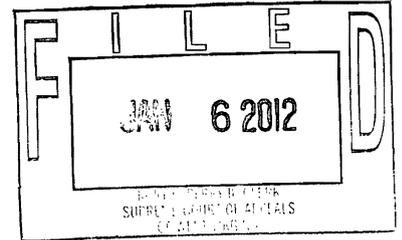


No. 11-1325



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

RICHARD RINGER,
Defendant Below, Petitioner,

v.

JOSEPH F. JOHN
Plaintiff Below, Respondent.

BRIEF OF RESPONDENT JOSEPH F. JOHN AND ASSIGNMENT OF ERROR

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

RICHARD RINGER,

Defendant Below, Petitioner,

v.

JOSEPH F. JOHN

Plaintiff Below, Respondent.

On Petition for Appeal
From the Circuit Court of
Preston County, West Virginia
Civil Action No. 09-C-225

BRIEF OF RESPONDENT JOSEPH F. JOHN AND ASSIGNMENT OF ERROR

Facts

Respondent adopts by reference the Statement of the Fact and Procedural History as stated in the Brief of Petitioner Richard Ringer, pages 1- 4, inclusive.

Standard of Review

Respondent adopts by reference the Standard of Review, to-wit: *de novo* standard of review as stated in the Brief of Petitioner.

Respondent's Reply/Argument to Petitioner's Assignments of Error

A. The Circuit Court utilized the correct prejudgment interest rate for damages awarded to Petitioner Richard Ringer.

The Petitioner argues on page 6 of it's Brief that the West Virginia Code and not the Administrative Order provides for how prejudgment interest should be calculated and cites the 2006 W.V.C. Statute of 56-6-31. However, the Administrative Order (Appendix of Petitioner, page 12) clearly states in the first full paragraph that "**Whereas, The West Virginia Legislature, *in an amendment to West Virginia Code 56-6-31*, which became effective January 2, 2007, has provided that the rate of interest on judgment and decrees...**" was to be set at 3% points above the Federal Reserve District's secondary discount rate... "*for West Virginia decrees and judgments for the payment of money entered on or after January 2, 2007...*". Administrative Order (emphasis added).

It is critical to note that said Order was an *amendment* to the Code statute cited by Petitioner in support of his argument. The statute cited by Petitioner was the 2006 statute; the Order makes it clear that the amendment became effective January 2, 2007.

Therefore the Court was referring to the Code statute *as amended* in making it's ruling.

In his argument on this issue Petitioner repeatedly refers to the 2006 statute that does not take into consideration the fact that said statute was amended in 2007 as per the Administrative Order.

Furthermore, every case cited by Petitioner with respect to this issue of the amount of the interest rate -- every case cited -- are before the 2007 amendment.

West Virginia Code 56-6-31 (b) states in relevant part that "notwithstanding the provisions of section 5, article six, chapter forty-seven of this code, the rate of interest on judgments and decrees...including pre judgment 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...".

West Virginia Code 56-6-31 (c) makes it clear that amendments to this statute during the year 2006 were effective January 2, 2007 which is the Administrative Order used by the Court in this case.

In summary, it is clear that the Court did not err in using the interest rate as provided by said Administrative Order and the ruling of the Court in this respect should be affirmed.

B. The Court did not err in determining the date on which prejudgment interest began to accrue.

Petitioner argues that the date upon which prejudgment interest should begin to accrue is the date of the cause of action. However, West Virginia Code 56-6-31 (a) states in relevant part that the amount of prejudgment interest shall be the rate "in effect for the calendar year in which the right to bring the same shall have accrued, *as determined by the Court...*". Emphasis added.

The aforesaid Administrative Order does not state that interest begins as of the date of the cause of action; it states in relevant part only the amount of the interest rate. The Court in this case correctly found that the amount of interest should be as of the year of the judgment which in this case was 2011. The Court notes in its ruling on Defendant's Motion to Amend Judgment Order that "A fair reading of the Administrative Order, *which makes no reference to the date of the cause of action*, would suggest

that the applicable interest rate" is the rate as of the year of judgment. Page 20 of Petitioner's Appendix, emphasis added.

It should be noted that the calculation of prejudgment interest is the duty of the trial court, not a jury. Grove By and Through Grove v Myers, 382 S.E.2d 536, 541 (W.Va. 1989). In the Grove case, which was clearly decided before the 2006 amendments to the Code and the 2007 Administrative Order, the Court stated that prejudgment interest to begin on the date of cause of action accrues. Grove, at page 543. The Court found that when a party has breached a duty to the other and the other injured, that is when the cause of action accrued. Grove, at page 543.

However, the Grove case made it clear that this ruling pertained only to *special or liquidated damages*. In the present case there was no instruction given by Petitioner on the issue of special damages or liquidated damages. As stated in the case of Beard v Lim, 408 S.E.2d 772, at page 777 (W.Va. 1991). It was held that "it 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*." Emphasis added.

Given the facts of this case it is certainly not clear as to when the causes of action arose with respect to the damages claimed by Petitioner. On pages 2 & 3 of Petitioner's Brief Petitioner lists the damages awarded to him by the jury; however, a review of the trial transcript (pages 22-104 of Petitioner's Appendix) makes it very clear that there was no clear date or dates as to when these causes of action occurred. For example, Petitioner was awarded \$20,000.00 for stone he claims he provided to Respondent. Petitioner's testimony regarding these damages start on page 186 of the transcript (page 69 of Appendix) and ends on page 191 of the transcript (page 70 of Appendix). However, *at no time was it stated when he provided the stone or when he was supposed to be paid for it.*

"Q. What was your agreement or understanding with Mr. John about how that would be compensated to you?"

" It was an expense".

Q. "How were you to be reimbursed or were you to be reimbursed?"

A. "To sell the house. I did get my portion out of the expense, the sections of the road, is that what you mean?"

Q. "I am asking you was there an understanding with Mr. John where you were to be compensated for the value of the stone?"

A. Yeah. We did with me because that way we didn't have to pay Cranesville Stone right up front. *We could wait until we sold the house...basically I was going to wait until we sold the -- started selling the first three houses.*" Page 190 of transcript, page 70 of Appendix, emphasis added.

In other words there was no date in the testimony as to when the stone was provided or specifically when Petitioner was to be paid for it; by his own testimony he was not going to be paid until the parties "started selling the first three houses."

It should be noted that at trial it was undisputed between the parties that they never sold a house with respect to this agreement or contract they had. Therefore if payment to the Petitioner was contingent upon the sale of a house the contingency never occurred.

Petitioner was also awarded \$16,500.00 for the storage of topsoil (page 2 of Petitioners Brief) and the testimony covering this topsoil is on pages 193-197 of the transcript, pages 71 - 72 of the Appendix. Petitioner does state in his testimony at page 193 of the transcripts, page 71 of the Appendix, that the topsoil was stored on his property May 11, 2007.

However, *there is no testimony as to any agreement between the parties as to the amount of monthly rental, when payment was due, and no testimony as to the particulars of the claim for damages.*

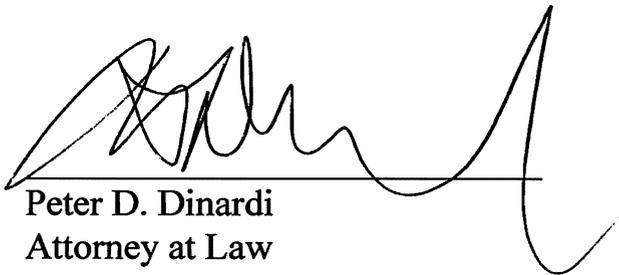
It should be noted at this point that Respondent was the Plaintiff in the original lawsuit before this Court and that Petitioner was the Defendant and only brought a Counterclaim for the damages sought after Respondent brought the Complaint. There was no claim made by Petitioner for these damages prior to Respondent bringing the original action against Petitioner!

The transcript makes it very clear that there was no true agreement between the parties as to the monthly rental for the topsoil, when payments were to be made on the rental, and the testimony as to when Petitioner was to be paid for the stone is very vague. Therefore as stated above, the trial court exercised it's discretion in finding on it's own, the actual date the cause of action arose i.e. the date of judgment. What other dates could the trial court have used? There was no testimony by the Petitioner or any witnesses as to when the date of the cause of action arose and in actions under contract such as this case the cause of action is when damages are ascertainable to a reasonable degree of precision. Employer - Teamsters Joint Council v Weatherall Concrete, 468 F. Supp. 1167 (S.D. W.Va. 1979).

Conclusion

In summary, given the fact that under the evidence, there were no clear agreement between the parties as to the terms of the alleged agreements or contracts regarding the topsoil, stone, etc i.e. amount of monthly rental, when to be paid, etc, the trial court did what it was authorized to do under the law: It calculated prejudgment interest from the date of trial court found that the cause of action accrued which in this case, given the lack of evidence on specific terms, would have been the date of judgment.

Accordingly Respondent hereby respectfully requests that the judgment of the trial court on the issues herein be affirmed.



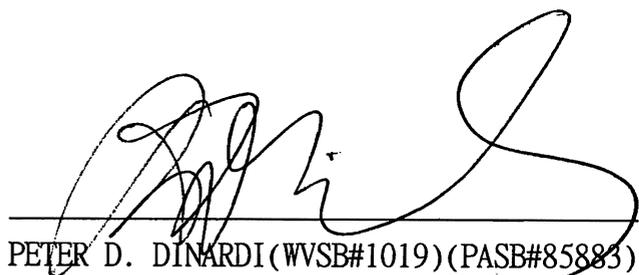
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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that I served a true copy of the foregoing
Brief of Respondent Joseph F. John and Assignment of Error by mailing
same to the following counsel of record January 5, 2012.

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