IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
APR - 7 2011

NO. 101556

SHEILA ANN RUTHERFORD,

Plaintiff,

v. CIVIL ACTION NO.: 03-C-2908

OLIVE V. MCCLANAHAN,

Defendant.

RESPONDENT'S SUMMARY RESPONSE AND HER CROSS-ASSIGNMENT OF ERROR

Comes now the Respondent, Sheila Ann Rutherford (plaintiff below), by and through counsel, Tim C. Carrico, Esq., and Carrico Law Offices LC for her summary response to the Petitioner, Olive V. McClanahan's (defendant below), petition for appeal pursuant to Revised Rule 10(e), and her cross-assignment of error. For her response and cross-assignment of error, Ms. Rutherford states as follows:

I.

STATEMENT OF FACTS

1. Sheila Ann Rutherford was injured in a car wreck occurring on July 13, 2002, in Kanawha County, West Virginia.

2. After the collision on July 13, 2002, Ms. Rutherford entered into a partial settlement with Olive McClanahan. Ms. Rutherford received a check in the amount of $100,000.00 dated March 3, 2004. This amount represented the policy limits of Mrs. McClanahan's liability insurance coverage. This partial settlement did not designate the specific damages that were being paid.

3. After the collision on July 13, 2002, Mrs. Rutherford entered into a partial settlement agreement with the Kanawha County Commission, the other tortfeasor. Mrs. Rutherford received a check in the amount of $30,000.00 dated March 17, 2008. This partial settlement did not designate the specific damages that were being paid. The Kanawha County Commission, pursuant to the partial settlement agreement was dismissed from Mrs. Rutherford's case.

4. Trial commenced on September 15, 2008. Mrs. Rutherford's under-insurance carrier, State Farm, elected to defend the lawsuit in the name of Mrs. McClanahan. Mrs. McClanahan challenged both the issues of liability and damages at trial.

5. That on September 29, 2008, Mrs. Rutherford prevailed on the issues of both liability and damages, and the jury returned the following verdict:

> Question 1: Do you find from a preponderance of the evidence that the Defendant Olive McClanahan was negligent and that her negligence was a proximate cause of the accident?
>
> ***Yes***
>
> Question 2: Do you find from a preponderance of the evidence that the Kanawha County Commission through Deputy Roush was negligent and that his negligence was a proximate cause of the accident?
>
> ***Yes***
>
> Question 3: If you have answered yes top either of the above questions, using 100% to represent total negligence of the two parties, apportion negligence between them:
>
> | | |
> |---|---|
> | ***Olive McClanahan:*** | ***49%*** |
> | ***Kanawha County Commission (Deputy Roush):*** | ***51%*** |
> | ***Total:*** | ***100%*** |
>
> Question 5: Do you find that the Plaintiff Sheila Rutherford was injured as a proximate result of the accident?
>
> ***Yes***

Question 6: If you have answered "No" please have the foreperson sign below and inform the bailiff of your verdict.

Yes

Question 7: If you have answered "Yes" to the question above, please award damages to Sheila Rutherford, if any, for damages proximately caused to her by the accident of July 13, 2002:

Medial Expenses:	***$147,000***
Lost Wages and Future Loss of Earnings:	***$20,000***
Pain and Suffering, past and future:	***$5000***
Loss of Enjoyment of Life, past and future:	***$0***
Loss of Household Services:	***$3000***
Dated: September 29, 2008.	

6. Mrs. McClanahan contends that based on the foregoing, she is entitled to a pro tanto set-off against Mrs. Rutherford's verdict of $175,000.

7. On October 8, 2008, Mrs. Rutherford filed her memorandum seeking prejudgment interest upon the entire amount of her special damages of $170,000 accruing at the statutory rate of 10% per annum from the date that her cause of action accrued on July 13, 2002, to the date of the verdict on September 29, 2008. She contended that the amount of the prejudgment interest is $105,632.87. She arrived at this figure as follows:

Special Damages	$170,000.00
Statutory rate of interest in 2002:	10% per annum
Yearly interest on special damages:	$17,000.00
Interest from July 13, 2002 to July 12, 2008 (six years):	$102,000.00
Interest from July 13, 2008, to September 29, 2008:	$3,632.87
Total Prejudgment Interest:	*$105,632.87*

8. On November 13, 2008, Mrs. McClanahan filed pleadings challenging Ms. Rutherford's request for $105,632.87 in prejudgment interest and filed a cross-petition

requesting that Mrs. Rutherford be awarded $22,326 in prejudgment interest. Therefore, the parties were in disagreement over $84,026.87 in prejudgment interest. Mrs. McClanahan asserted the following arguments in support of her position:

a. *She asserted that $43,650 represents Mrs. Rutherford's ascertainable pecuniary loss subject to prejudgment interest*. Pursuant this section of her brief, Mrs. McClanahan simply argued that prejudgment interest should be calculated on the verdict award after application of the pro-tanto off-set. Within this section of her brief, she provides a method for the Court to follow to determine Mrs. Rutherford's prejudgment interest. She asserts that that amount of the verdict is $175,000 and the amount of the off-set is $130,000. Thus, she contends that the amount of the verdict subject to prejudgment interest is only $45,000 ($175,000 less $130,000). However, she further contends that there must be a downward adjustment to the $45,000 figure in support of her assumption that a portion of it relates to general damages, and not special damages. She derives a multiplier. Her multiplier is 97%, which is the percentage of special damages to the whole verdict. Therefore, she contends that only $43,650.00 ($45,000 x 97%) is subject to prejudgment interest.

b. *She asserted that the interest rate used to calculate prejudgment interest should be 8.25%, the statutory rate of interest in effect in 2008, the year of Mrs. Rutherford's verdict; and not the statutory rate of interest rate of 10%, the rate in effect in 2002, the year her cause of action accrued.* Interestingly, Mrs. McClanahan agreed that the statutory rate should run on the special damages from July 13, 2002, the date the cause of action accrued. However, she contented that the statutory rate of 8.25%, which was in effect on the date of the verdict applied rather than the statutory rate of 10%, which was in effect the date that the cause of action accrued. In support of this position, she contended that this Court's administrative order setting

the statutory rate of interest in 2008 at 8.25% somehow amended West Virginia's prejudgment interest statute, W. Va. Code § 56-6-31(a), which requires that the amount of prejudgment interest be determined based on the statutory rate of interest in effect on the date the cause of action accrued.

8. On December 16, 2008, the parties appeared before the trial court to argue the issue of prejudgment interest. Ms. Rutherford in her memorandum of law argued inter alia that the language of W. Va. Code § 56-6-31 did not authorize the trial court to off-set settlement monies from the final verdict before calculating prejudgment interest. In support of this statutory interpretation, Ms. Rutherford cited multiple West Virginia cases. As persuasive authority on this specific point she cited a North Carolina appellate decision, Boykin v. Kim, 174 N.C.App. 278, 620 S.E.2d 707 (2005) (where the court recognized that trial courts were prohibited from off-setting settlement monies from the verdict before calculating prejudgment interest because the language of North Carolina's prejudgment interest statute did not specifically authorize such an off-set).

Also at the hearing, Ms. Rutherford explained to the trial court the specific method utilized in North Carolina to calculate prejudgment interest, and presented a worksheet showing that Mrs. Rutherford's prejudgment interest award would be $47,197.25 in the State of North Carolina, which is less than the $105,632.87 Ms. Rutherford was seeking. The reason the prejudgment interest award would be less in North Carolina is because trial courts there are specifically authorized to reduce the amount of the prejudgment interest award after giving consideration to the date and amount of settlement monies. This is known as an "interest credit". This is referred to by Mrs. McClanahan as the "declining principal" formula. See Mrs. McClanahan's Petition for Appeal at fn. 3. Ms. Rutherford did mistakenly propose "interest credit" as an option for the trial court.

9. On April 28, 2009, Ms. Rutherford filed with the trial court her Supplement to her Motion and Memorandum of Law Seeking Prejudgment Interest on Special Damages Pursuant to

W. Va. Code § 56-6-31, a copy of which is attached hereto as Exhibit no. 1. Ms. Rutherford supplied to the trial court a copy of judgment order issued by another Circuit Court in West Virginia in support her position against off-setting settlement monies from the verdict before calculating prejudgment interest. On June 3, 2009, Ms. Rutherford filed her Fourth Supplement to her Motion and Memorandum of Law Seeking Prejudgment Interest on Special Damages Pursuant to W. Va. Code § 56-6-31, a copy of which is attached hereto as Exhibit no. 2. In this pleading, Ms. Rutherford requests the Court grant her judgment for prejudgment interest of $83,492.20 ($105,623.87 less $22,326.98, the prejudgment interest previously paid by Mrs. McClanahan). Mrs. McClanahan filed a responsive pleading with the trial court requesting that the trial court deny this request.

10. The trial court finally entered a judgment order on July 16, 2010. The trial court awarded Mrs. Rutherford a total of $58,517.81 in prejudgment interest. The trial court did not off-set settlement monies from the verdict before calculating the award. However, the trial court did reduce the award after giving consideration to the date and amount of settlement monies. Given that Mrs. McClanahan previously paid Mrs. Rutherford $22,326.98 in prejudgment interest, the trial court directed her to pay an additional $36,190.83 in prejudgment interest. Mrs. McClanahan appealed this Judgment Order.

II.

MS. RUTHERFORD'S RESPONSE TO MRS. MCCLANAHAN'S FIRST ASSIGNMENT OF ERROR

Mrs. McClanahan's position that prejudgment interest is to be determined after off-setting the entire amount of settlement monies against the entire amount of the verdict is not supported by either West Virginia statutory or common law.

A. THE WEST VIRGINIA LEGISLATURE DID NOT INTEND FOR PREJUDGMENT INTEREST TO BE DETERMINED AFTER OFF-SETTING THE ENTIRE AMOUNT OF SETTLEMENT MONIES PAID BEFORE TRIAL AGAINST THE ENTIRE AMOUNT OF THE JURY VERDICT.

Prejudgment interest is determined under West Virginia Code § 56-6-31[1]:

The prejudgment interest statute that applies to special damages resulting from a tort is West Virginia Code § 56-6-31. See Grove v. Myers, syl. pts. 1, 2, 3, 4, 5181 W. Va. 342, 382 S.E.2d 536 (1989). This statute plainly and unequivocally states that "*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, and determined by the court, and that established rate shall remain constant from that date until the date of the judgment or decree." (Emphasis). It is

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[1] W. Va. Code § 56-6-31 in its entirety states as follows:

(a) Except where it is otherwise provided by law, every judgment or decree for the payment of money, whether in an action sounding in tort, contract or otherwise, entered by any court of this state shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: *Provided*, That if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount for special or liquidated damages shall bear interest at a 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. Special damages include lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court. If an obligation is based upon a written agreement, the obligation shall bear prejudgment interest at the rate set froth in the written agreement until the date the judgment or decree is entered and, thereafter, the judgment interest rate shall be the same as provided for in this section.

(b) Notwithstanding the provisions of section five, article six, chapter forty-section 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 in entered: *Provided*, That the rate of judgment 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 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 Discount rate in effect in subsequent years.

critical that our legislature did not state under W. Va. Code § 56-6-31 that "the amount of special or liquidated damages [after set-off] shall bear interest." Nor did the legislature state that "the special or liquidated damages [directly attributable to set-off monies previously paid] shall bear interest." Accordingly, if the language set forth under W. Va. Code § 56-6-31 is given its plain and ordinary meaning, prejudgment interest must be determined by the Court before any pro tanto set-off.

In further support of this statutory interpretation of W. Va. Code § 56-6-31, one must consider the language that our legislature did use in another prejudgment interest statute. Succinctly, W. Va. Code § 56-6-27 relates to an award of prejudgment interest on the principal due, or any part thereof in actions founded in contract only. See Corte Co., Inc. v. County Com'n of McDowell County, 171 W. Va. 405 (1982). In it, our legislature specifically stated that in all such cases the [jury] shall find the aggregate of principal and interest due at the time of the trial, *after allowing all proper credits, payments and set-off*[.] (Emphasis).

Importantly, our legislature did not insert such language within W. Va. Code § 56-6-31. Our legislature, by not including similar language under W. Va. Code § 56-6-31, requires that trial courts determine prejudgment interest on special damages before pro tanto set-off.

West Virginia common law establishes that pre-judgment interest is an additional compensatory damage that is necessary to make the person whole, and is determined based on the entire amount of special damages awarded by the jury notwithstanding the receipt of settlement monies before trial.

1. "Prejudgment interest, according to West Virginia Code § 56-6-31 and the decisions of [the West Virginia Supreme Court of Appeals] interpreting [this] 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). 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).

2. 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.

3. "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.

4. 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.

5. 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.

6. 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 fact 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).

B. MRS. MCLANAHAN'S PROPOSED PREJUDGMENT INTEREST CALCULATION CONTAINS INHERENT PROBLEMS THAT OUR LEGISLATURE INTENDED TO AVOID.

Not only is Mrs. McClanahan's proposed prejudgment interest calculation not supported by West Virginia law, it contains an inherent problem that our legislature intended to avoid. Mrs. McClanahan proposes that the entire amount of the verdict be off-set by the entire amount of the settlement monies. This is not a workable formula because to prevent its absurd results a trial court would be required to involve itself in the complications associated with determining prejudgment interest on each element of special damages from the respective dates on which each element was incurred. Our legislature intended to prohibit such an analysis when determining the amount of prejudgment interest. See Grove, 382 S.E.2d at 543.

The following scenario illustrates this problem. A person involved in a car accident is released from the hospital after incurring $5,000 in medical bills. She settles with the liability

carrier for policy limits of $50,000. After receiving these monies, it is determined that she needs neck surgery, which was not known at the time of the settlement. She has neck surgery and incurs $50,000.00 in medical bills. In addition, after receiving the settlement monies she can no longer work because of the surgery and suffers lost wages in the amount of $40,000. The matter then goes to trial, and there is applicable under-insurance coverage. The person obtains a verdict in the amount of $110,000 of which $95,000 is special damages ($55,000 past medical bills+$40,000 in lost wages). Under Mrs. McClanahan's theory, the tortfeasor before calculating prejudgment interest would be entitled to (1) an off-set of $50,000 against the $110,000 verdict leaving $60,000 subject to the prejudgment interest calculation; and (2) an additional reduction of $8,400 ($95,000/$110,000 = 86%; .86% x $60,000=$51,600; $60,000-51,600=8,400). This scenario would result in prejudgment interest being calculated on special damages of $51,600 rather than $95,000 notwithstanding the fact that the $50,000 in settlement monies were paid before the plaintiff suffered $90,000.00 of the special damages. Consequently, the plaintiff's prejudgment interest award is drastically reduced on account of settlement monies having no relationship to almost all of the special damages.

It appears this problem could be partially solved by calculating the amount of special damages based on $90,000.00 rather than $51,600 ($95,000 in special damages incurred after payment of settlement monies minus $5,000 in special damages incurred before the payment of settlement monies). However, a trial court could not do so because our legislature does not permit such an analysis and/or adjustment under West Virginia Code § 56-6-31. See Grove, 382 S.E.2d at 543. But, more importantly this statute does not permit a trial court's use of Mrs. McClanahan's prejudgment interest formula.

C. MRS. MCCLANAHAN'S RELIANCE ON OTHER DECISIONAL LAW IS MISPLACED.

Mrs. McClanahan in support of her position incorrectly relies on a non-reported decision issued by the United States District Court for the Northern District of West Virginia in CAMC v. Parke-Davis, 2001 W. Law 34852736 (N.D. W. Va. 2001). In this case, CAMC instituted a contribution action against another tortfeasor. Prior to obtaining a final judgment as to contribution from the other tortfeasor, CAMC received a partial settlement from another tortfeasor. After obtaining a favorable verdict against the defendant tortfeasor, CAMC requested the Court to determine prejudgment interest under W. Va. Code § 56-6-31. The defendant challenged CAMC's request for prejudgment interest on the theory that CAMC's contribution cause of action was founded in contract rather than tort. For this reason, the defendant argued that W. Va. Code § 56-6-27 applied, and that CAMC accordingly waived its right to prejudgment interest; it failed to submit this question to the jury as required by W. Va. Code § 56-6-27.

The trial court disagreed with the defendant tortfeasor argument, and concluded that as a matter of law W. Va. Code § 56-6-31 applied because CAMC's contribution action was founded in tort rather than contract. The trial court then without any explanation, analysis, or comment determined CAMC's prejudgment interest on CAMC's damages after first setting off the previous partial settlement. CAMC did not dispute or point out to the Court that it had improperly set off the previous judgment before calculating its prejudgment interest. This decision was not appealed to the Fourth Circuit.

This federal district court decision is not persuasive on the issue now before the Court. First, CAMC presented no argument to the Court challenging the Court's method of calculating prejudgment interest. Second, the Court provided no explanation or comment as to why it calculated CAMC's prejudgment interest after applying the set off. And, third, the action sub judice is a personal injury action rather than a contribution action involving joint tortfeasors, the

purpose of which is to make the plaintiff whole and to provide for full compensation. See Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, supra.

Finally, Mrs. McClanahan in support of her position incorrectly relies on a decision issued by the West Virginia Supreme Court of Appeals in Clark v. Kawasaki Motors Corp., U. S.A., 200 W. Va. 763, 490 S.E.2d 852 (1997), where the court considered a case involving a plaintiff's comparative fault. The Court ruled that West Virginia is a "settlement first state". This means that the trial court when determining the final amount to be inserted in the plaintiff's judgment must set off prior settlements against the final verdict before setting of the plaintiff's percentage of comparative fault.

This decision has absolutely no application to this case. First, nowhere in this decision does the court discuss the method of determining prejudgment interest in relation to pro tanto set-offs. Second, this decision simply involved the method to handle a pro tanto settlement in relation to a jury's comparative fault finding of the plaintiff. Importantly, in the case sub judice, it was stipulated that Ms. Rutherford was not at fault. Also, in the spirit of full compensation for a plaintiff, the court ruled that the pro-tanto settlement comes off the verdict before the plaintiff's percentage of comparative fault, which results in a greater award for the plaintiff (full compensation).

II.

MS. RUTHERFORD'S RESPONSE TO MRS. MCCLANAHAN'S SECOND ASSIGNMENT OF ERROR

Mrs. McClanahan in her second assignment of error contends that the trial court when it determined the amount of Ms. Rutherford's prejudgment interest incorrectly used the statutory rate of interest in effect at the time the cause of action accrued, rather than the rate in effect on

the date of the verdict.

Mrs. McClanahan incorrectly reads a conflict into W. Va. Code § 56-6-31(a) and (b), which does not exist. Subparagraph (b) establishes how the statutory rate of interest is calculated each year, which is the same for both prejudgment and post judgment interest. While, subparagraph (a) establishes the date from which prejudgment and post judgment interest run. Post judgment interest runs from the date of the judgment, and, prejudgment interest runs from the date the cause of action accrued. Therefore, there is not a conflict.

III.

MS. RUTHERFORD'S RESPONSE TO MRS. MCCLANAHAN'S THIRD ASSIGNMENT OF ERROR

Mrs. McClanahan alleges that the trial court erroneously calculated interest from the date of the accident on July 13, 2002, rather than the date the cause of action allegedly accrued against State Farm on March 10, 2004.

Mrs. McClanahan's error alleged herein is not supported by the law. This Court in Grove, supra 382 S.E.2d at 543 stated as follows:

> We agree with what was said in State v. Phillips, 470 P.2d 266 (Alaska 1970), with respect to when prejudgment interest begins to run: "For a cause of action to accrue, one party must have breached a duty to the other, and the other must have been injured. At the moment the cause of action accrued, the injured party was entitled to be left whole and became immediately entitled to be made whole." Id. at 274. Therefore, prejudgment "interest [runs] from the time the cause of action accrues," id., that is, from the date of injury. Guin v. Ha, 591 P.2d 1281, 1284 (Alaska 1979). See also Davis v. Chism, 513 P.2d 475, 481 (Alaska 1973).

The gravamen of Mrs. McClanahan's argument is that Ms. Rutherford's action was converted into an action against State Farm on March 10, 2004, the date that the liability carrier paid Ms. Rutherford its policy limits of $100,000. This could not be any more inaccurate. This matter is a cause of action against Mrs. McClanahan, and not against State Farm. This action

does not involve any breach of a duty by State Farm at any point in time. This matter only involves a personal injury claim arising from a car wreck that occurred on July 13, 2002. This matter involves a breach of a duty by Mrs. McClanahan as to Ms. Rutherford that occurred on July 13, 2002. The parties of record, Ms. Rutherford and Mrs. McClanahan, are currently arguing before this Court over the amount of prejudgment interest. State Farm is not a party, and has never been a party. This matter does not involve its conduct in any regard. State Farm is simply defending in the name of Ms. McClanahan. For these reasons, Mrs. McClanahan's third assignment of error is baseless.

IV.

CONCLUSION

WHEREFORE, for the reasons stated herein, Ms. Rutherford respectfully requests the Court to dismiss Mrs. McClanahan's petition for appeal. In addition, she asserts her cross-assignment of error set forth below, and specifically requests the relief requested therein. She seeks any other relief deemed necessary and appropriate by the Court.

RESPONDENT'S CROSS-ASSIGNMENT OF ERROR

I.

ASSIGNMENTS OF ERROR

The trial court erred when it reduced Ms. Rutherford's prejudgment interest award from $105,632.87 to $58,517.81 based on the trial court's consideration as to the date and amount of prior settlement monies received by Ms. Rutherford. This reduction to Ms. Rutherford's prejudgment interest award was not permitted by West Virginia law.

II.

STATEMENT OF THE CASE

The facts concerning this appeal are not disputed. The respondent, Ms. Rutherford, was injured in a car wreck on July 13, 2002. She entered into a partial settlement with the petitioner, Ms. McClanahan. She received a settlement check from Ms. McClanahan's liability insurance carrier in the amount of $100,000 on March 10, 2004. She entered then entered into a partial settlement with the other tortfeasor, the Kanawha County Commission. She dismissed the Kanawha County Commission from her action. She received a check from the Kanawha County Commission in the amount of $30,000.00 dated March 17, 2008.

Ms. Rutherford's trial the commenced against Mrs. McClanahan in September 2008. Ms. Rutherford's underinsurance carrier, State Farm, defended the claim in Mrs. McClanahan's name. The jury returned a verdict on September 29, 2008, for $175,000. As to this amount, $170,000 related to special damages.

Ms. Rutherford requested the trial court to award her $105,632.87 in prejudgment interest.[2] Mrs. McClanahan agreed that Ms. Rutherford was entitled to prejudgment interest.

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[2]

Special Damages	$170,000.00
Statutory rate of interest in 2002:	10% per annum
Yearly interest on special damages:	$17,000.00
Interest from July 13, 2002 to July 12, 2008 (six years):	$102,000.00
Interest from July 13, 2008, to September 29, 2008:	$3,632.87

But she contended that that Ms. Rutherford was only entitled to prejudgment interest in the amount of $22,326.00. On December 16, 2008, the parties appeared before the trial court to argue the issue of prejudgment interest. Ms. Rutherford in her memorandum of law argued inter alia that the language of W. Va. Code § 56-6-31 did not authorize the trial court to off-set settlement monies from the final verdict before calculating prejudgment interest. In support of this statutory interpretation, Ms. Rutherford cited multiple West Virginia cases. As persuasive authority on this specific point she cited a North Carolina appellate decision, Boykin v. Kim, 174 N.C.App. 278, 620 S.E.2d 707 (2005) (where the court recognized that trial courts were prohibited from off-setting settlement monies from the verdict before calculating prejudgment interest because the language of North Carolina's prejudgment interest statute did not specifically authorize such an off-set).

Also at the hearing, Ms. Rutherford explained to the trial court the specific method utilized in North Carolina to calculate prejudgment interest, and presented a worksheet showing that Mrs. Rutherford's prejudgment interest award would be $47,197.25 in the State of North Carolina, which is less than the $105,632.87 Ms. Rutherford was seeking. The reason the prejudgment interest award would be less in North Carolina is because trial courts there are specifically authorized to reduce the amount of the prejudgment interest award after giving consideration to the date and amount of settlement monies. This is known as an "interest credit". This is referred to by Mrs. McClanahan as the "declining principal" formula. See Mrs. McClanahan's Petition for Appeal at fn. 3. Ms. Rutherford did mistakenly propose "interest credit" as an option for the trial court.

On April 28, 2009, Ms. Rutherford filed with the trial court her Supplement to her Motion and Memorandum of Law Seeking Prejudgment Interest on Special Damages Pursuant to W. Va. Code § 56-6-31, a copy of which is attached hereto as Exhibit no. 1. Ms. Rutherford supplied to the trial court a copy of judgment order issued by another Circuit Court in West Virginia in support her position against off-setting settlement monies from the verdict before calculating prejudgment interest. On June 3, 2009, Ms. Rutherford filed her Fourth Supplement

to her Motion and Memorandum of Law Seeking Prejudgment Interest on Special Damages Pursuant to W. Va. Code § 56-6-31, a copy of which is attached hereto as Exhibit no. 2. In this pleading, Ms. Rutherford requests the Court grant her judgment for prejudgment interest of $83,492.20 ($105,623.87 less $22,326.98, the prejudgment interest previously paid by Mrs. McClanahan). Mrs. McClanahan filed a responsive pleading with the trial court requesting that the trial court deny this request.

The trial court finally entered a judgment order on July 16, 2010. The trial court awarded Mrs. Rutherford a total of $58,517.81 in prejudgment interest. The trial court did not off-set settlement monies from the verdict before calculating the award. However, the trial court did reduce the award after giving consideration to the date and amount of settlement monies. Given that Mrs. McClanahan previously paid Mrs. Rutherford $22,326.98 in prejudgment interest the trial court directed her to pay an additional $36,190.83 in prejudgment interest to Mrs. Rutherford. Mrs. McClanahan appealed this Judgment Order. Ms. Rutherford now asserts this cross-assignment of error as to the trial court's reduction of her prejudgment interest award after giving consideration to the date and amount of settlement monies received.

III.

SUMMARY OF ARGUMENT

The trial court did not have authority to reduce Ms. Rutherford's prejudgment interest award from $105,632.87 to $58,517.81.

IV.

STATEMENT OF ORAL ARGUMENT AND DECISION

Oral argument is not necessary under revised rule 18(a)(4). The facts are not disputed and this cross-assignment of error involves a pure legal question.

V.

ARGUMENT

The prejudgment interest statute that applies to special damages resulting from a tort is West Virginia Code § 56-6-31. See Grove v. Myers, syl. pts. 1, 2, 3, 4, 5181 W. Va. 342, 382 S.E.2d 536 (1989). This statute states that "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, and determined by the court, and that established rate shall remain constant from that date until the date of the judgment or decree." (Emphasis). It is critical that our legislature did not state under W. Va. Code § 56-6-31 that "the amount of prejudgment interest shall be reduced after consideration is given to the date and amount of prior settlement monies."

In addition, one must consider the language that our legislature determined not to use in another prejudgment interest statute. W. Va. Code § 56-6-27 relates to an award of prejudgment interest on the principal due, or any part thereof in actions founded in contract only. See Corte Co., Inc. v. County Com'n of McDowell County, 171 W. Va. 405 (1982). In it, our legislature specifically stated that in all such cases the [jury] shall find the aggregate of principal and interest due at the time of the trial, *after allowing all proper credits, payments and set-off*[.] (Emphasis). Importantly, our legislature determined not to include this language within W. Va. Code § 56-6-31. Clearly, our legislature by not including similar language under W. Va. Code § 56-6-31 did not authorize the trial court to reduce Ms. Rutherford's prejudgment interest award after consideration of the date and amount of settlement monies previously paid.

Finally, this Court in Grove held that "[b]y 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. This decision recognizes that the trial court did not have the statutory authority to reduce Ms. Rutherford's prejudgment interest award from $105,632.87 to $58, 517.81.

VI.

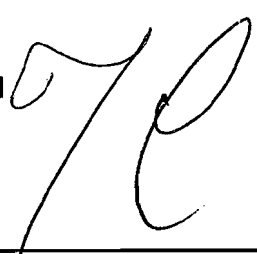
CONCLUSION

WHEREFORE, for the reasons stated herein, Ms. Rutherford respectfully requests the Court to reverse the trial court's final judgment as it relates to her prejudgment interest award, and direct that she be awarded prejudgment interest in the amount of $105,632.87. She seeks any other relief deemed necessary and appropriate by this Court.

RESPECTFULLY SUBMITTED,

SHEILA RUTHERFORD
Respondent

By Counsel



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(304) 347-3800

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SHEILA ANN RUTHERFORD,

Plaintiff,

v. CIVIL ACTION NO.: 03-C-2908

OLIVE V. MCCLANAHAN and

Defendants,

and

OLIVE V. MCCLANAHAN

Plaintiff,

CIVIL ACTION NO.: 04-C-1931

v.

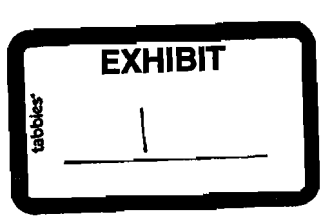
KANAWHA COUNTY COMMISSION

Defendant.

PLAINTIFF SHEILA ANN RUTHERFORD'S SUPPLEMENT TO HER MOTION AND MEMORANDUM OF LAW SEEKING PREJUDGMENT INTEREST ON SPECIAL DAMAGES PURSUANT TO W. VA. CODE § 56-6-31

Comes now the Plaintiff, Sheila Ann Rutherford, by counsel Tim C. Carrico, Esq., for her supplement to her motion seeking prejudgment interest on her special damages set forth in the jury's verdict executed on September 30, 2008. For her supplement, the plaintiff states as follows:

1. Attached hereto as Exhibit no. 1 is the Judgment Order on the Jury Verdict in a Logan County, West Virginia, personal injury case Civil Action no. 07-C-278wherein Judge Rory L. Perry, entered a Judgment Order on April 14, 2009. Importantly, under this Order the trial court applied the defendant's pro tanto off-set for settlement monies *after* the calculation of the plaintiff's prejudgment interest on special damages. The plaintiff in the instant case is simply



requesting this Court to do the same.

2. Interestingly, the defendant in the Logan County action was also represented by State Farm's counsel's in the case before this Court.

3. That Exhibit No. 1 attached hereto is persuasive authority in support of the plaintiff's argument that prejudgment interest on special damages is calculated before application of the defendant's pro tanto off-set for pre-trial settlement monies received by the plaintiff.

WHEREFORE, for the reasons stated herein, the plaintiff requests the Court to determine the amount of her prejudgment interest on her special damages before application of the defendant's pro tanto settlement monies received before trial.

RESPECTFULLY SUBMITTED,

SHEILA RUTHERFORD
Plaintiff

By Counsel

Tim C. Carrico (WVSB 6771)
Carrico Law Offices LC
602 Virginia Street East, Suite 300
Charleston, W. Va. 25301
(304) 347-3800

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SHEILA ANN RUTHERFORD,

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and

OLIVE V. MCCLANAHAN

Plaintiff,

CIVIL ACTION NO.: 04-C-1931

v.

KANAWHA COUNTY COMMISSION

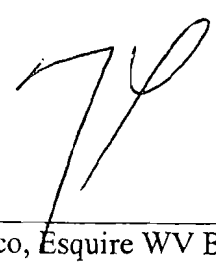
Defendant.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing *"Plaintiff Sheila Ann Rutherford's Supplement to Her Motion and Memorandum of Law Seeking Prejudgment Interest on Special Damages Pursuant to W.Va. Code Section 56-6-3"* was served this 28th day of April, 2009, via United States mail, postage prepaid upon the following persons:

David A. Mohler, Esquire
Bowles Rice McDavid Graff & Love
P.O. Box 1386
Charleston, WV 25325-1386

David F. Nelson, Esquire
FRANCIS, NELSON & BRISON
P.O. Box 3029
Charleston, WV 25331-3029



Tim C. Carrico, Esquire WV Bar ID 6771

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE