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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

2010 NOV 16 PM 3:44 ST
No. _____

CATHY S. GAYSON, CLERK
KANAWHA CO. CIRCUIT COURT

SHEILA ANN RUTHERFORD,

Plaintiff,

v.

CIVIL ACTION NO.: 03-C-2908

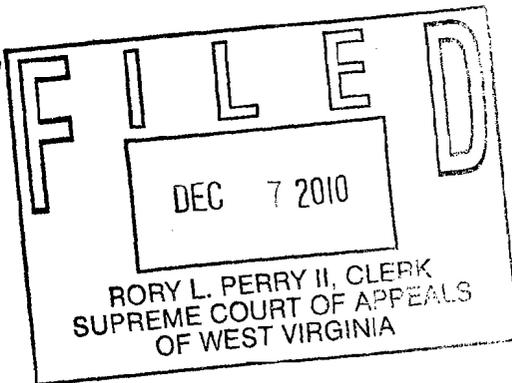
Judge Jennifer F. Bailey

Circuit Court of Kanawha County, West Virginia

OLIVE V. MCCLANAHAN and
KANAWHA COUNTY COMMISSION,

Defendants.

PETITION FOR APPEAL



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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This action is an appeal by State Farm Mutual Automobile Insurance Company (“State Farm”), challenging a Judgment Order entered on July 16, 2010, by Judge Bailey in the Circuit Court of Kanawha County, West Virginia, regarding the calculation of prejudgment interest upon a jury verdict for plaintiff which included special damages in the amount of \$170,000. State Farm is plaintiff’s underinsured carrier and defended the action in the name of the tortfeasor, Olive M. McClanahan.

This appeal presents three unresolved legal issues regarding the calculation of prejudgment interest under West Virginia law: (1) how to treat the offset of prior settlements when calculating prejudgment interest; (2) whether the interest rate to be applied is the interest rate in effect at the time the cause of action accrued or at the time the judgment is entered; and (3) the date from which prejudgment interest begins to accrue against the underinsured carrier. State Farm asserts that the trial court’s July 16, 2010, Judgment Order incorrectly decided each of the three issues identified above.

As to the first issue, State Farm asserts that prejudgment interest should be calculated based on the amount of the jury verdict only after the verdict is reduced *pro tanto* by any prior settlements among joint tortfeasors. Conversely, the plaintiff asserted that prejudgment interest should be calculated on the entire jury amount, before the application of the *pro tanto* setoff entitled to the State Farm as a result of the prior settlements. The trial court took “the middle road” and calculated the prejudgment interest based a formula generally known as the “declining principal” formula. Specifically, the trial court calculated interest on the entire \$170,000.00 special damages award beginning from the date of the accident, and adjusted the base figure on which interest was calculated depending upon the date and amount of the prior

settlements. State Farm asserts this is improper because this goes against the intent and purpose of “prejudgment interest,” and specifically the definition of “judgment.” Further, by entering into the prior settlement agreements, the plaintiff, either expressly or impliedly, waived or released any right to collect interest on the amounts recovered in the prior settlements.

As to the second issue, State Farm asserts that the prejudgment interest should be calculated at the interest rate in effect at the time the verdict was entered. Thus, as the verdict was entered on September 29, 2008, defendant asserts that prejudgment interest should have been calculated at the rate of 8.25%, the effective interest rate for the 2008 calendar year. Conversely, the trial court ruled in favor of plaintiff on this issue, calculating the prejudgment interest at a rate of 10%, the interest rate in effect on July 13, 2002, the date of the accident. The prejudgment interest statute, West Virginia Code § 56-6-31, is ambiguous as to the applicable interest rate, and appears to contradict itself. Further, the trial court’s ruling directly conflicts with the 2008 Administrative Order entered by the West Virginia Supreme Court of Appeals, which mandates that the interest rate to be applied is the interest rate effective at the time the judgment is entered.

As to the third issue, State Farm asserts that, regardless of the aforementioned issues, the trial court nevertheless incorrectly determined that prejudgment interest first began to accrue against State Farm at the time of the accident on July 13, 2002. State Farm asserts that because it is the underinsured carrier, prejudgment interest cannot begin to accrue against it until the plaintiff’s cause of action accrues against it. Pursuant to West Virginia law, before the insured is permitted to have a direct cause of action against his or her underinsured carrier, liability must first be established. As such, the insured must first obtain a judgment or a settlement against the tortfeasor’s liability carrier before the insured’s cause of action accrues

against the underinsured carrier. Thus, at the earliest, plaintiff's cause of action did not accrue against State Farm until March 10, 2004, when plaintiff's received a settlement check from the liability carrier.

II. STATEMENT OF FACTS

Plaintiff was injured in a motor vehicle accident on July 13, 2002, in Kanawha County, West Virginia. She filed suit against defendants Olive V. McClanahan (McClanahan) and the Kanawha County Commission (KCC), and properly provided notice of the suit to her underinsured carrier, State Farm. Approximately eighteen (18) months after the suit was filed, McClanahan's liability insurance carrier, Liberty Mutual, settled plaintiff's claim for \$100,000.00, representing the maximum limit of McClanahan's liability coverage. Liberty Mutual issued a check representing said amount which plaintiff received on March 10, 2004. Subsequently, plaintiff entered into a settlement agreement with KCC and received a check acknowledging such in the amount of \$30,000.00 on March 17, 2008. Thus, prior to the trial of this matter, plaintiff had received \$130,000.00 in prior settlements from the alleged tortfeasors, and the remaining defendant was State Farm, plaintiff's underinsured carrier, who elected to defend the action in the name of the tortfeasor, McClanahan.

On September 15, 2008, the plaintiff proceeded to trial against State Farm seeking to recover under her underinsured policy. On September 29, 2008, the jury returned a verdict of \$175,000.00, which included \$170,000.00 in special damages. However, pursuant to the previous settlements of Liberty Mutual and KCC, State Farm was entitled to a *pro tanto* setoff of \$130,000.00. Therefore, State Farm was obligated to plaintiff for \$45,000.00 in total damages,

which includes \$43,650.00 in special damages.¹ State Farm satisfied this part of the judgment by delivering a check to plaintiff's counsel in the amount of \$45,000.00 on October 2, 2008.

Thereafter, a dispute arose between the parties regarding the calculation of prejudgment interest to be added to the special damages portion of the judgment. As such, on or about October 8, 2008, plaintiff moved for \$105,632.87 in prejudgment interest in *Plaintiff Sheila Ann Rutherford's Motion and Memorandum of Law Seeking Prejudgment Interest on Special Damages Pursuant to W. Va. Code § 56-6-31* ("Plaintiff's Motion"). On or about November 13, 2008, defendant responded and cross-moved in *Defendant's Response to Plaintiff Sheila Ann Rutherford's Motion and Memorandum of Law Seeking Prejudgment Interest on Special Damages Pursuant to W. Va. Code § 56-6-31 and Defendant's Cross Motion Requesting This Court Order the Prejudgment Interest Be Set in the Amount of \$22,326.98* ("Defendant's Cross-Motion").

Plaintiff's Motion asserted that she is entitled to prejudgment interest in the amount of \$105,632.87. This amount represented the interest calculated on the entirety of the \$170,000.00 special damages verdict prior to applying the *pro tanto* setoff of \$130,000.00. Therefore, plaintiff's calculation neglected the fact that plaintiff was already in possession of \$130,000.00 prior to the September 29, 2008, verdict as a result of the settlement agreements. Plaintiff's Motion further calculated the prejudgment interest at a rate of 10%, that being the interest rate effective at the time of the accident on July 13, 2002. Plaintiff's positions are contrary to the intent and plain language of the prejudgment statutes enacted by the West

¹ Special damages constituted 97% of the total jury verdict (\$170,000 of \$175,000). Thus, 97% of defendant's \$45,000 obligation is considered special damages. Accordingly, \$43,650 (97% of \$45,000) is the amount of special damages defendant is obligated to plaintiff after the *pro tanto* setoff.

Virginia legislature, the administrative order of the West Virginia Supreme Court of Appeal, and also counter to relevant case law.

Conversely, Defendant's Cross Motion asserted that plaintiff is only entitled to prejudgment interest on \$43,650.00, the amount of special damages defendant is obligated to plaintiff after the *pro tanto* setoff of \$130,000 is applied to the jury verdict. Defendant's Cross Motion further asserted that the correct interest rate in which to calculate the prejudgment interest is 8.25%, the interest rate in effective for all judgments entered in the calendar year of 2008, pursuant to the administrative Order entered by the West Virginia Supreme Court of Appeal.

On December 16, 2008, the parties appeared before the trial court for oral argument on their motions. The trial court thereafter failed to issue a ruling until over a year and half later, by Order entered July 16, 2010 (the "Order"). It is from this Order that State Farm seeks relief.

In regards to the treatment of *pro tanto* setoffs when determining prejudgment interest, the Order calculated the interest based on a sliding scale, generally known as the "declining principal" formula. Specifically, from the time of the accident on July 13, 2002, until on March 10, 2004 - when plaintiff received her first settlement check from Liberty Mutual in the amount of \$100,000.00 - prejudgment interest was calculated on the entire special damages judgment amount of \$170,000.00. Then from March 10, 2004, until March 16, 2008 - when plaintiff received her second settlement check from KCC in the amount of \$30,000.00, prejudgment interest was calculated on \$70,000.00 of the special damages judgment. Then from

March 26, 2008, until the date of the jury verdict on September 29, 2008, prejudgment interest was calculated on \$30,000.00 of the special damages judgment.

In regards to the applicable interest rate, the trial court ruled that 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.

III. ASSIGNMENTS OF ERROR

1. The trial court's treatment of the prior settlements in calculating the prejudgment interest was erroneous, as the prejudgment interest should have been calculated on the base amount of \$43,650.00, the amount of special damages owed to plaintiff after applying the *pro tanto* setoffs from the prior settlements.

2. The trial court's application of the 10% interest rate was erroneous, as the prejudgment interest rate effective at the time of the judgment was 8.25%.

3. The trial court erroneously calculated prejudgment interest from the date the accident occurred, on July 13, 2002, rather than the date the cause of action accrued against the State Farm, the underinsured carrier, which was not until the plaintiff settled with the liability carrier on March 10, 2004.

IV. STANDARD OF REVIEW

The three issues on appeal regarding prejudgment interest require the interpretation of statutory and decision law, and thus the standard of review for this Court is *de novo*. As specifically held by this Court:

In reviewing a circuit court's award of prejudgment interest, we usually apply an abuse of discretion standard. **When, however, a**

circuit court's award of prejudgment interest hinges, in part, on an interpretation of our decision or statutory law, we review *de novo* that portion of the analysis.

Syl. pt. 2, *Hensley v. West Virginia Dept of Health & Human Resources*, 508 S.E.2d 616 (W. Va. 1998) (Emphasis added.) Accordingly, as the treatment of prior settlements, the applicable interest rate, and date in which prejudgment interest first began to accrue against State Farm each require the interpretation of the West Virginia Code, the 2008 Administrative Order of the West Virginia Supreme Court of Appeals, and/or decisional law, the appropriate standard of review is *de novo*.

V. ARGUMENT

A. The trial court's treatment of the prior settlements in calculating the prejudgment interest was erroneous, as the prejudgment interest should have been calculated on the base amount of \$43,650.00, the amount of special damages owed to plaintiff after crediting the *pro tanto* setoffs.

1. Pursuant to W. Va. Code § 56-6-31, \$43,650.00 represents plaintiff's ascertainable pecuniary loss subject to prejudgment interest.

The West Virginia Supreme Court has repeatedly held that “the purpose of a rule allowing prejudgment interest as part of damages for ascertainable pecuniary loss is to fully compensate the injured party for the loss of the use of funds that have been expended.” *Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc.*, 413 S.E.2d 404, 407 (W. Va. 1991). See also *Bond v. City of Huntington*, 276 S.E.2d 539, 548 (W. Va. 1981), *superseded by statute as stated in Rice v. Ryder*, 400 S.E.2d 263 (W. Va. 1990).

In the present case, plaintiff reached settlement agreements with Liberty Mutual and KCC for a combined amount of \$130,000.00. As such, plaintiff has been fully compensated for \$130,000.00 of the total verdict. Plaintiff's ascertainable pecuniary loss is the amount for which she has had loss of use and has yet to recover. Plaintiff does not have “loss of use” of the

\$130,000. Plaintiff's has "loss of use" of \$43,650.00, representing the special damages still entitled to plaintiff. Therefore, plaintiff is only permitted to obtain prejudgment interest on \$43,650.00, the unrecovered special damages from the accident. Plaintiff is precluded from recovering interest on the entire special damage verdict of \$170,000.00 because she has already recovered \$130,000.00. Plaintiff does not have a loss of use of funds if she has *recovered* the funds. Since plaintiff recovered \$130,000.00 of the funds from settlement agreements, \$130,000.00 is not an ascertainable pecuniary *loss*. Conversely, the funds are in her possession and available for her use and enjoyment. W. Va. Code § 56-6-31 defines special damages as "out-of-pocket expenditures." However, if plaintiff has possession of the money, then it cannot be considered "out-of-pocket."

Essentially, if the plaintiff has recovered a portion of her damages, that amount is no longer within the definitions of "lose of use" or "ascertainable pecuniary loss." Logically, the amount of special damages the plaintiff has yet to recover equals the ascertainable pecuniary loss. Therefore, plaintiff is only entitled to prejudgment interest for her ascertainable pecuniary loss of \$43,650.00.

- 2. The trial court's formula for calculating the prejudgment interest is improper because plaintiff's right to prejudgment interest on the prior settlement amounts are deemed released and/or waived, as any such right was subsumed in the prior settlements.**

There is a split of authority in regards to the method to calculate prejudgment interest when, prior to the judgment against a non-settling party, the plaintiff settles with a co-defendant, thereby entitling the non-settling party to a *pro tanto* setoff of the settlement amount from the jury verdict. While other Courts have grappled with this question, West Virginia has not previously addressed the issue.

The two methods employed by various courts regarding the effect of a prior settlement on the calculation of prejudgment interest include the method similar to that employed by the trial court, or the method advocated by State Farm herein.² The formula utilized by the trial court is generally known as the “declining principal” formula.³ Generally, the effect of the formula reduces the base figure upon which prejudgment interest is calculated depending on the date and amount of the prior settlement.

The second method of calculating prejudgment interest when prior settlements are involved is that advocated by State Farm.⁴ This approach subtracts the prior settlement(s) from the from the jury verdict prior to assessing prejudgment interest. Courts adopting this approach reason that the plaintiff, upon accepting the settlement, waives the right to prejudgment interest on the total amount of the judgment. The Colorado Court of Appeals explained as follows:

Here, plaintiff negotiated a complete settlement with the tortfeasor. Accordingly, the prejudgment interest she now seeks is deemed subsumed in that settlement amount. Thus, we conclude that plaintiff, by accepting the settlement and the distribution of its proceeds, has waived any right to assert a claim for prejudgment interest on the \$50,000 settlement.

Witt v. State Farm Mutual Automobile Ins. Co., 942 P.2d 1326, 1327 (Colo. App. Ct. 1997). See also *Martinez v. Jesik*, 703 P.2d 638, 639 (Colo. App. 1985) (“Plaintiffs, by voluntarily settling

² Importantly, no jurisdiction employs the method advocated by the plaintiff at the trial court level because such results in a double recovery, thereby granting a windfall to the plaintiff. As provided above, the plaintiff sought to have prejudgment interest calculated on the entire \$170,000.00 without any credit from the prior settlements.

³ Though not all states refer to it as the “declining principal” formula, and further the precise calculation formula varies, they essential accomplish the same goal as one another and also the method employed by the trial court. This has been adopted in states such as North Carolina, Texas, and South Dakota. See *Brown v. Flowe*, 507 S.E.2d 894 (N.C. 1998); *Brainard v. Trinity Universal Ins. Co.*, 216 S.W3d 809 (Tex. 2006); and *Setliff v. Stewart*, 694 N.W.2d 859 (S.D. 2005).

⁴ This method has been adopted in states such as Colorado, Michigan, Missouri and Minnesota. See cases from each jurisdiction, *infra*.

and relinquishing their claim against one of the co-tortfeasors, gave up their right to interest on this amount in exchange for the certainty of the settlement”); *Gutierrez v. Bussey*, 837 P.2d 272 (Colo. App. Ct. 1992) (party is not entitled to prejudgment interest on settlement amounts received before trial); *Freysinger v. Taylor Supply Co.*, 494 N.W.2d 870, 871 (Mich. Ct. App. 1992) (“When a plaintiff accepts a settlement, the plaintiff waives the right to prejudgment interest on that amount of the total judgment.”); *Harvey v. Security Services, Inc.*, 384 N.W.2d 414 (Mich. App. Ct. 1986) (same); *Bowan v. Express Medical Transporters, Inc.*, 135 S.W.3d 452, 464 (Mo. App. Ct. 2004) (“[P]ublic policy suggests that we should credit defendants for payments made to plaintiffs prior to trial so that plaintiffs do not, in effect, collect interest twice on the prior settlement.”); *Casey v. State Farm Mut. Auto. Ins. Co.*, 464 N.W.2d 736, 739 (Minn. App. Ct. 1991) (holding that a prior settlement constitutes a collateral source, and “prior to calculating prejudgment interest, collateral source payments must be deducted.”)

This method is in line with West Virginia law and the interpretation and intent of the prejudgment interest statute as set forth in W. Va. Code § 56-6-31. This is evidenced by the fact that the only decision to interpret W. Va. Code § 56-6-31 involving a prior settlement held that prejudgment interest should be awarded only on the amount of the verdict remaining after reduction of the verdict by the amount of the prior settlement.

Specifically, the United States District Court of the Northern District of West Virginia, in *CAMC v. Parke-Davis*, 2001 WL 34852736 (N.D. W. Va. 2001), confronted the same factual circumstance at issue in the present case. The *CAMC* Court held that pursuant to West Virginia’s prejudgment interest statute, W. Va. Code § 56-6-31, the plaintiff was entitled to prejudgment interest on the amount of the jury verdict only after it was reduced by the prior settlement amount.

In *CAMC*, the plaintiffs engaged in arbitration with a third party which resulted in a confidential agreement in which plaintiffs would receive an \$875,000 settlement. Thereafter, the plaintiffs filed an action against a joint tortfeasor and ultimately obtained a jury verdict of \$1,750,000. The case was decided pursuant to the Court's interpretation of West Virginia case and statutory law regarding prejudgment interest. Pursuant to W. Va. Code § 56-6-31, the Court awarded plaintiff prejudgment interest on only \$875,000 of the \$1,750,000 verdict. This represented the \$1,750,000 jury verdict minus the \$875,000 settlement amount previously obtained by the plaintiff. The Court expressly held as follows:

This Court believes that interest should be awarded on the entire jury verdict, minus the setoff amount. In this case, interest should be awarded on the sum of \$875,000 (\$1.75 million jury verdict minus [the] \$875,000 settlement amount).

CAMC v. Parke-Davis, 2001 WL 34852736, 7 (N.D. W. Va. 2001) (Parenthetical *included* in Opinion). The *CAMC* Court properly applied W. Va. Code § 56-6-31, and precluded the plaintiff from obtaining a windfall recovery.

Further, defendant's position accurately reflects the plain meaning of "prejudgment interest." The interest is termed "prejudgment" and not "preverdict" interest. It is based on the judgment amount, not the verdict amount. The judgment in this case, which the Court is required to enter under the law, is the verdict minus the previous settlements. That "judgment" amount is \$45,000. Prejudgment interest is thus to be based on that amount, or the amount of the special damages comprising that amount. Logically, as set forth above, by entering into the prior settlement agreements, any claim for prejudgment interest on those amounts is considered a part of the prior settlement. The defendant is only responsible for the

prejudgment interest on the unpaid portion of the judgment, which is considered plaintiff's "ascertainable pecuniary loss."

A related point is that a plaintiff should not be entitled to interest on funds which have not been awarded to her. The plaintiff is not entitled to interest on \$170,000 against McClanahan because her judgment against McClanahan is only \$45,000, not \$170,000. It is completely unreasonable to suggest that interest should be calculated using a figure which is \$125,000 more than the actual judgment amount against the defendant.

Accordingly, defendant requests that this Court reverse the trial court's Order because it failed to credit the entire settlement against the verdict prior to calculating the prejudgment interest.

B. The trial court's application of the 10% interest rate was erroneous because the prejudgment interest rate effective at the time of the judgment was 8.25%.

The West Virginia Code is contradictory as to the appropriate interest rate to apply to determine prejudgment interest. Specifically, the prejudgment interest statute, West Virginia Code § 56-6-31 appears to expressly contradict itself. In § 56-6-31(a), the statute, in pertinent part, provides as follows:

Provided, That if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of special or liquidated damages shall bear interest **at the rate in effect for the calendar year in which the right to bring the same shall have accrued**, as determined by the court and that established rate shall remain constant from that date until the date of the judgment or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree.

W. Va. Code § 56-6-31 (a) (Emphasis added.) Clearly, this subsection appears to suggest that the appropriate interest rate to be applied is the interest rate effective the year that the cause of action accrued, and not the time the judgment was entered.

However, the following subsection, § 56-6-31 (b), provides as follows:

Notwithstanding the provisions of section five, article six, chapter forty-seven of this code, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the Fifth Federal Reserve District secondary discount rate **in effect on the second day of January of the year in which the judgment or decree is entered**: Provided, That the rate of prejudgment and post-judgment interest shall not exceed eleven percent per annum or be less than seven percent per annum. **The administrative office of the Supreme Court of Appeals shall annually determine the interest rate to be paid upon judgments or decrees for the payment of money and shall take appropriate measures to promptly notify the courts and members of the West Virginia State Bar of the rate of interest in effect for the calendar year in question.** Once the rate of interest is established by a judgment or decree as provided in this section, that established rate shall thereafter remain constant for that particular judgment or decree, notwithstanding changes in the Federal Reserve District discount rate in effect in subsequent years.

W. Va. Code § 56-6-31 (b). (Emphasis added.) Here, this subsection of the statute appears to say exactly the opposite, that the appropriate interest rate to be applied is the interest rate effective in the year the judgment was entered. Further, the section also grants the authority to the Administrative Office of the Supreme Court of Appeals to annually determine the interest rate for each calendar year.

Therefore, now turning to the 2008 Administrative Order of the Supreme Court of Appeals of West Virginia, which establishes the prejudgment interest rate in 2008 pursuant to W. Va. Code § 56-6-31 (b), provides as follows:

IT IS THEREFORE ORDERED, That the rate of interest for the year 2008 for judgments and decrees entered on or after January 2, 2008, be and is set at 8.25% and that the Administrative Office of the West Virginia Supreme Court of Appeals shall take appropriate measures to promptly notify the courts and members of the West Virginia State Bar of said rate of interest.

See 2008 Administrative Order, attached hereto as Exhibit A. (Emphasis added.) This appears to agree with § 56-6-31 (b), and thus likewise contradicts § 56-6-31(a).

Accordingly, State Farm asserts that this Administrative Order, pursuant to and in conjunction with § 56-6-31 (b), specifically provides that the interest rate to be applied is the interest rate in effect the calendar year the judgment is entered. “The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” *Zimmerer v. Romano*, 679 S.E.2d 601, 616 (W. Va. 2009). Here, it is clear that the Administrative Order and § 56-6-31(b) are more specific with regard to prejudgment interest. Certainly, the Administrative Order pertains specifically to prejudgment interest, as it has no other purpose. Further, as between §§ 56-6-31(a) and (b), section (b) is the provision that specifically pertains to determining the interest rate.

Accordingly, as the statute is contradictory, the more specific statute and the express Administrative Order provide that the applicable interest rate is the rate in effect the year in which the judgment was entered. Therefore, in the present matter, the judgment was entered on September 29, 2008. Pursuant to the 2008 Administrative Order, plaintiff is entitled to an interest rate of 8.25% per annum, not 10%. Thus, the trial court committed reversible error in calculating the prejudgment interest at a rate of 10%.

C. The trial court erroneously calculated prejudgment interest from the date the accident occurred, on July 13, 2002, rather than the date the cause of action accrued against the State Farm, the underinsured carrier, which was not until the plaintiff settled with the liability carrier on March 10, 2004.

In *Grove v. Myers*, 382 S.E.2d 536 (W. Va. 1989), this Court specifically held that the award of prejudgment interest on special damages is to be calculated from the date the cause of action accrued. *Id.* at Syl. Pt. 2. *Grove* provides that “the date on which the cause of action accrued, which in a personal injury action is, ordinarily, when the injury is inflicted.” *Id.* However, though a cause of action for personal injury “ordinarily” accrues when the injury is inflicted, such is not the case in an action by the insured against his or her underinsurance carrier.

Importantly, in a first party action against the underinsured carrier, the insured’s cause of action is based in contract, pursuant to the insurance policy between the insured and the underinsured carrier. “When a direct action against an uninsured or underinsured motorist carrier is pursued, that action sounds in contract and is governed by the statute of limitations applicable to contract actions.” Syl. Pt. 2, *Plumley v. May*, 434 S.E.2d 406 (W. Va. 1993). Further stated, “the relationship between the policyholder and the insurance carrier arises from a mutual exchange of consideration, i.e., the payment of premiums in exchange for underinsured motorist coverage, with the performance of the parties controlled by the written terms and conditions contained in the insurance policy.” *Miller v. Fluharty*, 500 S.E.2d 310, 318 (W. Va. 1997).

Accordingly, in the case in which the insured brings a cause of action against his underinsurance carrier, the cause of action does not accrue at the time of the accident, but when the insured may assert a claim to recover under the insurance policy. In Syllabus Point 2 of *Postlethwait v. Bost Old Colony Ins. Co.*, 432 S.E.2d 802, 805 (W. Va. 1993), this Court held

that “W. Va. Code [33-6-31(d) (1988)], our uninsured [and underinsured] motorist statute, does not authorize a direct action against the insurance company providing uninsured motorist coverage until a judgment has been obtained against the uninsured motorist.” *Postlethwait* further held in Syllabus Point 4 that:

A plaintiff is not precluded under W. Va. Code 33-6-31(d) (1988), from suing an uninsured/underinsured carrier if the plaintiff has settled with the tortfeasor’s liability carrier for the full amount of the policy and obtained from the uninsured/underinsured carrier a waiver of its right of subrogation against the tortfeasor.

Id. at Syl. Pt. 4.

The present matter involves a direct action by the plaintiff, the insured, against State Farm, the plaintiff’s underinsured carrier. Therefore, pursuant to *Postlethwait* and W. Va. Code 33-6-31(d), the plaintiff’s cause of action did not accrue on the date of the accident, but rather when plaintiff settled with the tortfeasor’s liability carrier and obtained from State Farm a waiver of its right of subrogation against the tortfeasor. Here, plaintiff did not satisfy this condition until she obtained the \$100,000.00 settlement with the liability carrier, Liberty Mutual, on March 10, 2004. Thus, although the accident occurred on July 13, 2002, plaintiff’s cause of action did not accrue against State Farm until March 10, 2004, approximately 18 months later.

As such, plaintiff is only entitled to prejudgment interest from the time her cause of action accrued up to the time in which the verdict was entered. However, because plaintiff’s cause of action against State Farm did not accrue until March 10, 2004, plaintiff is only entitled to prejudgment interest from then until the verdict was entered on September 29, 2008. The trial court incorrectly calculated the prejudgment interest from the date of the accident on July 13, 2002. As evidenced in footnote 2 of the Order, this resulted in improperly awarding an

additional \$28,224.66 in prejudgment interest from July 13, 2002 through March 9, 2004. Considering that the entire prejudgment interest award was \$58,517.81, this error resulted in nearly doubling the amount of prejudgment interest awarded to plaintiff. Therefore, even if this Court affirmed the trial court's calculation formula and application of the 10% interest rate, plaintiff is at most entitled to only \$30,293.15 in prejudgment interest.

Further, this Court has previously indicated in dicta that it agrees with State Farm on this issue. In footnote 22 of *Miller v. Fluharty*, supra, this Court cited to the following Vermont case regarding the insured's right to prejudgment interest in a first party action:

Webb v. U.S. Fidelity & Guar. Co., 158 Vt. 137, 144-145, 605 A.2d 1344, 1349 (1992) (insurance carrier liable for prejudgment interest from date insurance carrier has a duty to pay underinsured motorist benefits to policyholder).

Miller at fn. 22. *Webb* specifically held that the underinsured carrier cannot be liable for prejudgment interest prior to it having an obligation to make a payment to the insured. Therefore, the date in which the underinsured carrier became liable for prejudgment interest "could be no earlier than the date that payment of the \$20,000 was made to the plaintiff by the liability carrier for the other driver." *Webb* at 1348.

A holding by this Court that an underinsured carrier cannot be liable for prejudgment interest prior to the time in which the insured obtains a judgment or settlement against the tortfeasor is not only in accordance with West Virginia law, it is also sound public policy. Without such a rule, the prejudgment interest statute would unfairly prejudice the underinsured carrier. The underinsured carrier does not have the power to settle the claim or control the litigation between the insured and the liability carrier. For example, the plaintiff and the liability carrier could litigate the matter for three or four years, and then reach a settlement on

the eve of trial. The case then goes to trial, and the underinsured carrier would be responsible for all the prejudgment interest accumulated over the past couple years, despite the fact it only recently was obligated to make any payment to the insured and had no control over the litigation prior to the settlement. The liability carrier, the party who controlled the litigation and delayed the settlement, has now avoided having to pay the prejudgment interest damages dating back to the time of the accident. The liability carrier has simply dropped the prejudgment interest damages off in the lap of the underinsured carrier, and skipped out the door.⁵

Therefore, for the reasons articulated above, the trial court incorrectly calculated the prejudgment interest beginning on July 13, 2002. Plaintiff's claim for prejudgment interest against State Farm, as the underinsured carrier, did not accrue, at the earliest, until plaintiff settled with the tortfeasor's liability carrier on March 10, 2004. Thus, the trial court's Order improperly awarded, at a minimum, nearly double the amount of prejudgment interest owed to plaintiff. Accordingly, State Farm respectfully requests that this Court reverse the trial court's Order for improperly awarding prejudgment interest for the 18 month period after the accident occurred but before plaintiff's direct cause of action against State Farm accrued.

VI. CONCLUSION

In sum, State Farm seeks relief from this Court from the July 16, 2010, Order on three points of error. First, the trial court should have deducted the entire amount of the prior settlements from the verdict before calculating prejudgment interest. Plaintiffs are not entitled to

⁵ This public policy also relates directly to § I. (B), *supra*, regarding the appropriate treatment of prior settlements in calculating the prejudgment interest as advocated by State Farm. In order to prevent a liability carrier from dropping prejudgment interest damages in the lap of the underinsured, the amount of the prior settlement is deducted from the verdict prior to calculating prejudgment interest. As described above, the reasoning is that the prior settlement is deemed to have included plaintiff's claim for prejudgment interest on that amount. This prevents the underinsured carrier from being unfairly prejudiced when in a position where the liability carrier controls the litigation.

prejudgment interest on settlement amounts regardless of when such settlements were reached because any claim on prejudgment interest is subsumed into the prior settlement agreements. Second, the appropriate interest rate to apply is 8.25%, the interest rate in effect the year in which the judgment was entered. West Virginia Code § 56-6-31 expressly contradicts itself, but subsection (b), in conjunction with the Administrative Order from this Court, are more specific and state that the interest rate to be applied is the interest rate in effect the year the judgment is entered. Third, the trial court erred in calculating prejudgment interest from the date the accident occurred on July 13, 2002. Prejudgment interest is only calculated from the date the cause of action accrues, and plaintiff's cause of action did not accrue against State Farm, the underinsured carrier, at the earliest, until plaintiff reached a settlement with Liberty Mutual, the tortfeasor's liability carrier on March 10, 2004.

WHEREFORE, Petitioner, State Farm Mutual Automobile Insurance Company, respectfully requests that this Honorable Court accept its Petition for Appeal and thereafter vacate the July 16, 2010, Order entered by the trial court and provide instructions on the correct manner in which to calculate prejudgment interest in this case.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

By Counsel,



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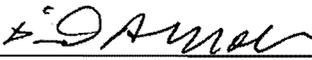
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CERTIFICATE OF SERVICE

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I, David A. Mohler, counsel for Petitioner, State Farm Mutual Automobile Insurance Company, do hereby certify that service of the *Petition for Appeal* was made upon the parties listed below via hand delivery, a true and exact copy thereof to:

Tim C. Carrico, Esquire
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Counsel for Plaintiff

this 16th day of November, 2010.


David A. Mohler (WVSB #2589)