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KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SHEILA ANN RUTHERFORD,

Plaintiff,

v.

CIVIL ACTION NO.: 03-C-2908

OLIVE V. MCCLANAHAN,

Defendants

and

OLIVE V. MCCLANAHAN

Plaintiff,

v.

CIVIL ACTION NO.: 04-C-1931

KANAWHA COUNTY COMMISSION

Defendant.

JUDGMENT ORDER

The trial of this matter commenced on September 15, 2008. The Plaintiff, Sheila Rutherford, appeared in person and by counsel, Tim C. Carrico, Esq. and Rachael S. Carrico, Esq.; the Defendant/Plaintiff, Olive V. McClanahan, appeared in person and by counsel, David A. Mohler and the law firm of Bowles Rice McDavid Graff & Love LLP; and the Defendant, Kanawha County Commission, appeared in person by representative Deputy D. Roush and by counsel, David F. Nelson, Esq.

1. The jury, having heard all of the evidence, instructions of the Court and arguments of counsel, returned its verdict on Monday, September 29, 2008, assessing forty-nine percent (49%) of total negligence against Defendant, Olive McClanahan, and 51% of the total negligence against Defendant, Kanawha County Commission. The jury

assessed damages in favor of the Plaintiff as follows:

Medical Expenses	\$147,000
Loss Wages and Future Loss of Earnings	\$20,000
Pain and Suffering, Past and Future	\$5,000
Loss of Enjoyment of Life, Past and Future	\$0
Loss of Household Services	\$3,000.00

2. The Kanawha County Commission and Olive McClanahan had agreed and stipulated prior to trial that if Ms. McClanahan is found less than 50% at fault, she would collect a liquidated sum of \$12,000 against Kanawha County Commission.

3. It is accordingly **ORDERED** and **ADJUDGED** that Olive McClanahan recover \$12,000.00 from Defendant, Kanawha County Commission. It is further **ORDERED** and **ADJUDGED**, that Olive McClanahan recover post judgment interest on this amount at the statutory rate of interest for the calendar year of 2008, which is 8.25%.

4. Plaintiff, Sheila Ann Rutherford received \$130,000.00 prior to the commencement of the trial in settlements (\$100,000 from Liberty Mutual, Ms. McClanahan's liability carrier on March 10, 2004), and (\$30,000 from the Kanawha County Commission on March 17, 2008). Applying those offsets to the verdict, it is accordingly **ORDERED** that the Plaintiff, Sheila Ann Rutherford receive \$45,000 from Defendant Olive V. McClanahan, on her underinsurance claim.

5. That the Defendant, Olive McClanahan, satisfied this part of the Court's judgment on October 2, 2008, by hand delivering a check in the amount of \$45,000 to Plaintiff, Sheila Rutherford's, counsel.

6. That on November 24, 2008, the Defendant, Olive McClanahan, paid the Plaintiff, Sheila Rutherford, \$22,326.98 toward her prejudgment interest.

7. In addition, on December 16, 2008, the Plaintiff, Sheila Rutherford, by

and through counsel, Tim C. Carrico, Esq., and the Defendant, Olive McClanahan, by and through counsel, David A. Mohler, Esq., appeared for oral argument on Plaintiff Sheila Rutherford's motion for prejudgment interest on her special or liquidated damages.

8. The issues before the Court concerning Plaintiff Sheila Rutherford's motion for prejudgment interest are as follows: (1) whether prejudgment interest is determined based on the entire amount of special damages awarded by the jury to the Plaintiff, Sheila Rutherford, or whether it is determined based on an amount arrived at after applying the \$130,000 pretrial settlement proceeds to the jury verdict; and (2) whether the rate of interest used to calculate the total amount of prejudgment interest is 10%, the statutory rate of interest in effect under W. Va. Code § 56-6-31 for the calendar year in which Plaintiff Sheila Rutherford's cause of action accrued, or 8.25%, the statutory rate of interest in effect for the calendar year of 2008, the year in which the jury rendered a verdict.

9. The Plaintiff, Sheila Rutherford, contends that prejudgment interest must be determined by the Court on the entire amount of her special damages of \$170,000, at the statutory interest of 10%, which was the statutory rate of interest in effect at the time her action accrued on July 13, 2002. She further contends that the period for determining her prejudgment interest should be from July 13, 2002, the date of the subject three car accident, to October 2, 2008, the date that the Defendant, Olive McClanahan, hand delivered a check in the amount of \$45,000 to the Plaintiff's counsel.

10. The Plaintiff, Sheila Rutherford, alleges that the prejudgment interest on \$170,000 based on the foregoing is \$105,819.18.¹

¹ 7/13/02 to 7/12/03: \$17,000
7/13/03 to 7/12/04: \$17,000

11. The Defendant, Olive McClanahan, contends that Plaintiff Sheila Rutherford's prejudgment interest award should be based on a special damage figure arrived at after application of the pretrial settlement proceeds of \$130,000. She contends that the special damages of \$170,000 are 97% of the total verdict of \$175,000. Therefore, she contends that 97% of the amount remaining after the application of the *pro tanto* offset be used to calculate the prejudgment interest amount. The amount remaining after application of the *pro tanto* offset is \$45,000. And, 97% of \$45,000 is \$43,650. The Defendant, Olive McClanahan therefore argues that prejudgment interest should be determined based on a special damage figure of \$43,650.

12. The Defendant, Olive McClanahan, also contends that the statutory rate of interest to be used to determine the total amount of prejudgment interest is 8.25% rather than 10%, as argued by the Plaintiff. It is noted that the statutory rate of interest under W. Va. Code § 56-6-31 for the 2008 calendar year is 8.25%. Using a rate of interest of 8.25% and a special damage figure of \$43,650, the Defendant, Olive McClanahan, therefore contends that Plaintiff Sheila Rutherford's prejudgment interest award should be \$22,326.98. This amount was paid to Plaintiff's counsel on November 24, 2008. Therefore, Defendant Olive McClanahan asserts that the Plaintiff is not entitled to any further prejudgment interest.

13. The applicable law on prejudgment interest is as follows:

a. "Prejudgment interest, according to West Virginia Code § 56-6-31

and the decisions of [the West Virginia Supreme Court of Appeals] interpreting [this]

7/13/04 to 7/12/05:	\$17,000
7/13/05 to 7/12/06:	\$17,000
7/13/06 to 7/12/07:	\$17,000
7/13/07 to 7/12/08:	\$17,000
7/13/08 to 10/2/08 (82 days):	<u>\$3,819.18</u>
Prejudgment Interest on total verdict:	\$105,819.18

statute, is not a cost, but a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned.” Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, 186 W. Va. 583, 413 S.E.2d 404 S.E.2d 404, 408 (W. Va. 1991).

b. That “[u]nder W. Va. Code § 56-6-31, as amended, prejudgment interest on special or liquidated damages is recoverable as a matter of law and must be calculated and added to those damages by the trial court rather than by the jury.” Grove v. Freda, syl. pt. 1, 181 W. Va. 342, 382 S.E.2d 536 (1989).

c. That “[u]nder W. Va. Code § 56-6-31, as amended, prejudgment interest on special or liquidated damages is calculated from the date on which the cause of action accrued, which in a personal injury action is, ordinarily, when the injury is inflicted.” Id. at syl. pt. 2.

d. “By providing in W. Va. Code § 56-6-31 [1981] that prejudgment interest on special or liquidated damages is to be computed from the date the cause of action accrued, the legislature implicitly decided to avoid the complications inherent in calculating prejudgment interest on each element of special or liquidated damages from the respective dates on which each element was incurred. ‘We recognize that damages are typically incurred intermittently throughout the prejudgment period....[para.] [A] system which would force litigants to determine precisely when each element of a plaintiff’s damage award was incurred would impose an onerous burden on both the trial bench and bar.’” Grove, 382 S.E.2d at 543, citing cases.

e. That “[u]nder W. Va. Code § 56-6-31, as amended, prejudgment interest is to be recovered on special or liquidated damages incurred by the time of the

trial, whether or not the injured party has by then paid for the same. If there is sufficient evidence to demonstrate that the injured party is obligated to pay for medical or other expenses incurred by the time of the trial, and if the amount of such expenses is certain or reasonably ascertainable, prejudgment interest on those expenses is to be recovered from the date the cause of action accrued.” Id. at syl. pt. 3.

f. When a general verdict is returned, the plaintiff is entitled to prejudgment interest on the entire amount of the verdict when it contains unspecified amounts of special or liquidated damages. Grove, 382 S.E.2d at p. 542.

g. That “[i]t is the duty of the trial court to ascertain where possible, the amount of special damages proved at trial as well as the actual accrual date of the damages. Prudent defense counsel should continue to seek a special interrogatory on the issue of special damages where it would aid the trial court in its determinations, but failure to submit a special interrogatory will not necessarily justify an award of prejudgment interest on the entire verdict by the trial court. However, in the face of such failure to submit a special interrogatory, the trial court should give the plaintiff the benefit of any doubt in the calculation of prejudgment interest.” Beard v. Lim, 185 W. Va. 749, 408 S.E. 2d 772 (1991).

14. Based on the foregoing, this Court finds as a matter of law that the Plaintiff’s prejudgment interest should be calculated based on the statutory rate of interest of 10%, the rate of interest in effect for the calendar year within which her cause of action arose.

15. Further, based on the foregoing, this Court finds as a matter of law that Plaintiff Sheila Rutherford’s prejudgment interest should be determined based on the

time period of July 13, 2002, the date her cause of action accrued, to September 29, 2008, the date the jury returned the verdict, as more fully discussed below.

16. This Court finds that as a matter of law the figure used to calculate the Plaintiff's prejudgment interest for the period of July 13, 2002 through March 9, 2004 is \$170,000. This Court further finds that for the period of March 10, 2004, the date upon which plaintiff received \$100,000 from Defendant Olive McClanahan's liability carrier, to March 16, 2008, the figure used to determine the plaintiff's prejudgment interest is \$70,000. This Court further finds that for the period from March 17, 2008, the date upon which the Plaintiff received \$30,000 from the Defendant, Kanawha County Commission, through September 29, 2008, the date of the jury verdict, the figure used to determine plaintiff's prejudgment interest is \$40,000. Therefore, the Plaintiff, Sheila Rutherford, is entitled to prejudgment interest in the amount of \$58,517.81²

17. This Court finds as a matter of law that the Defendant, Olive McClanahan, is entitled to a prejudgment interest offset of \$22,326.98, the amount previously paid by the defendant toward prejudgment interest on November 24, 2008.

18. It is therefore, **ORDERED** and **ADJUDGED** that Plaintiff, Sheila Rutherford, recover from Defendant, Olive McClanahan, \$36,190.83 (\$58,517.81 less \$22,326.98).

19. It is further **ORDERED** and **ADJUDGED**, that the Plaintiff, Sheila

² 7/13/02 to 7/12/03:	\$17,000
7/13/03 to 3/09/04 (241 days):	\$11,224.66
3/10/04 to 3/09/05 :	\$7,000
3/10/05 to 3/09/06:	\$7,000
3/10/06 to 3/09/07:	\$7,000
3/10/07 to 3/09/08:	\$7,000
3/10/08 to 3/16/08 (7 days):	\$134.25
3/17/08 to 9/29/08 (197 days):	<u>\$2158.90</u>
Prejudgment Interest on total verdict:	\$58,517.81

Rutherford, recover post judgment interest on this amount at the statutory rate of interest for the calendar year of 2008, which is 8.25%.

20. That still pending before this Court is Plaintiff Sheila Rutherford's Amended Motion for Attorney Fees based on the theory that she substantially prevailed in the underlying action. Also, pending is the Plaintiff's Amended Motion for Leave to File her Second Amended Complaint. This matter shall remain on this Court's docket until these motions are ruled on or otherwise disposed of by the Court.

21. The Defendant, Olive McClanahan, reserves all objections made on pretrial rulings, rulings made by the Court during the trial and reserves the right to file post-trial motions.

22. It is therefore, **ORDERED** and **ADJUDGED** that the Defendants, Olive McClanahan and Kanawha County Commission, shall pay and share equally the cost of the jury fees as calculated by the Clerk of the Circuit Court, to be remitted within (10) days of the entry of this Order.

THE CLERK SHALL SUBMIT CERTIFIED COPIES OF THIS ORDER TO COUNSEL OF RECORD.

ENTER: Jennifer F. Bailey
JUDGE JENNIFER F. BAILEY

DATED: July 16, 2010

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY G. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 20
DAY OF July, 2010
Cathy G. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA