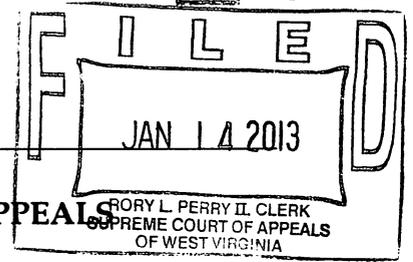


No. 11-1325



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

**PETITIONER'S SUPPLEMENTAL REPLY TO
BRIEF OF RESPONDENT, JOSEPH F. JOHN**

Petitioner submits this Reply to Brief of Respondent, Joseph F. John, pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure.

Facts

Petitioner adopts by reference the Statement of the Fact and Procedural History as stated in the Brief of Petitioner Richard Ringer and Assignments of Error, p.1-5.

Standard of Review

Petitioner adopts by reference the *de novo* Standard of Review as stated in the Brief of Petitioner Richard Ringer and Assignments of Error, p. 5.

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I. **W. Va. Code § 56-6-31 Mandates that Pre-Judgment Interest Begins to Run at The Rate in Effect When the Right to Bring a Cause of Action Accrues, and Administrative Orders do not amend the West Virginia Code.**

W. Va. Code § 56-6-31(a) provides that pre-judgment interest “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). W. Va. Code § 56-6-31(b) authorizes the West Virginia Supreme Court of appeals to “annually determine the interest rate to be paid upon judgments or decrees for the payment of money.”

Respondent’s position appears to be that a 2007 Administrative Order¹ designed to set the interest rate for the calendar year of 2007 has substantively amended W. Va. Code § 56-6-31. Specifically, Respondent argues that the portion of W. Va. Code § 56-6-31(a) which provides that pre-judgment interest “shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued[.]” is no longer good law. *Id.* Respondent fails to realize that the Administrative Orders set forth, each year, by this Court, merely establish the **rate at which interest** is to run. Such Administrative Orders do not, in any way, alter the law set forth in W. Va. Code § 56-6-31 regarding when prejudgment interest begins to run.

Contrary to arguments set forth in Respondent’s brief, the fact that the

¹Such as the one set forth on page 12 of Petitioner’s Appendix.

Administrative Order does not specifically state that interest begins to run as of the date of the accrual of one's cause of action does not alter W. Va. Code § 56-6-31.² Respondent fails to recognize that the Administrative Order does not mention accrual of one's cause of action **because the Administrative Order does not alter the West Virginia Code in this regard.**

Respondent's argument appears to be that because the 2007 Administrative Order was entered after § 56-6-31 was enacted in 2006, then the provisions relating to the timing of the effective rate for prejudgment interest are repealed. This argument cannot be taken seriously. The purpose of the 2007 Administrative Order is merely to set the interest rate for that year. This authority is given to the West Virginia Supreme Court of Appeals by W. Va. Code § 56-6-31(b). It is somewhat ridiculous for Respondent to argue that the Supreme Court somehow used this authority to set the interest rate given to it through W. Va. Code § 56-6-31(b) to substantively alter the definition of which year's rate applies, as set forth in W. Va. Code § 56-6-31(a), without explicitly stating it was doing so.

Moreover it is unclear as to how Respondent arrives at the conclusion that the 2007 Administrative Order is an Amendment to the timing requirements for prejudgment interest. Respondent contends that by merely using the word "amendment" in its 2007 Administrative Order, the West Virginia Supreme Court of Appeals was somehow voiding provisions of W. Va. Code § 56-6-31(a). However,

²See Respondent's brief at page 4.

nothing in the Administrative Order supports this interpretation. It is perfectly clear that the “amendment” referred to in the Administrative Order is merely the amendment of the interest rate reflected for the calendar year of 2007, which the Supreme Court of Appeals is authorized to amend under § 56-6-31(b). Nothing in the Administrative Order suggests that it is attempting to change the requirements for which year’s rate applies under § 56-6-31(a).

Finally, it is noteworthy that § 56-6-31(a) is still in full force and effect as written, and the language setting the prejudgment interest rate at the rate in effect in the year of which the right to bring the cause of action accrues still stands as good law without contrary notation. If Respondent were correct, and this Administrative Order had substantively amended the prejudgment interest requirements, then **no section** of the West Virginia Code could be trusted as written. All code sections would have to be second-guessed by a thorough search of potentially relevant Administrative orders that could implicitly amend the code. This is obviously not the state of the law in West Virginia and underscores the preposterousness of Respondent’s argument.

Ultimately, the Administrative Order merely alters the rate at which interest accrues, and, contrary to Respondent’s arguments, the Administrative Order does not, in any way, alter or amend the portion of W. Va. Code § 56-6-31 which mandates that pre-judgment interest “shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued[.]” Id.

II. The proper date for beginning the calculation of interest is July 19, 2007, because that is when Petitioner's cause of action accrued.

Respondent next argues that Petitioner's right to bring a cause of action against Respondent did not accrue until the date of the final judgment.³ West Virginia law, and common sense, dictate that this cannot be the case. If Petitioner did not have a right to bring his cause of action against Respondent when such a cause of action was originally asserted by Petitioner, then Petitioner's suit against Respondent would have been dismissed as a matter of law. Clearly, Petitioner had a right to bring suit against Respondent before the trial in the underlying matter began. In fact, as set forth previously by this Court, Petitioner had a right to bring suit against Respondent the moment he was injured by Respondent's actions:

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. Therefore, prejudgment interest runs from the time the cause of action accrues, that is, from the date of injury.

Grove By and Through Grove v. Myers, 181 W.Va. 342, 349, 382 S.E. 2d 536, 543 (W. Va. 1989) (internal citations omitted) (emphasis added).

Although Grove, was set forth prior to the 2007 Administrative Order, issued by this Court, the 2007 Administrative Order does NOT alter the law set forth above. As set forth above, the 2007 Administrative Order, and all subsequent similar Administrative Orders set forth by this Court, merely alter the rate upon which interest

³See Respondent's Brief at Page 4-8.

is to be calculated. Contrary to Respondent's arguments, the Administrative Order does NOT alter W. Va. Code § 56-6-31, regarding when prejudgment interest begins to run, and Grove is still good law. Respondent further attempts to distinguish Grove, based on the fact that the Grove ruling applied only to special and liquidated damages. See Respondent's Brief at Page 5. The crux of this argument appears to be that the jury in this case was not instructed on special or liquidated damages. Yet Respondent somehow ignores two facts: First, the judge explicitly found that the damages that Respondent owed to Respondent in this case *were* special damages pursuant to W. Va. Code § 56-6-31. See Appendix, p. 6. Second, it is the duty of the **defense counsel**⁴ to issue a special interrogatory on the issue of special damages. Sy Pt. 3, Beard v. Lim, 185 W.Va. 749, 750, 408 S.E.2d 772, 773 (1991). If the defendant fails to do so, " the trial court should give the plaintiff the benefit of any doubt in the calculation of prejudgment interest." Id. Thus, Respondent is now in the awkward position of assigning error to both the Court and the Petitioner for an omission that was actually the responsibility of "prudent defense counsel." Beard makes clear that the benefit of the doubt should be given to the Plaintiff in such circumstances as a matter of law. Id.

Respondent also argues that since no time was explicitly agreed upon for when Respondent was obligated to pay Petitioner, the date of the accrual of Petitioner's cause of action could be the date of judgment. See Respondent's Brief at Page 6-7. This

⁴While Petitioner was originally the Defendant in this case, Petitioner's recovery is based on his Counterclaim as a Counter-Plaintiff. Thus, for the purposes of the damages awarded to Petitioner that are the subject of this appeal, Petitioner was the Plaintiff.

argument is incorrect for several reasons, the most important of which is that it assumes that the Petitioner's recovery from Respondents was based solely upon a formal contract⁵. However, the jury was also instructed as to unjust enrichment. Unjust enrichment recovery is based on the equitable principle that one person may not enrich himself unjustly at the expense of another. Lockard v. City of Salem, 130 W.Va. 287, 292, 43 S.E.2d 239, 242 (1947); Development Co. v. Howell, 101 W.Va. 748, 133 S.E. 699 (1926). Unjust enrichment is based on implied contract, not formal contract, and in such cases, no actual agreement between the parties exists. Rosenbaum v. Price Const. Co., 117 W.Va. 160, 165, 184 S.E. 261, 263 (1936). Thus, it is irrelevant that there was no specific agreement between the parties as to the actual date Respondent was to pay Petitioner. Instead, the date of accrual for an unjust enrichment case is the date that Respondent was unjustly enriched, because that is the date that Petitioner would have the right to bring his cause of action. See Grove By and Through Grove, 181 W.Va. at 349,, 382 S.E. 2d at 543 (1989).

As set forth, in greater deal in Petitioner's Supplemental Brief, the date the cause of action accrued was July 19, 2007. Petitioner's Supplemental Brief, p. 2-6. Although Petitioner performed work for Respondent and attempted to collect payment for said work prior to July 19, 2007, July 19, 2007 was the date of the final invoice that Petitioner sent Respondent, which was acknowledged by Respondent in Court. Thus,

⁵It should also be noted that Respondent's argument fails even under a breach of contract theory of recovery. Even if Petitioner's damages were based solely on breach of contract, he still would be entitled to prejudgment interest from the date of the agreement of payment. Whatever that date may have been, it was surely well before the date of judgment in this case.

July 19, 2007 is the more conservative, and very last date on which Respondent admitted that Petitioner sought payment. Accordingly, July 19, 2007 is, the latest possible date, by which Petitioner had a right to bring his cause of action, and is therefore the appropriate date for the calculation of prejudgment interest under the law.

Finally, Respondent attempts to argue the merits of the case, related to the sale of a planned house and the storage of topsoil, which are not before the Court at this time. It is also wholly irrelevant and/or moot for Respondent to argue that Petitioner did not sue until he was sued first and that "there was no true agreement" between the parties. The jury in this case found Respondent liable under breach of contract or unjust enrichment. It is therefore, clear that the jury found the Respondent liable for his actions and/or omissions, and it is further clear that said actions/omissions took place on or before July 19, 2007.

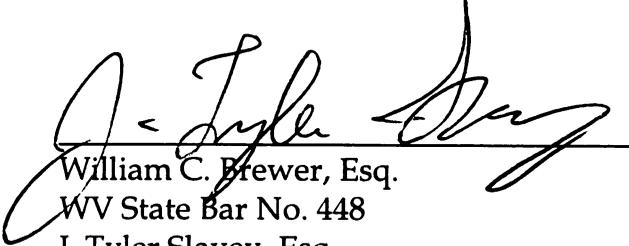
III. Conclusion

Accordingly, for the reasons set forth in Petitioner's Appeal brief and for the reasons set forth above, Petitioner Ringer respectfully requests that this Court hereby reverse the Circuit Court's August 18, 2011, Order Denying Petitioner's Motion to Amend Judgment Order, and that this Court rule that prejudgment interest runs from the time a cause of action begins to accrue, i.e. from the date of the injury, that this Court rule that the rate of prejudgment interest is that which is in effect when the cause of action begins to accrue, and that this Court rule that Petitioner Ringer is entitled to prejudgment interest at a rate of 9.75% per annum beginning on July 19, 2007.

Alternatively, Petitioner Ringer requests that this Court reverse the Circuit Court's August 18, 2011, Order Denying Petitioner's Motion to Amend Judgment Order, that this Court rule that prejudgment interest runs from the time a cause of action begins to accrue, i.e. from the date of the injury, that this Court rule that the rate of prejudgment interest is that which is in effect when the cause of action begins to accrue, and that this Court remand this case to the Circuit Court of Preston County, to determine the exact date on which Petitioner Ringer's claims against Respondent John began to accrue.

RESPECTFULLY SUBMITTED,
RICHARD RINGER
PETITIONER, BY COUNSEL.

BREWER
&
GIGGENBACH, PLLC
Attorneys at Law
Of Counsel

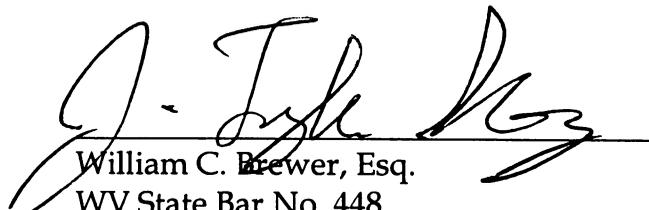

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true copy of the within **PETITIONER'S SUPPLEMENTAL REPLY TO BRIEF OF RESPONDENT, JOSEPH F. JOHN** on the 11th day of January, 2013, via United States mail, postage prepaid, upon the following:

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