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COLORADO COURT OF APPEALS
Opinion by Grove, J., Dailey and Welling, J.J., concurring
Case No. 19CA1243

BOULDER COUNTY DISTRICT COURT
Honorable Nancy W. Salomone, Judge
Case No. 11CV912

Petitioner: FORD MOTOR COMPANY

v.

Respondent: FORREST WALKER

▲ **COURT USE ONLY** ▲

Case No. 20SC947

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BRIEF OF AMICUS CURIAE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of Colo. App. R. 29, 32, and 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in Colo. App. R. 53(g).

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colo. App. R. 29, 32, and 53.

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INTERESTS OF AMICUS CURIAE

Founded in 1986, the American Tort Reform Association (ATRA) is a national, nonpartisan, nonprofit coalition of large and small businesses, trade associations, and professional firms. ATRA is dedicated to improving the civil justice system, with a focus on promoting fairness, balance, efficiency and predictability in civil litigation. In addition to legislative efforts and public education outreach, for more than two decades ATRA has filed *amicus curiae* briefs in cases that have addressed important civil justice issues.

Statutes providing for pre-judgment and post-judgment interest are prominent among the matters ATRA regularly addresses. ATRA frequently engages in efforts, including legislative actions and public discussion, to ensure that pre-judgment and post-judgment interest practices fulfill their core purpose of accounting for the time value of money and do not become vehicles for windfall recoveries.

If left unreviewed, the Colorado Court of Appeals' decision in *Walker* will establish an irrational financial penalty on civil defendants who appeal adverse verdicts and are successful in that effort. ATRA's members are committed to developing the law, but the *Walker* determination that a judgment debtor must pay

pre-judgment interest at a high fixed rate during the pendency of appeals that correct erroneous trial court action will substantially burden and disincentivize those efforts.

INTRODUCTION

C.R.S. § 13-21-101 has more stitchwork than Frankenstein's monster. The statute was substantially amended in 1982, only to be torched as unconstitutional but resuscitated through judicial re-writing in 1996,[1] then re-built once more by the Court in 2009.[2] After all that, the General Assembly injected the Court's handiwork into the statute.[3] This repeated splicing has distorted the statutory

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[1] *Rodriguez v. Schutt*, 914 P.2d 921, 929-30 (Colo. 1996).

[2] *Sperry v. Field*, 205 P.3d 365, 369-70 (Colo. 2009) (construing statute to avoid applying post-judgment interest from the date of claim accrual, despite the judicially re-written provision stating "post-judgment interest shall be calculated . . . from the date the action accrued."). The Court identified this as "an example of the errors that can occur when we attempt to re-write statutory language." *Id*. at 370.

[3] The General Assembly declared that the 2018 statutory revisions were undertaken "to repeal specific language in a section of statute that was ruled unconstitutional by the Colorado Supreme Court[.]" *See* 2018 Colo. Legis. Serv. Ch. 99 (S.B. 18-098, Section 1).

structure established by the General Assembly and obscured the connections and interplay among its components.[4]

Despite all the splicing and excision that has occurred, the heart of the statute has remained: The purpose of applying variable-rate interest under C.R.S. § 13-21-101 is "to eliminate the financial incentive (or disincentive) to appeal and to ensure that the judgment creditor receives the time value of his or her money judgment,"[5] and this Court has construed C.R.S. § 13-21-101 with the aim of protecting that core consideration.[6] This purpose applies universally to all appeals,

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[4] For example, in the 1982 version of the statute, subsection (1) stated that variable-rate pre-judgment and post-judgment interest "must be calculated" for appealed judgments, specified the trigger date for accrual as "the date the action accrued," but identified no termination date for interest accumulation. Section (2) added details to complete the calculation. Subsection(2)(a) described the full period on which variable-rate interest "is payable" on judgments affirmed on appeal: "from the date the action accrued until satisfaction of the judgment[.]" Subsection (2)(b) provided, for judgments modified or reversed with direction for entry of specific sums, the same variable-rate interest calculation period. The 2018 amendments to comport with *Rodriguez* and *Sperry* were grafted onto the existing 1982 statutory structure, but in doing so for the purpose of comporting with the Court's rulings, the calculation end point was added to Subsection (1), overlapping what was already present in Subsections (2)(a) and (2)(b).

[5] *Sperry*, 205 P.3d at 370.

[6] *Id*. (re-configuring understood operation of the statute so that the calculation of interest "creates no disincentive for the judgment debtor to appeal[.]").

and neither the General Assembly's statements of intent nor this Court have suggested that variable-rate interest should apply only to some subset of cases that judgment debtors appeal.[7]

The Court of Appeals teased from the statute's presently cobbled structure an intent to differentiate fully successful appeals from partially successful or unsuccessful appeals.[8] That conclusion reads into the statute words that simply are not present, while ignoring direct statements shouting from the page. The decision depends on the use of a legal fiction to sweep aside two facts of history that the statute views as traffic signals. In doing so, the Court of Appeals reached a result

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[7] The title of the 1982 amendment establishing the variable-rate interest provision was "An Act Concerning Interest Payable on Appealed Money Judgments in Civil Actions." Act of March 25, 1982, ch. 39, 1982 Colo. Laws 227 (emphasis added). The amendment's effective date provision indicates it "[a]pplies to all appeals filed with the court of appeals or supreme court on or after January 1, 1983." Digest of Bills Enacted by the Fifty-Third General Assembly, 1982 Second Regular Session, at 18-19 (emphasis added). The Court found the statute to have the following rational basis for distinguishing the classes of judgments to which fixed-rate interest and variable-rate interest applies: "their entry or non-entry into the appellate process." *Rodriguez*, 914 P.2d at 927. The Court also described the operation of the interest provisions as depending solely on whether an appeal was filed: "Postjudgment interest on personal injury money judgments which the judgment debtor appeals will accrue at the market-determined rate, while postjudgment interest on personal injury money judgments which the judgment debtor does not appeal will accrue at nine percent." *Id*. at 929 (emphasis added).

[8] *Walker v. Ford Motor Co*., 2020 COA 164, ¶ 9.

that thwarts, rather than supports, the statute's recognized and legitimate policy aim. Under the Court of Appeals' vision, rather than "eliminate any financial incentive or disincentive to appeal," the statute will retroactively burden with high fixed-rate interest some meritorious appeals that correct trial court legal errors and unfair rulings. This ruling deserves the Court's review.

REASONS FOR GRANTING THE PETITION

I. THE PROCEDURAL SEQUENCE PRESENTED IN THIS CASE RECURS AND JUSTIFIES CLARIFICATION OF THE POST-JUDGMENT INTEREST CALCULATION

This lawsuit has followed a procedural cycle that is not unusual for personal injury cases: the trial produces a money judgment for the plaintiff, after which the defendant pursues an appeal that results in reversal of that judgment, with remand for a new trial. Several Colorado personal injury cases have followed this trajectory.[9]

[9] *See*, *e.g.*, *Estate of Ford v. Eicher*, 250 P.3d 262, 265-66, 272 (Colo. 2011) (jury returned verdict in favor of plaintiff in medical malpractice lawsuit, defendant appealed trial court's exclusion of expert opinions, Court of Appeals reversed and remanded for a new trial, Supreme Court affirmed the Court of Appeals); *Reid v. Berkowitz*, 315 P.3d 185, 188, 198 (Colo. App. 2013) (jury awarded plaintiff compensatory damages for injuries experienced in fall on defendant's premises, defendant appealed trial court's refusal to submit comparative fault issue for jury consideration, Court of Appeals reversed and remanded for new trial to consider plaintiff's comparative negligence); *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 982, 990 (Colo. App. 2011) (plaintiff prevailed at trial in nursing home

Because this scenario will certainly occur again in future cases, the Court should grant the petition in order to resolve the Court of Appeals' presently inconsistent directives to trial courts on determining post-judgment interest in this scenario. On the one hand, the Court of Appeals in *Ackerman v. Power Equip. Co*., 881 P.2d 451, 453 (Colo. App. 1994) ruled that "[t]he final paragraph of C.R.S. § 13–21–101 (1)" provides the governing rule in a personal injury case and requires variable-rate postjudgment interest "in the event of an appeal." (emphasis added). On the other hand, in the present case the Court of Appeals held that only when an appellate outcome described in C.R.S. § 13–21–101(2)(a) or (2)(b) occurs will postjudgment interest be calculated at the variable rate.[10] This inconsistency will trouble district courts on remanded cases until this Court clarifies the rule.

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negligence case, defendants appealed on several issues including jury instructions, Court of Appeals reversed and remanded for new trial as to the liability of one of the appealing defendants).

[10] *Walker v. Ford Motor Co*., 2020 COA 164, ¶ 9. To be sure, the court in *Walker* construed the version of C.R.S. § 13–21–101 reflecting the General Assembly's 2018 amendments. As noted above, however, the General Assembly declared those changes were made to address issued addressed by the Court and did not describe an intent to change the categories of cases in which variable-rate postjudgment interest would apply. *See* 2018 Colo. Legis. Serv. Ch. 99 (S.B. 18-098, Section 1).

II. THE COURT OF APPEALS' INTERPRETATION OF C.R.S. § 13–21–101 RELIES ON ILLUSIONS AND PRODUCES A DISTINCTION THAT HAS NO RATIONAL JUSTIFICATION

A court's construction of a statute should be guided by the enactment's legislative purpose. *See Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186, 1189 (Colo. 2010) ("When interpreting a statute, we strive to give effect to the legislative purposes by adopting an interpretation that best effectuates those purposes."). C.R.S. § 13–21–101(1) since 1982 has stated its application of variable-rate interest in universal terms upon fulfillment of a single specified condition: appeal by the judgment debtor. The Court has described the statute's legislative purpose – and its rational basis – as encompassing all judgments appealed:

> The 1982 amendment to section 13-21-101 created the distinction between judgments which the judgment debtor appeals and those which the judgment debtor does not appeal. The General Assembly intended that the amendment, and its market-determined interest rate, apply only to judgments which the judgment debtor appeals.

Rodriguez, 914 P.2d at 928.[11]

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[11] *See also Sperry*, 205 P.3d at 367 ("the distinction between judgments which are appealed and those which are not for purposes of post-judgment interest is permissible.") (citing *Rodriguez*, 205 P.3d at 927-28).

With no carve-outs articulated in the statute itself and no limitations discussed in prior decisions determining the statute's scope and proper purpose, the Court of Appeals' declaration of an exception to the scope of C.R.S. § 13–21–101(1) – identified for the first time nearly four decades after enactment of the variable-rate interest provisions – warrants suspicion. *See Slack v. Farmers Ins. Exch*., 5 P.3d 280, 284 (Colo. 2000) ("The court will not create an exception to a statute that the plain language does not suggest or demand."). In the sunlight of closer examination, the justifications offered by the Court of Appeals for denying application of variable-rate interest to successful appeals crumble.

A. C.R.S. § 13–21–101(2) Cannot Reflect a Legislative Purpose to Limit Variable-Rate Post-Judgment Interest to Certain Categories of Cases Appealed.

The Court of Appeals' holding depends on a signal of legislative intent it infers from the structure of C.R.S. § 13–21–101,[12] but the General Assembly did not build that structure as it now stands. Subsections (2)(a) and (2)(b), as they were crafted by the General Assembly, applied variable-rate interest to both the pre-judgment and post-judgment periods and provided additional detail needed for

[12] *Walker*, 2020 COA 164, ¶ 9 ("the fact that the General Assembly chose to include those subsections [(2)(a) and (2)(b)] demonstrates that it did not intend for postjudgment interest to accrue in every case once an appeal is filed.").

calculating the accumulated interest in certain situations.[13] The overlapping language that now occurs in subsections (1), (2)(a) and (2)(b)[14] exists because the Court's statutory re-writing in *Rodriguez* and *Sperry* has now been incorporated.[15] In other words, the current language in these subsections is the product of two Court rulings that changed the scope and terms of the statute.

To infer a legislative purpose to exclude the application of variable-rate interest to successful appeals producing reversals for new trials to this splicing of judicial re-articulation onto pre-existing statute, as the Court of Appeals has done, invents a scheme where none exists. Further, C.R.S. § 13–21–101(1) has never contained any of the common statutory signals, such as "subject to" or "only as specified," that would be expected if the General Assembly originally did mean to apply variable-rate interest only to appealed cases that did not result in reversals for new trials.[16] The best indication of legislative purpose remains the unlimited

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[13] *See* n. 4, *supra*.

[14] All three subsections now indicate that "postjudgment interest" runs at the rate "set forth [or 'out'] in subsections (3) and (4) of this section" for the period "from the date of judgment through the date of satisfying the judgment[.]"

[15] *See* n. 4, *supra*.

[16] If the interplay between Subsection (1) and Subsection (2) gives rise to any inference of the General Assembly's intent, it should be that no interest at all

language set forth in the enactment's title, reflected in the terms of Subsection (1), and acknowledged by the Court.[17]

B. The Court of Appeals Prioritizes a Legal Fiction Over Historical Facts.

C.R.S. § 13–21–101(1) shifts to variable-rate interest when a specific contingency takes place: the judgment debtor initiates an appeal of a judgment awarding money damages for personal injuries. Once this event happens, there is no way to put the toothpaste back in the tube – the filing of the appeal is an empirical circumstance documented in the court record. The statute provides no

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accumulates during the period of an appeal that produces a reversal and remand for new trial. When the General Assembly created the statute's structure, Subsection (1) declared that pre-judgment and post-judgment interest "must be calculated" using the variable rate, and Subsection (2) set forth the manner of calculating pre-judgment and post-judgment interest for appeals in which the judgment is affirmed (Subsection (2)(a)) and for appeals in which the judgment is modified or reversed with direction for entry of a money judgment (Subsection (2)(b)). *See* n. 4, *supra*. Conspicuously absent is any legislative direction for the manner of calculating pre-judgment and post-judgment interest for appeals that result in vacated judgments. If the legislature described no manner of calculating pre-judgment and post-judgment interest following a successful appeal, the absence of any such provision suggests that pre-judgment or post-judgment interest is recoverable. *See Spahmer v. Gullette*, 113 P.3d 158, 163 (Colo. 2005) ("[W]e will not read a statute to accomplish something the plain language does not suggest[.]").

[17] *See* n. 7, *supra*.

mechanism which would cause the interest calculation to revert back to fixed-rate interest.

Applying the legal fiction that a judgment reversed on appeal ceases to exist, the Court of Appeals held that the first judgment in this case "vanished."[18] Although the legal effect of the original judgment may have disappeared, the statute's touchstone is the presence of an appeal, and the historical fact that an appeal occurred and was litigated over a period of years cannot be wished away. To meet its legislative purpose, C.R.S. § 13–21–101 must be read as concerned with observable facts and not legal fictions. To operate otherwise would re-insert the potential for financial disincentives for judgment debtors to pursue appeals that the statute was designed to erase.[19]

C. The Existence of a Rational Basis for Calculating Post-judgment Interest Using a Variable Rate Depends on Including Successful Appeals Vacating Judgments for New Trials.

The Court in *Rodriguez* determined that the post-judgment interest provision of C.R.S. § 13–21–101 had a rational basis and did not violate equal protection, but

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[18] *Walker*, 2020 COA 164, ¶ 11.

[19] *See Sperry*, 205 P.3d at 370. *See also Rodriguez*, 914 P.2d at 928 (identifying "an intent to neutralize the economic benefits and detriments of appeal under the statutorily set rate of interest.").

the Court reached that finding based on the understanding that the provision did not differentiate among classes of cases appealed.[20] The Court of Appeals' decision creates a new distinction that requires a retroactive change in the calculated rate of interest over the period of the appeal for some, but not all, judgment debtors. But there is no rational basis for treating judgment debtors who successfully appeal and overturn the awards against them less favorably than debtors who pursue only partially successful or utterly unmeritorious appeals. Indeed, that outcome is an upside-down result contrary to the expressed intent of the legislature.[21]

If, as this Court has recognized, the legislature was concerned about removing the financial incentives and disincentives of appeals for both sides, then it follows that the legislature wanted to focus the parties' attention on the merits of the appellate arguments that a case offers.[22] Successful appeals, which right injustices, identify trial court errors, and develop the law, should receive the most

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[20] *See Rodriguez*, 914 P.2d at 927 ("a rational basis in fact distinguishes the classes: their entry or non-entry into the appellate process.").

[21] *See Smith*, 230 P.3d at 1191.

[22] *See*, *e.g.*, *Rodriguez* at 928 (quoting legislative testimony that bill sought to remedy the situation of a defendant "which appeals simply to make money, notwithstanding the fact the appeal may not be a good one.").

favorable treatment. Under the Court of Appeals' view, however, appellate winners become practical losers if the defendant cannot produce a liability reduction on re-trial sufficient to offset additional interest accruing at the higher, fixed prejudgment rate over the years spent litigating the appeal. By burdening some of the very appeals that prove the most valuable to the justice system, the Court of Appeals' interpretation actively undercuts the statute's legislative purpose.

CONCLUSION

The Court should grant the petition for certiorari and review the Court of Appeals' decision de novo review.

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CERTIFICATE OF SERVICE

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