order issued by the Tenth Circuit in *Wing v. Gillis*, No. 12- 4071 (10th Cir. May 21, 2013) (unpublished). *Wing* cited that where the rate of prejudgment interest is not set by statute, the appropriate rate lies “within the sound discretion of the court.” *Id.*, citing *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1287 (10th Cir. 2002). The litigants in *Wing* advocated the 10% rate set by §15-1-1 on the one hand, and the federal post-judgment rate (approximately 2.08%)¹³ on the other. The *Wing* court affirmed that the trial court’s adoption of 5% as an explicitly middle ground figure was within its discretion. Judge Waddoups then adopted the 5% simple interest rate from *Wing* as the appropriate prejudgment interest rate where §15-1-1 did not apply, specifically because the chose in action was not the subject of a contract.

Similarly, in *Peterson v. Jackson*, 2011 UT App 113, ¶¶56-58, 253 P.3d 1096, the Utah Court of Appeals affirmed trial court’s equitable decision to use of the post-judgment rate in §15-1-4 to calculate prejudgment interest in the statutory dissolution of a privately held corporation. While the statute at issue (§16-10a-1434) provided only that

¹³ The *Wing* decision did not state the post-judgment rate. For this brief, the rate was derived from the United States Courts website link to historical rates listing the interest rate for February 6, 2008, the date affirmed by *Wing* as the appropriate date to commence prejudgment interest. Available at <http://www.uscourts.gov/FormsAndFees/Fees/Post-judgmentInterestRates.aspx>; <http://www.federalreserve.gov/releases/h15/20080211/>

interest “may be allowed at the rate and from the date determined by the court to be equitable,” *Peterson* affirmed that the use of the post-judgment rate in §15-1-4 was “rational” and did not exceed its discretion. *Id.* at ¶58.

Finally, a federal case previously cited by Plaintiffs regarding prejudgment interest, *Krum v. Hartford Life & Acc. Co.*, 942 F. Supp. 2d 1171 (D. Utah 2013), set its prejudgment interest rate using §15-1-1 without reasoning or discussion. However, *Krum* cited to the same Tenth Circuit case relied on by *Wing* for its authority that a trial court has the discretion to set prejudgment interest rates, namely *Caldwell v. Life Ins. Co. of North America*, 287 F.3d 1276 (10th Cir. 2002). Ironically, *Caldwell*, like *Wilcox*, did not apply §15-1-1. *Caldwell* applied the federal post-judgment rate in calculating the prejudgment interest rate for damages resulting from unpaid disability benefits. *Id.*, at 1287.

These cases provide a reasonable basis for the district court’s application of the post-judgment interest rate in this case. Similarly, Utah’s post-judgment interest statute, U.C.A. §15-1-4, follows the demarcation between contract and non-contract actions, a distinction related to that made in *Wilcox* for understanding the limited application of §15-1-1. Section 15-1-4 specifies that contracting parties may set their own interest rates, and that such rates will apply to prejudgment interest. All other claims, such as the claims here, use the federal rate plus 2%. U.C.A. §15-1-4(3)(a).

As a whole, Title 15 Chapter 1 applies one set of rules to contract actions, and another set of rules for all other claims, including the tort claims awarded by the jury in this case. The post-judgment rate is the only applicable rate set by the Utah legislature,

and the structure of Title 15 Chapter 1 supports its adoption and use here.

The district court's decision that the limited scope of §15-1-1, as already defined by the Supreme Court in *Wilcox*, did not include the claims awarded by the jury in this case. The district court's decision to apply Utah's federal post-judgment simple interest rate of 2.27% per annum¹⁴ to calculate prejudgment interest was within its discretion, as it had at least one reasonable basis (if not more). It therefore should be affirmed, and the Fullers' appeal denied.

II. THE PARTIES STIPULATED ONLY TO WITHDRAW JURY INSTRUCTION NO. 29 AND THAT PREJUDGMENT INTEREST WOULD APPLY TO PROPERTY DAMAGE.

Should this Court decide that the foregoing has not resolved this appeal and that it requires further analysis, Western States respectfully submits that any stipulation concerning the withdrawal of Jury Instruction No. 29 was limited and properly construed by the district court, appropriately exercising its discretion. In the alternative, the district court properly reformed the stipulation to correct the parties' mutual mistake underlying the stipulation and/or reflect the limitations of the meeting of their minds.

Moreover, any error regarding the scope of the stipulation was invited by the Fullers themselves; and their false accusation that Western States engaged in a deliberate

¹⁴ Utah law uses the federal post-judgment rate as of the start of the calendar year in which a judgment is entered (rather than the interest rate from the particular week of a judgment). "Except as otherwise provided by law, all other final civil and criminal judgments of the district court and justice court shall bear interest at the federal post-judgment interest rate as of January 1 of each year, plus 2%." U.C.A. §15-1-4(3)(a). The rate set by the Utah Supreme Court for 2015 was 2.27%. *See* <https://www.utcourts.gov/resources/intrates/interestrates.htm>

“bait and switch approach” is not supported by the record and defamatory. It should be struck from the record, or at least disregarded.

Lastly, Western States preserved its objections and is therefore not estopped from making its arguments here. Western States did not request relief from a stipulation agreed in scope; it questioned the scope of such stipulation. When the perceived scope of their stipulation to withdraw Jury Instruction No. 29 and interest-related determinations came to light, the issues were timely raised by Western States and fully vetted in the district court.

The Fullers’ appeal should be denied on any of these grounds.

A. **The District Court Correctly Decided That the Parties Intended to Withdraw Jury Instruction No. 29 and Permit the Court To Make Additional Determinations Required for the Interest Calculation.**

Jury Instruction No. 29 was withdrawn by stipulation of the parties. However, the terms and scope of its withdrawal are at issue.

Stipulations are construed as any other contract. “[A] cardinal rule in construing ... a contract is to give effect to the intentions of the parties.” *Coulter & Smith v Russell*, 966 P.2d 852, 857-58 (Utah 1998); *Maw v. Noble*, 354 P.2d 121, 123 (Utah 1960) (“if the intent of the parties can be ascertained with reasonable certainty it must be given effect”) (emphasis added) (additional citations omitted). “[I]ntent is gleaned from the totality of the circumstances.” *Allen v. Prudential Prop. & Cas. Ins.*, 839 P.2d 798, 810 (Utah 1992). . . .”

A meeting of the minds is “basic” to a stipulation. *Brown v. Brown*, 744 P.2d 333, 335 (Utah App. 1987). “...[D]eterminations as to the intended scope of a stipulation ...

present questions of fact that are appropriately directed, in the first instance, to the district court. *Prinsburg State Bank, v. Abundo* 2011 UT App 239, ¶8, 262 P.3d 454, citing *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 73, 221 P.3d 234 (“The intent of the parties involves a question of fact and should be dealt with accordingly.”)

Here, the parties’ stipulation to withdraw Jury Instruction No. 29 was oral and never clearly memorialized, making the intentions of the parties more difficult to glean. The District Court concluded that Western States stipulated that prejudgment interest applied to a property damage verdict. It also correctly recognized that the parties did not stipulate to a binding prejudgment interest rate.

The parties did not, as suggested by the Fullers, simply discuss and then withdraw Jury Instruction No. 29 because all questions related to prejudgment interest had been decided. Rather, as reflected in a more complete quotation from the record, the parties began discussing prejudgment interest in connection with creating a Special Verdict form at the urging of the Fullers. Questions about damages, interest, and the Special Verdict form itself were interrelated and interspersed through the record:

THE COURT: [W]e were arguing a special verdict form, and the question is whether there should be one damages line or a separate line for rent and for the other damages. I have indicated that I want them broken out. . . [because] I thought that in the event my pretrial rulings with respect to rent were wrong, it would help alleviate the need for a potential retrial. Mr. Christiansen ... objects to it and believes that the more efficient and appropriate form would be one that just has a single damage line....

MR. CHRISTIANSEN: Your Honor, may I raise one more thing along the lines of what we've been talking about?...[T]here really are three broad categories of damage items[...:]property damage, prejudgment interest, and lost rent. And I would propose that we have separate lines for each of those, because that's the way that I've presented the case. If we're going to break out the two, we might as well break out the three.

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

MR. CHRISTIANSEN: Yes.

MR. CHRISTIANSEN: ...I'm not asking for prejudgment interest on the rent. It's based only on the personal property.

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

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

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

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

THE COURT: That's fine.

MR. BARRETT: I'm not opposed.

THE COURT: Yeah, that's fine.

MR. CHRISTIANSEN: Okay. Very good...

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

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 --

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. ...

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....

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 No. 29 is withdrawn.

R. 1969:67-74.

While the Fullers try to make hay of the district court's musing that it could do a 10% calculation in its head, that aside does not mean that the parties agreed that the rate was a settled question. Nor do these discussions—including the district court's statements—in any way impute the correctness of any proposed and conditional interest rate. "The amount is fine," in the totality of the circumstances, can easily refer to the fact that the parties agreed that interest could be applied to property damages, but not to rent damages (which the court and parties had spent several minutes discussing and parsing, at the Fullers' insistence as much as anyone's). Prejudgment interest was also predicated on the breach of contract claim as Western States conceded there was a legitimate basis for applying §15-1-1 in many contract cases; and, at that moment, breach of contract was still a pending claim available to the jury. "The amount is fine" can also equally refer to the final layout of the Special Verdict form, given all of the discussions – about considering and finally including separate lines for property damages amounts, a line for rent damages amounts, and ultimately no line for interest damages amounts (as the judge would calculate interest on property damages but not on rent damages and would

determine the date from which interest would accrue). The record reflects that this was the full scope of discussions leading up to the removal of Jury Instruction No. 29, no less and no more.¹⁵

The district court determined that that Western States stipulated to interest on property damage.¹⁶

MR. BARRETT: I'm not precluded from arguing there's no date certain, there's no measuring by facts and figures, and that the-

THE COURT: Yes...you are. That's what I'm saying. Because, to the extent that my memorandum decision was inconsistent with that, the stipulation -- they're entitled to it. Now the question is when the date starts -

MR. BARRETT: Okay .

¹⁵ Western States further explained its intent at the subsequent January 29, 2015 telephonic motion hearing arguments on interest rates after supplemental briefing ordered by the district court: that interest was not a foregone conclusion, and that its award and amount depended on findings by the jury (about particular claims) and the court (about the rate, date that interest started accruing, etc.):

COURT: it was clear to me, Mr. Barrett, from reviewing the transcript, that Mr. Christiansen was led into withdrawing that instruction, which had been approved, based on an understanding that if they were successful, and we didn't separate any claims --... his clients were entitled to prejudgment interest. [That did not depend on whether the elements of certain claims were met.]

MR. BARRETT: if that's what -- if that's what I said to the Court, that's not my intent.

R. 1973:6-7. While the district court decided that interest was a foregone conclusion on all claims related to property damage, the conversation also illuminates where the parties' minds did and did not meet.

¹⁶ Western States did not intend to simply stipulate to the availability of interest on all claims, as the Instruction No. 29 depended on which if any claims were found valid by the jury. It was never clear that negligent misrepresentation required the application of interest, and any stipulation to that was inadvertent. (See fn (12): "if that's what I said to the Court, that's not my intent.")

THE COURT: - and what the number is. That's what I'm saying...

COURT: But I think it's clear [counsel for the Fullers] withdrew that instruction thinking, I'm entitled to prejudgment interest. If I win, we're just going to calculate it.

R.1973:10-11.

The record thereby shows that the district court cabined the parties' stipulation in keeping with the discussions in their totality.

First, the parties and the Court decided that there would be separate damages lines on the special verdict form. Second, the parties revisited interest because the MUJI guided that while the jury could decide questions of fact related to interest, the court should calculate interest. Third, the District Court itself proposed that Jury Instruction No. 29 be withdrawn altogether. Fourth, the parties agreed that interest would apply to property damages but not rent damages, and that this made sense of the separate verdict form lines for those distinct damages. At that time, Western States believed that predicate determinations about interest remained, including the start date for accrual, whether the damages were fixed and reasonably certain, and the rate. The Court agreed that there were further determinations required, but only about the start date and the rate. But these differences of view were not apparent until after the verdict was rendered. Fifth, Jury Instruction No. 29 was withdrawn, and the calculation of interest reserved to the court. Sixth, once the Fullers filed their Motion for Entry of Judgment seeking 10% interest

from February 3, 2007, and Western States objected as to the date and the rate,¹⁷ the ambiguity of the parties' stipulation to withdraw Instruction No. 29 became apparent.

The Fullers now ask this Court to abandon the totality of these circumstances in favor of an alternate reality where the terms of withdrawal were expressly agreed and there were no predicate determinations remaining. As reflected by the record, the Fullers' suggested scenario never actually occurred.¹⁸

Instead, after extensive review of the record, the district court concluded that the parties only stipulated to remove Jury Instruction No. 29 and that prejudgment interest would apply to property damage and not to rent damage - but the parties did not stipulate to a 10% interest rate. The record shows that other questions were indisputably reserved to the district court, including the start date for accrual of interest. The record supports the district court's reasonable basis for its determination of the scope of the parties stipulation and its enforcement of that scope. This Court should therefore affirm the district court's decision on this question.

¹⁷ The date was later agreed to by the Fullers as June 13, 2007. R.1973:13.

¹⁸ The *Prinsburg* test cited by the Fullers necessarily assumes that the scope of a stipulation is settled when considering setting aside a stipulation. It does not address the scope of the stip itself, which is what's at issue. The scope of the stip requires interpretation of an oral contract, which is shown by the transcripts (which have several gaps labeled as "inaudible" by the transcriptionist).

B. Withdrawal of Jury Instruction No. 29 Did Not Require That the District Court Apply a 10% Interest Rate, Which Would Have Been An Error of Law.

Even if the parties somehow agreed to a 10% prejudgment interest rate in proposed Jury Instruction No. 29 discussing a claim that was never presented to the jury, the district court was not bound by such a stipulation because it was an error of law.

A court may refuse to provide an instruction that includes an error of law.¹⁹ Likewise, the court would not be bound by a stipulation by the parties to instruct itself in such a way, and was free to revisit the question of the appropriate prejudgment interest rate once the issue was brought to its attention. The district court did not err in doing so. Indeed, it would have been error for the district court to not address an error of law brought to its attention. *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.”)²⁰

Moreover, Instruction No. 29 was prepared for the jury, not the court. The instruction describes a “claim” for interest; but no claim for interest was presented to the jury. The district court need not be instructed on the law; it needs to decide the law. The

¹⁹ *Miller v. Utah Dept. of Transp.*, 2012 UT 54, ¶13, 285 P.3d 1208 (A “trial court may properly refuse to give requested instructions where it does not accurately reflect the law governing the factual situation of the case.”)

²⁰ Sister courts agree that “a reviewing court is not bound by an erroneous stipulation as to a conclusion of law which is not a stipulation of fact.” *See, e.g., Valdez v. Taylor Automobile Co.*, 129 Cal.App.2d 810, 278 P.2d 91 (Cal.App. 1954). It makes no sense to require that a court enforce stipulated errors of law when that same court is not required to ensure that a jury enforce stipulated errors of law.

parties stipulated to removing numerous questions related to interest from the jury and reserved them for the court.

Further, the parties contemplated a 10% rate of interest based on the anticipated facts to be presented at trial. The jury had yet to find any facts when the instruction was withdrawn.

Lastly, even if the parties stipulated to a 10% interest rate under §15-1-1, the district court was required to revisit that if it later appeared to be legal error, as a trial court never has discretion to commit an error of law. *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.”)

Therefore, the district court acted within its discretion by considering the applicable and appropriate rate of interest in this case after the withdrawal of Jury Instruction No. 29, regardless of whether the interest rate was stipulated or not.

C. In the Alternative, the District Court Correctly Reformed the Stipulation, Which was Based on the Parties’ Mutual Mistake as to the Rate of Interest.

In the alternative and based on the foregoing, the parties’ stipulation to withdraw Jury Instruction No. 29 was based on a mutual mistake that the prejudgment interest rate was stipulated at 10% and that this was the appropriate prejudgment interest rate. Utah law is clear that “[a] mutual mistake of fact can provide the basis for equitable rescission or reformation of a contract even when the contract appears on its face to be a complete and binding integrated agreement.” *Burningham v. Westgate Resorts, Ltd.*, 2013 UT App 244, ¶ 12, 317 P.3d 445 (emphasis added) (citation and internal quotation marks

omitted). “A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain,” *id.* (citation and internal quotation marks omitted), and subsequently fail to reduce their actual intent to writing, *FDIC v. Taylor*, 2011 UT App 416, ¶ 47, 267 P.3d 949. *See also Peterson v. Coca-Cola USA*, 2002 UT 42, ¶ 19, 48 P.3d 941 (noting that mutual mistake “warrants the reformation” of a contract where, among other things, “the instrument as made failed to conform to what the parties intended” (citation and internal quotations omitted)).

The parties here stipulated to withdrawing Jury Instruction No. 29 consistent with *Fell*. That case makes clear that loss of property will be remedied by damages, to which prejudgment interest will be added if the amount of damages can be mathematically fixed as of a certain date. *Fell*, at 88 P.3d 1003, 1007. If and when those conditions are met, interest may be calculated at the “legal rate.” *Id.* At the time of *Fell*, the legal rate was set by statute at 8% for all claims, unless the parties to a contract set it at another rate.²¹

At the point that Jury Instruction No. 29 was withdrawn, there was no agreement about the amount of damages, from what date interest might accrue, or the applicable rate of interest - all aspects of the interest calculation that were as yet undetermined.

Where a mutual mistake is alleged, the court may consider parol evidence. *See, e.g., Kendall Insurance v. R&R Inc.* 189 P.3d 114, 2008 UT App 235, ¶16 (affirming equitable rescission of an integrated, written contract based on mutual mistake of fact). That’s exactly what the district court did here; it went beyond the oral agreement to

²¹ *See* n.6, *infra*, for the text of the statute in effect at the time of *Fell*.

withdraw Jury Instruction No. 29 and looked (repeatedly) at the record of the parties' statements leading up and culminating in the withdrawal. *See, e.g.*, R. 1973:1, 3, 7. Upon realizing the parties' disagreement, and reviewing both the record and the parties arguments about the bases for and the scope of the stipulation, the district court correctly decided that the interest rate was not stipulated.

The district court summarized the circumstances in its January 6, 2015 decision. It later vacated the parts of that decision that might question whether interest would be awarded, but it did not vacate the decision in its entirety. Questions about the amount, including the rate, lingered. The following January 29, 2015 excerpt describes the parts of the district court's previous decision which were modified and which were undisturbed:

"...[Western States] did not stipulate to an absolute award of any prejudgment interest that [the Fullers] requested. Rather, in withdrawing the jury instruction on that issue, the parties agreed that the [c]ourt should make the final determination regarding prejudgment interest after the conclusion of the trial and add that amount to the final judgment." R. 1796. "In order to determine ...what the amount of interest is, ...[and] [g]iven the parties' agreement that the [c]ourt should make the final determination of prejudgment interest, I believe that further briefing on the prejudgment issue would be appropriate." *Id.*

After the parties provided supplemental briefing, the district court explained its views of the briefs at the start of additional argument, in order to elicit clarification from the parties:

"I'm going to stick by my preliminary ruling that there was a stipulation as to the entitlement of prejudgment interest, and that it was based on that stipulation that Mr. Christiansen withdrew [I]nstruction 29. That leaves, though, the question of the calculation, and I had said in chambers on the record, to the extent anything in my memorandum decision is inconsistent with that ruling or this ruling, I'm vacating that portion of the memorandum decision."

R.1973:12. The court then heard the parties' additional argument, and decided the interest rate question later the same day:

"I have spent some more time considering the question of the appropriate rate in this matter, and re-reviewed some of the authorities. I am convinced that the post judgment rate is appropriate, not the 10 percent rate in this matter."

R.1973:20.

In sum, the district court's decisions to reconsider the appropriate interest rate and to apply the post-judgment rate may be affirmed as a reformation of the stipulation to withdraw the instruction as to the interest rate, which had been based on a mutual mistake regarding the scope of the stipulation and was also an error of law.

The Fullers' appeal can and should be denied on this alternative ground.

D. Any Error Regarding the Stipulation to Withdraw Jury Instruction No. 29 Was Invited By the Fullers.

The district court's statement that "the amount is fine" is not appealable, as it was not part of any order of the court; it was an ambiguous remark of the court, at most. In addition, any error regarding the withdrawal of Jury Instruction No. 29 results from ambiguity sanctioned or unquestioned by the Fullers, and any resulting error was therefore invited.

The parties (and the court) agreed that not all questions related to interest were stipulated away; the date of accrual was always in question. *Compare* R.1805-06; and R.1840. In addition, at the time of the stipulation, neither liability nor an amount of damages were resolved. R.1969:68-73. While the Fullers apparently thought the interest rate was settled, their understanding was singular and not shared by others. When the

district court reviewed the record, the withdrawal of Jury Instruction No. 29 was premised only on the award of interest, not on a particular calculation of interest.²²

The Fullers effectively seek to appeal the district court's isolated comments in an effort to justify reversal – in particular, by referencing the court's remark "the amount" as "fine." Appt. Brief at 22, 26. Such statements are not appealable, as they only guided the parties' arguments. A similar situation was address in *Braun v. Nevada Chemicals, Inc.*, 2010 UT App 188, 236 P.3d 176. Braun, upon hearing that the court was leaning against his position and considering dismissal of his complaint with prejudice, willingly withdrew his complaint to avoid that outcome and refile under an alternative theory. *Id.*, at ¶14. Braun later argued that the court's comments before his withdrawal showed that the court had decided against him, and that withdrawal was simply the efficient means to an appealable end. *Id.*, at ¶14.

The Court of Appeals distinguished a court's comments from an appealable action:

"[B]y withdrawing his ... complaint in order to avoid the risk of a dismissal with prejudice, [Braun] failed to obtain a ruling from the trial court that he could challenge on appeal. The judge expressed her preliminary opinion of Defendants' motion to dismiss, but she did not grant or deny the motion. Comments such as those by the trial judge here are useful to guide counsel's argument, are entirely appropriate, and are not appealable. " [T]he law is well settled ... that the statements made by a trial judge are not the judgment of the case and it is only the signed judgment that prevails.... [No order of the court] dismissed the complaint; Plaintiff withdrew it."

²² "...[T]here was a stipulation as to the entitlement of prejudgment interest, and that it was based on that stipulation that Mr. Christiansen withdrew Instruction No. 29. That leaves, though, the question of the calculation...." R.1973:12.

Braun, ¶14, citing *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978) (affirming the district court's written, signed ruling even though it differed from that court's prior oral ruling)."

Here, the Fullers agreed to withdraw Jury Instruction No. 29. That did not prevent the Fullers from presenting their evidence or argument to the jury or the court, before, during, or after the trial. The court's statement that "the amount is fine" can relate to several aspects of the discussions about the Special Verdict form, the multiple considerations about prejudgment interest, or both. Under *Braun*, the district court's statement that "the amount is fine" does not constitute an order of any sort and is not appealable. Only the district court's enforcement of the stipulation to withdraw may be appealable, and the scope of that stipulation is not shown by the court's ambiguous remark (which was only one statement among many on the interrelated subjects discussed at the time).²³

The only thing that the stipulated withdrawal accomplished was to concede that prejudgment interest was to be calculated by Judge Himonas if the jury awarded property damages. Nothing less, nothing more.

Finally, any error in enforcing the stipulation was occasioned by the Fullers' express agreement to withdraw Jury Instruction No. 29 without clarifying the scope of its agreement. It is undisputed that the subsequent determination of the date of accrual was left to the judge, and the Fullers should not now be allowed to reimagine the discussions to suggest that nothing was left to be determined. "[A] party cannot take advantage of an error committed at trial when that party led the trial court into committing the error."

²³ R. 1973:68-74.

Braun at ¶15, quoting *Pratt v. Nelson*, 2007 UT 41, ¶ 17, 164 P.3d 366. Any ambiguity in the scope of the parties' stipulation should bear on the party seeking relief—the Fullers.

Any error regarding the scope of the stipulation was invited by the Fullers and this Court should therefore affirm the district court's appropriately discretionary decision concerning the scope of such stipulation.

E. The Fullers' Accusation of a "Bait and Switch" is a Baseless Tactic Not Permitted by the U.R.A.P. and Should Be Struck From the Appeal and/or Disregarded.

The Fullers inappropriately accuse Western States of a "bait and switch approach" regarding the withdrawal of Jury Instruction No. 29. Appts. Brief at 24, n.4; 49 (calling it a "litigation tactic" and "legal maneuvering.") This desperate approach asserting that Western States engaged in a deliberate, preconceived strategy is wholly without merit and should be stricken from the record. Should the Court entertain such a statement, it amounts to a claim of fraudulent inducement.²⁴ Western States categorically denies making any false statement about the stipulation to withdraw, about the interest rate, or about any other issue in this case. The record does not reflect any false representations and shows that that no inducement was intended nor was one suffered.

²⁴ See, e.g., *Daines v. Vincent*, 190 P.3d 1269, 2008 UT 51, ¶ 38 (stating that a claim of fraudulent inducement requires "clear and convincing evidence" establishing eight elements "with particularity," including but not limited to evidence of a knowing (or reckless) false representation regarding a "presently existing material fact" that was made while "knowing that there was insufficient knowledge upon which to base such a representation.") In addition to not making a false statement of fact with knowledge, the Fullers knew far more of the existing facts that they intended to present than did Western States.

Further, any such insinuations would equally apply to the district court, which made considerable efforts to repeatedly review the record in fairness to both parties and shared Western States' view that the rate of interest was not stipulated. The Fullers were as aware of the facts and law related to their claims as anyone involved in this matter. Unless the Fullers suggest that Western States' good faith efforts, representations, and arguments were part of some grander conspiracy with the district court to deprive the Fullers of prejudgment interest, the Fullers' insinuations amount to sour grapes at best, and scandalous at worst.²⁵ As in *Peters*, in support of these allegations Fullers' counsel offers nothing beyond the fact that the errors were made. Western States respectfully suggests that this Court strike such defamatory and offensive statements from the record.

²⁵ See, e.g. *Peters v. Pine Meadow Ranch Home Ass'n*, 2007 UT 2, ¶¶ 7-10, 151 P.3d 962 (striking appellants' briefs which made unfounded accusations about motive rather than mere error as scandalous and imposing sanctions and attorneys' fees on appellant's counsel) ("[Appellant's] counsel was fully entitled to note the factual error made by the court of appeals.... Indeed, it was his obligation as an advocate to do so. So, too, was it fully appropriate for counsel to assert that the court of appeals had incorrectly interpreted [a] case. ...[A]ddress[ing] errors of fact and law is the very purpose of the appellate process. ...[But] [t]here is a light year's difference between an innocent mistake of fact or law and the intentional fabrication of evidence or the intentional misstatement of a holding... Counsel's unfounded accusations ...are scandalous in that they are defamatory and offensive to propriety. ...[Counsel has claimed] that these errors were intentional and the result of improper motives. In support of these accusations, counsel offers nothing beyond the fact that the errors were made.")

F. Western States Preserved Its Arguments About the Applicable Interest Rate and the District Court's Decision Was Within Its Discretion.

Western States appropriately preserved its arguments about the scope of the stipulation to withdraw Jury Instruction No. 29, and is therefore not estopped from addressing the applicable interest rate.

The Fullers misunderstand and/or misapply controlling case law addressing stipulations. Even though “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,’”²⁶ the stipulation analysis here is not complete, because the scope of the stipulation itself is at issue.

The circumstances here limit the scope of the stipulation, which necessarily affects whether or not the district court acted within its discretion when enforcing the stipulation. In the cases cited by the Fullers, stipulations were negotiated at length and placed in writing by the parties as to specific facts. Most critical to the Court's analysis, the *Prinsburg* court declined to address his claims because “he failed to preserve these issues for appeal when it stipulated to their resolution and did not subsequently ask the district court to limit or modify the judgment resulting therefrom.” *Prinsburg* at ¶12 (citation omitted).

²⁶ *Prinsburg* at ¶14, citing *Amoss v. Bennion*, 517 P.2d 1008, 1009-10 (Utah 1973); see also *Redev. Agency v. Tanner*, 740 P.2d 1296, 1299-1300 (Utah 1987) (concluding that the parties' stipulations precluded “future determination” of the issues contained therein).

Here, not only was the stipulation to withdraw done orally, it also undisputedly left some determinations to the court: Western States expressly asked the district court to limit or modify the judgment requested by the Fullers, and made that request based on the disputed scope of the stipulation. R.1799-1811. When Fullers moved for an award of 10% interest on the full judgment, Western States objected to the amount, the date for commencing interest, and the interest rate.²⁷ A court may exercise its discretion to set aside a stipulation under certain conditions. *Prinsburg* at ¶14, quoting *Yeargin, Inc. v. Auditing Div. of Utah State Tax Com'n*, 2001 UT 11, ¶21, 20 P.3d 287. The party seeking relief must request it from the court by a timely filed motion and show that it should be set aside for justifiable cause.

That is exactly what Western States' objection to the Fullers' motion for prejudgment interest at 10% served to do. It did not request relief from a stipulation of agreed scope; it questioned the scope of the stipulation.²⁸

²⁷ Western States also contested whether the award of interest was conceded. Upon review of the record by the district court, Western States abandoned that argument and does not raise it here.

²⁸ *Prinsburg* also notes that stipulations signed by counsel and filed for the court are rarely if ever inadvertent. *Id.*, at ¶14. In this case, the agreement was oral and under the pressure of trial. The parties also agree that enforcement of a stipulation is reviewed for abuse of discretion. *Prinsburg*, at ¶10 and n.8. A decision within the discretion of the district court will only be reversed "if there is no reasonable basis for that decision." *Johnston v. Labor Comm'n*, 307 P.3d 615, 620 (stating the trial court standards for abuse of discretion and applying them to administrative proceedings). If a reasonable basis is apparent from the record, the decision will stand. *Id.* "...[T]he trial court may properly refuse to give requested instructions where it does not accurately reflect the law governing the factual situation of the case." *Miller v. Utah Dept. of Transp.*, 2012 UT 54, ¶13, 285 P.3d 1208. In addition, a district court is effectively required to address an error of law brought to its attention, as legal error is reversible error. *See Wilson v. IHC Hospitals, Inc.*, 2012 UT

Western States therefore preserved its arguments as to the scope of the oral stipulation and, under *Prinsburg*, the stipulation to withdraw Jury Instruction No. 29 did not preclude further discussion of prejudgment interest. The district court's decision to revisit the interest rate was appropriate because Western States expressly brought the scope of the stipulation to its attention. Western States' objection to the Motion for Judgment did not seek relief from a stipulation; it showed that the oral stipulation was ambiguous (and/or based upon a mutual mistake).²⁹ Accordingly, Western States preserved those questions, and the Fullers' request to estop Western States from re-asserting its preserved arguments should be denied.

CONCLUSION

Western States respectfully requests that the Court affirm the district court's decision to award prejudgment interest at the post-judgment interest rate set by §15-1-4 as within its discretion and decide that any other bases for reversal are without merit.

In addition, the Court should award Western States' costs and reasonable attorney fees related to defending this appeal because it was the prevailing party on the issue of the appropriate interest rate in the court below.

43, ¶ 52 n.15, 289 P.3d 369 ("A trial court abuses its discretion if it commits legal error.")

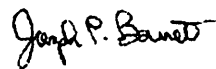
²⁹ This was not some ploy by Western States to lay an elaborate trap for the Fullers. To the contrary, both parties and the court were silent about the date of commencement, as well as about the interest rate. It is inarguable that failure to bring up the date of accrual was not a stipulation to a particular date. It was simply left for later determination by the district court based on the evidence and arguments of the parties. The same applies to the applicable interest rate.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 13,604 words, excluding the Table of Authorities and Addendum as exempted by Utah R. App. P. 24(f)(1)(B). Also, the Brief of Appellees complies with the typeface requirements of Utah Rules of Appellate Procedure 72(b) because it has been prepared using Microsoft Word, Times New Roman, size 13 font.

DATED: December 30, 2015.

BARRETT LAW, P.C.



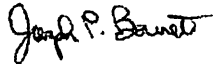
Joseph P. Barrett
Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2015, I caused to be served by email, a true and correct copy of the foregoing **APPELLEES' BRIEF** to the following:

Clerk of the Utah Court of Appeals
450 South State Street
Salt Lake City, UT 84114
courtofappeals@utcourts.gov

Stephen K. Christensen (6512)
CHRISTIANSEN LAW, PLLC
311 South State Street, Suite 250
Salt Lake City, Utah 84111
Telephone: (801) 716-7016
Facsimile: (801) 716-7017
steve@skclawfirm.com
Attorney for Appellants



Joseph P. Barrett

Tab 1

Addendum Exhibit 1:
***Wing v. Gillis*, No. 12- 4071**
(10th Cir. May 21, 2013)
(unpublished)

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

May 21, 2013

Elisabeth A. Shumaker
Clerk of Court

ROBERT G. WING, Receiver for
VesCor Capital Corporation,

Plaintiff-Appellee,

v.

BRUCE S. GILLIS, individually and as
trustee of the Bruce S. Gillis MD MPH
Inc. Pension Trust and as trustee of the
Cloud Nine Aviation LLC Retirement
Trust,

Defendant-Appellant.

Nos. 12-4071 & 12-4121
(D.C. No. 2:09-CV-00314-DB)
(D. Utah)

ORDER AND JUDGMENT*

Before **LUCERO**, Circuit Judge, **PORFILIO**, Senior Circuit Judge, and
TYMKOVICH, Circuit Judge.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Bruce S. Gillis, trustee for the Bruce S. Gillis MD MPH Inc. Pension Trust and the Cloud Nine Aviation LLC Retirement Trust (Trusts),¹ appeals from district court orders granting summary judgment and awarding prejudgment interest to Robert G. Wing, Receiver for VesCor Capital Corporation (Receiver). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

Val Southwick operated VesCor and a complex network of corporations and limited liability companies as a Ponzi scheme.² Together, the Trusts, who were some of the earlier investors in VesCor, purchased over \$2.5 million worth of securities from VesCor and received, over time, a return from VesCor of more than \$582,000 on their investments. In August 2006, Dr. Gillis sold the MPH Pension Trust's interest in a VesCor project to Steven Shapiro for \$1.24 million (Shapiro Transaction). Three months later, Mr. Shapiro sued Dr. Gillis and the Trusts and Mr. Southwick in Nevada state court. In 2011, Mr. Shapiro and Dr. Gillis and the Trusts entered into a settlement, extinguishing all claims Mr. Shapiro had against Dr. Gillis and the Trusts.

¹ Upon stipulation of the parties, the district court dismissed Dr. Gillis, individually, from the litigation.

² "A Ponzi scheme is a fraudulent investment scheme in which 'profits' to investors are not created by the success of the underlying business venture but instead are derived fraudulently from the capital contributions of other investors." *Sender v. Buchanan (In re Hedged-Investments Assocs., Inc.)*, 84 F.3d 1281, 1282 n.1 (10th Cir. 1996).

In the meantime, on February 6, 2008, the United States Securities and Exchange Commission (SEC) filed suit against Mr. Southwick and VesCor alleging violations of securities laws.³ On May 5, the district court appointed the Receiver for VesCor. The Receiver filed many lawsuits against VesCor investors to recover fraudulent transfers in order to distribute money to later investors. He filed this suit on April 9, 2009, asserting a claim for fraudulent transfers based on payments by VesCor to the Trusts in excess of the amounts invested by them.

The parties filed cross motions for summary judgment. The district court granted the Receiver's motion and denied the Trusts' motion. After noting that the Trusts did not challenge the Receiver's assertion that VesCor operated as a Ponzi scheme, the court decided that "the investment returns VesCor paid to the Trusts were fraudulent transfers" and thus the amounts received by the Trusts exceeding their investments must be returned. Aplt. App. at 70. Also, the court decided as a matter of law that it had jurisdiction over the Trusts' property located in California, that California law did not exempt the property from execution, and that the Trusts should be treated the same as other VesCor investors. Lastly, the court decided that MPH Pension Trust was not entitled to offset its liability to the receivership by the amount paid by Mr. Shapiro. The court's judgment ordered the Trusts to return the

³ On March 31, 2008, in a separate action in Utah state court, Mr. Southwick pleaded guilty to several counts of securities fraud and was sentenced to prison.

amounts they made to the receivership estate. MPH Pension Trust was ordered to return \$1,788,667.66, and Cloud Nine Trust was ordered to return \$33,939.94.

After judgment was entered, the Receiver moved to amend the judgment to include prejudgment interest. The court awarded interest at 5% beginning February 6, 2008, the date the SEC filed its underlying lawsuit against VesCor. The court modified its judgment against MPH Pension Trust to \$2,330,105.88 and against Cloud Nine Trust to \$44,213.72. The Trusts appeal both the grant of summary judgment and the award of prejudgment interest.

ANALYSIS

I

We review the district court's summary judgment order de novo, and in doing so, we apply the same standard used by the district court. *Llewellyn v. Allstate Home Loans, Inc.*, 711 F.3d 1173, 1178 (10th Cir. 2013). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A

The Trusts admit that legal authority supports the district court's decision to treat them like other investors and to require them to return the amounts they received in excess of their investment. *See Donell v. Kowell*, 533 F.3d 762, 770 (9th Cir. 2008) ("[T]he general rule is that to the extent innocent investors have received payments in excess of the amounts of principal that they originally invested,

those payments are avoidable as fraudulent transfers.”); *Scholes v. Lehmann*, 56 F.3d 750, 757-58 (7th Cir. 1995) (same). But they present various arguments in an attempt to distinguish themselves from other investors. They argue that the district court erred in not estopping the Receiver from abrogating an October 2004 agreement between VesCor and the Utah Division of Securities requiring VesCor to repay principal and interest to all investors, including the Trusts. The Trusts maintain that there is no authority requiring early investors, such as themselves, to return money to a receiver for distribution to later investors when the government did not adequately supervise the conduct of the organization engaged in the Ponzi scheme.

Additionally, the Trusts assert that the equities balance in their favor, because the creditors represented by the Receiver knew at least as much about VesCor as the Trusts’ beneficiaries knew and because the Trusts paid monies to retiree beneficiaries and any recovery by the Receiver will harm other beneficiaries who are counting on current Trust assets to fund their retirements.

“It is generally recognized that the district court has broad powers and wide discretion to determine relief in an equity receivership.” *SEC v. VesCor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (internal quotation marks and ellipsis omitted). “The basis for broad deference to the district court’s supervisory role in equity receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions,” and “a primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for

the benefit of the creditors.” *SEC v. Hardy*, 803 F.2d 1034, 1037-38 (9th Cir. 1986). The district court, however, abuses its discretion and is not entitled to deference when its decision is “arbitrary, capricious, whimsical, or manifestly unreasonable.” *Estate of Bishop v. Equinox Int’l Corp.*, 256 F.3d 1050, 1055 (10th Cir. 2001) (internal quotation marks omitted).

Upon consideration of the Trusts’ arguments, we conclude that the district court did not abuse its discretion in treating the Trusts the same as other VesCor investors. Other investors were covered by the 2004 agreement between VesCor and the Utah Division of Securities, and there is no indication that those investors were treated differently than the district court treated the Trusts. *Cf. VesCor Capital*, 599 F.3d at 1194 (noting district court seeks to equitably distribute assets). Furthermore, there is no indication apart from the Trust’s conclusory assertion that the Utah Division of Securities failed to properly supervise VesCor. Nor is there any indication what other investors knew about the VesCor Ponzi scheme. While retirees covered under the Trusts may be adversely affected, we have recognized that not everyone will like an equitable plan. *See VesCor Capital*, 599 F.3d at 1195; *see also Donell*, 533 F.3d at 776 (“We are aware that it may create a significant hardship when an innocent investor . . . is informed that he must disgorge profits he earned innocently, often years after the money has been received and spent.”).

Accordingly, we conclude that the district court correctly decided that the monies given to the Trusts in excess of their original investments were fraudulent

transfers, and the differences between the original investments and the amounts received must be returned. *See Donell*, 533 F.3d at 772 (requiring investors to return fictitious profits as fraudulent transfers, when investor receives more than amount invested); *Scholes*, 56 F.3d at 757-58 (reaching similar decision in Ponzi case).

B

Next, the Trusts argue that the district court erred by including the Shapiro Transaction in its calculation of damages. According to the Trusts, the \$1.24 million the MPH Pension Trust received when it sold part of its interests in VesCor to Mr. Shapiro should not be part of the Receiver's calculations because Mr. Shapiro filed a lawsuit against the Trust and Dr. Gillis to recover that money. Since that case settled, the Trust contends that the Receiver has no standing to raise the issue for Mr. Shapiro and the \$1.24 million should not be part of the damages calculation.⁴

⁴ The terms of the settlement are not disclosed. At a hearing on the summary-judgment motion, the Trusts' counsel stated that "money has been paid by the pensions to Steven Shapiro to satisfy claims that were brought in" the Nevada court. Aplt. App. at 46. The Trusts' counsel later admitted he did not know the exact amount agreed upon to settle the Nevada lawsuit, but he knew it was not \$1.24 million. *Id.* at 48. Also, the Receiver's counsel was unaware of the dollar amount paid back to Mr. Shapiro, but counsel understood that the amount was "de minimis." *Id.* at 49. On appeal, the Receiver indicates that he "is willing to decrease the amount of the receivership's recovery against the Trusts by the amount actually returned to Mr. Shapiro" as part of the settlement. Aplee. Br. at 12; *see* Aplt. App. at 49 (indicating that if Trusts paid back money to Mr. Shapiro, Receiver would give offset to Trusts and decrease claim Mr. Shapiro has against receivership). But "the Trusts did not disclose [in the district court] the amount of the settlement, and have not given the Receiver that information since then." Aplee. Br. at 12. Nor was the amount disclosed in the Trusts' appellate briefs.

(continued)

Even without the settlement, the Trusts argue that the Shapiro Transaction is not part of this case because it would be subject to double liability through Mr. Shapiro's Nevada lawsuit and this lawsuit.

In considering the Shapiro Transaction, the district court determined as follows:

MPH . . . reduced the amount of its investment when it assigned part of its investment to Mr. Shapiro in exchange for a payment of \$1,240,000.00. This assignment to Shapiro reduced the amount of MPH's investment, and consequently reduces the amount by which MPH can be deemed to have given reasonable equivalent value in exchange for the payments received. After assigning the claim to Shapiro, MPH's investment in VesCor (and therefore its offset) is reduced

Aplt. App. at 74. In effect, the court treated the \$1.24 million as a payment in excess of the Trusts' investment.

We cannot conclude that the district court abused its discretion. When MPH Pension Trust transferred ownership in part of its investment to Mr. Shapiro, it no longer had the investment and could not use it as an offset against the Receiver's fraudulent transfer claim. Thus, the \$1.24 million effectively was a return on the Trust's original investment, and the district court properly required MPH Pension Trust to return to VesCor the \$1.24 million the MPH Pension Trust received from Mr. Shapiro.

The parties dispute whether Dr. Gillis was aware of the Ponzi scheme at the time he sold interests in VesCor to Mr. Shapiro. *See* Aplt. App. at 46. The Trusts' counsel indicated that Mr. Southwick entered into a separate transaction with Mr. Shapiro creating liability by VesCor to Mr. Shapiro. *See id.* at 52.

C

The Trusts argue that the district court erred in finding that their assets were not exempt under Cal. C.C.P. 704.115(b), which provides that assets of qualified retirement plans are exempt from creditors.⁵ Like the district court, we disagree with the Trusts' interpretation of this statute. When, as is true here, claims are against the Trusts themselves, not the Trusts' beneficiaries, the statute does not exempt the Trusts' assets from the Receiver's claims. See *In re Rucker (Cunning v. Rucker)*, 570 F.3d 1155, 1160 (9th Cir. 2009) (stating that "purpose of [§ 704.115(b)] exemption is to permit a judgment debtor to place funds beyond the reach of creditors, so long as they qualify for the exemption under the law" (internal quotation marks omitted)). Thus, the district court did not err in refusing to exempt the Trusts' assets from the Receiver's fraudulent transfer claim.

D

Next, the Trusts argue that the district court erred in deciding the Receiver had jurisdiction over their assets located in California. As is required by 28 U.S.C. § 754,⁶ the Receiver filed copies of the complaint and the order of appointment of a

⁵ Section 704.115(b) provides that "[a]ll amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt."

⁶ Section 754 provides:

A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall . . .

(continued)

receiver in the proper California federal district court in order to obtain jurisdiction over the California assets. The Trusts contend, however, that because the California case was closed in March 2010, there is no pending California case or controversy giving the Receiver jurisdiction over the assets. But § 754 does not require a case to be pending in California; it requires only that the complaint and order of appointment be filed in the California court in order for the Utah court to exercise jurisdiction over the assets located in California. Thus, we conclude the district court did not abuse its discretion in deciding it has jurisdiction over the California assets.

II

The Trusts argue that the district court erred in awarding prejudgment interest because the court made no finding that the Trusts engaged in misconduct. Also, they argue that the court erred in awarding prejudgment interest because VesCor made payments to the Trusts at the direction of the Utah Division of Securities, which allegedly failed to supervise VesCor's and Mr. Southwick's activities as they continued to engage in fraudulent activity. Even if the court properly awarded

be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

....

Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

prejudgment interest, the Trusts contend that the court erred in awarding interest at a rate of 5%, rather than at the post-judgment interest rate set by 28 U.S.C. § 1961.

Finally, the Trusts argue that any award of interest should accrue from April 9, 2009, the date the Receiver filed this lawsuit, not from February 6, 2008, the date the SEC filed its underlying lawsuit against VesCor.

We conclude the district court did not abuse its discretion in awarding prejudgment interest. *Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063, 1073 (10th Cir. 2008) (“An award of prejudgment interest is within the district court’s discretion.” (internal quotation marks omitted)). Without the award, the Trusts effectively would have benefited from an interest-free loan of the amount in excess of their investments. *See William A. Graham Co. v. Haughey*, 646 F.3d 138, 145 (3d Cir. 2011) (“Requiring only that a losing defendant pay back the principle amount of a wrongfully obtained sum permits him to retain the money’s time value as a windfall in the form of an interest-free loan.”). In other words, the award of prejudgment interest compensates for the loss of use of the money. *See Donell*, 533 F.3d at 772; *Morrison Knudsen*, 532 F.3d at 1073. Under fairness and equity principles, prejudgment interest was proper. *See Morrison Knudsen*, 532 F.3d at 1075.

Having decided that the district court did not abuse its discretion in awarding prejudgment interest, we next consider whether the court abused its discretion in selecting a 5% rate of interest. *See SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450,

1476 (2d Cir. 1996) (reviewing rate of interest for abuse of discretion). The parties concede that there is no federal statute setting forth an appropriate rate of prejudgment interest. Although the Trusts assert that § 1961 provides the appropriate rate, § 1961 “applies to post-judgment interest, and the district court was not bound by its strictures. Many circuits have held that courts are not required to use section 1961 in calculating prejudgment interest and that the calculation rests firmly within the sound discretion of the trial court.” *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1287 (10th Cir. 2002). In this case, the district court chose an interest rate that was mid-way between the interest rates proposed by the parties. Under the circumstances, we cannot say that the district court abused its discretion in selecting a 5% rate of interest.

Lastly, the Trusts also challenge the district court’s decision to award prejudgment interest from the date the SEC filed suit against Mr. Southwick and VesCor instead of from the date the Receiver filed this lawsuit. The court could have selected that date, or the court could have awarded prejudgment interest from an earlier date when a transfer was made, *see, e.g., Donell*, 533 F.3d at 772. Instead, the court picked a date in the middle of those dates. We defer to the district court’s determination and conclude the court did not abuse its discretion in choosing the date the SEC filed suit against VesCor and Mr. Southwick.

CONCLUSION

The judgment of the district court is affirmed.⁷

Entered for the Court

John C. Porfilio
Senior Circuit Judge

⁷ We remind the Receiver of his duty to cite to the district court record. *See* Fed. R. App. P. 28(b) (referring to Fed. R. App. P. 28(a)(9)(A)), which requires citations to parts of record relied upon).