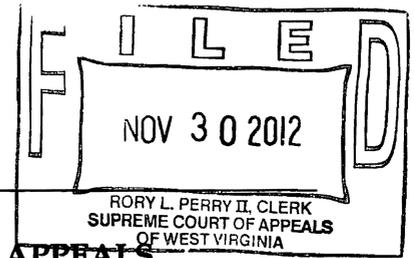


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No. 11-1325



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

RICHARD RINGER,

Defendant Below, Petitioner,

v.

JOSEPH F. JOHN,

Plaintiff Below, Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER, RICHARD RINGER

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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

SUPPLEMENTAL BRIEF OF PETITIONER, RICHARD RINGER

I. Procedural History

Petitioner submits this Supplemental Brief pursuant to the October 31, 2012 Order entered by the Supreme Court of Appeals. More specifically, on October 31, 2012, the Supreme Court of Appeals ordered Petitioner to submit a supplemental brief addressing (1) the date used for calculating the rate of prejudgment interest and (2) whether W. Va. Code § 56-6-31 or § 56-6-27 governs the calculation of prejudgment interest in this case. Accordingly, Petitioner submits the following to address the issues raised in said October 31, 2012 Order.

II. Argument

A. The proper date used for calculating the rate of prejudgment interest in this case should be July 19, 2007.

As this Court is well aware, on or about August 18, 2011, the Circuit Court of Preston County, in an Order signed by Senior Status Justice Larry Starcher, ruled on Petitioner's Motion to Amend Judgment Order, and on various motions filed by Respondent John¹, and entered an "Order Denying Plaintiff's Motion for New Trial; Order Granting, in part, and Denying, in part, Plaintiff's Motion for Stay of Execution/Ruling on Topsoil; and Order Denying Defendant's Motion to Amend Judgment Order." [hereinafter the August 18, 2011, Order].² In the August 18th Order, the Circuit Court incorrectly interpreted W. Va. Code § 56-6-31 and also ruled incorrectly that the applicable interest rate for Petitioner Ringer's claims against Respondent John was seven percent (7.0%). *See* Exhibit 4, at page 20 of the Appendix.³

¹None of which are at issue in this appeal.

²*See* Exhibit 4, pages 13 through 21 of the Appendix, attached to Petitioner's Petition for Appeal.

³ It is unclear from the August 18th Order whether the Circuit Court is overruling its prior decision, set forth in the Judgment Order (attached to Petitioner Ringer's original Brief as Exhibit 2). More specifically, in the Judgment Order, the Circuit Court held that Petitioner Ringer was entitled to pre-judgment interest at a rate of 7.0% beginning from August 2, 2010, the date on which Petitioner Ringer filed his counterclaim against Respondent John. The Circuit Court's August 18, 2011, Order, authored by Senior Status Justice Larry Starcher, does not specifically address this aspect of the prior ruling of the Circuit Court, which was authored by Circuit Judge Lawrance Miller, Jr. In fact, the only dates cited by Justice Starcher in the August 18, 2011, Order are relating to calendar year 2011. Accordingly, at this time, it is unclear to Petitioner Ringer whether the Circuit Court has ruled that Petitioner Ringer is entitled to prejudgment interest from the date of the entry of the Judgment Order, as it appears to be in the August 18, 2011, Order (which would make absolutely no sense as prejudgment interest, by its very nature, only accrues until the date of judgment) or whether the Circuit Court has ruled that Petitioner Ringer is entitled to receive prejudgment interest from August 2, 2010, as was ordered by Circuit Judge Miller in the Judgment Order. However, such issue is actually of no consequence, because either ruling would be an incorrect interpretation of W. Va. Code § 56-6-31.

W. Va. Code § 56-6-31 provides that prejudgment interest for special 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.” *Id.* In the seminal case on prejudgment interest, Grove By and Through Grove v. Myers, 382 S.E.2d 536 (W. Va. 1989), this Court interpreted the “accrued” language of § 56-6-31 as follows:

This inexact language obviously means ‘from the date the right to bring [an action for] the same [such damages] shall have accrued[.]’ ‘Accrue,’ for purposes of determining when a cause of action accrues, ordinarily means to come into existence; to become vested. Dunn v. Bank of Union, 74 W.Va. 594, 599, 82 S.E. 758, 760 (1914). See also Black's Law Dictionary 19 (5th ed. 1979). In syllabus point 1 of Jones v. Trustees of Bethany College, 177 W.Va. 168 , 351 S.E.2d 183 (1986), this Court held that ‘[t]he statute of limitations ordinarily begins to run when the right to bring an action for personal injuries accrues[,] which is when the injury is inflicted.’

Id at 543.

Clearly, W. Va. Code § 56-6-31 mandates that prejudgment interest begins to run when a cause of action accrues, i.e. from the date a party has a right to bring a claim. In this case, it is clear from the evidence presented at trial that Petitioner Ringer’s claims against Respondent John began to accrue on July 19, 2007.⁴

⁴W. Va. Code § 56-6-27 also mandates that prejudgment interest begins to run which a cause of action accrues. Please see pages 9-10 below. Accordingly, even if this Court determines that W. Va. Code § 56-6-27, and not W. Va. Code § 56-6-31, applies in this matter, then Petitioner is still entitled to prejudgment interest from July 19, 2007, until the entry of the judgment in this matter.

Pursuant to Petitioner Ringer's testimony, it is clear that he performed work, as early as May 23, 2007, for which he was never compensated by Respondent John. See Exhibit 5, at page 68 of the Appendix. In fact, the evidence is clear that Petitioner Ringer provided services during May, June and July of 2007 for which he was never compensated.⁵ Id. Furthermore, during the trial of this matter, Respondent John entered into evidence a number of invoices, which included an invoice for work performed by Petitioner Ringer up to July 19, 2007. Id. at page 43 of the Appendix. More specifically, Respondent Joseph John testified as follows:

Q: Joseph, looking at [Exhibit] 3A, what is 3A?

A: 3A is an invoice bill from Tonya Ringer. That's Mrs. Ringer, the ex-Mrs. Ringer. And it is - the letterhead is R-Rentals d/b/a and it is for machine work on May 30th, May 31st, and June 1st.

Q: Okay. And the jury will get these at the end so we won't spend a whole lot of time on them, but they will get to look at it, but what is 3B?

A: 3B is an invoice from Ringer's Snow Removal, owner Richard Ringer, for machine work **July 5, 16, 17, 18, and 19.**

Id. (emphasis added).

While it is clear that a variety of work was done to the subject property, for which separate invoices were submitted by Petitioner Ringer prior to that July 19, 2007

⁵ As set forth in footnote 4 in Petitioner's original Appeal Brief, Petitioner Ringer previously requested that the Circuit Court rule that he was entitled to prejudgment interest from July 19, 2007, but, after reviewing the trial transcript, it is now apparent that Petitioner Ringer's cause of action actually began to accrue before July 19, 2007. However, Petitioner Ringer does not wish to further confuse matters by altering its prior request to the Circuit Court, so, at this time, Petitioner Ringer is simply requesting, as was set forth in his prior request to the Circuit Court, that this Court rule that Petitioner Ringer is entitled to prejudgment interest beginning on July 19, 2007.

date, Petitioner Ringer seeks to avoid the difficulty and confusion associated with the computation of prejudgment interest for each service provided and has chosen the more conservative, and very last date on which Respondent John admitted that Petitioner Ringer sought payment for any service Petitioner Ringer provided to Respondent John, which is July 19, 2007.

Clearly, Respondent John received the benefit of the work performed by Petitioner Ringer upon completion of such work and Petitioner Ringer was not paid, and still has not been paid, for the value of the benefit conferred upon Respondent John. As such, Petitioner Ringer's right to bring a cause of action against Respondent John began to accrue at the time that the benefit of his services, for which he was not paid, was conferred upon Respondent John; that date, conservatively, being July 19, 2007. In other words, as of July 19, 2007, Petitioner Ringer had a right to bring a cause of action against Respondent John for the value of the work Petitioner Ringer performed which benefitted Respondent John.

In the Brief of Respondent Joseph F. John and Assignment of Error, hereinafter "Respondent's Brief," Respondent John argues that it is unclear as to when the cause of action arose with respect to the damages claimed by Petitioner Ringer and that therefore, in exercising its discretion, the Circuit Court found that the cause of action did not accrue until the date of judgment. *See* Respondent's brief, p. 8. Respondent's assertion in this regard is simply incorrect. Obviously, Petitioner Ringer asserted a valid claim against Respondent John as Petitioner Ringer ultimately received a

judgment against Respondent John. As such, in the alternative, even if this Court rejects Petitioner's claim that he is entitled to prejudgment interest from July 19, 2007, the latest possible date on which Petitioner's cause of action could accrue would be the date such action (i.e. Petitioner's claim against Respondent) was asserted. More specifically, the latest possible date which Petitioner's cause of action could accrue was, without question, when Petitioner asserted his counterclaim against Respondent on August 2, 2010, which Circuit Court Judge Lawrance Miller also ruled, in the initial Judgment Order, should be the date from which Petitioner's prejudgment interest award against Respondent John should begin to run.

Accordingly, as set forth above and in Petitioner's prior pleadings in this matter, Petitioner's cause of action clearly accrued on July 19, 2007. Therefore, the 2007 prejudgment interest rate should be applied in this matter and Petitioner should be awarded prejudgment interest from July 19, 2007 through the date of judgment. Alternatively, if this Court rejects Petitioner's claim that he is entitled to prejudgment interest from July 19, 2007, then Petitioner is, at the very least, entitled to prejudgment interest from August 2, 2010, through the date of judgment.

B. West Virginia Code § 56-6-31 governs the calculation of prejudgment interest in this case. However, regardless of whether West Virginia Code § 56-6-31 or West Virginia Code § 56-6-27 governs, July 19, 2007 is the appropriate date of calculation of prejudgment interest.

West Virginia Code § 56-6-31 [2006] provides that:

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 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[.]

Id.

“Special damages includes lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court.” Id.

West Virginia Code § 56-6-27 provides that “[t]he jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict.” Id.

As such, it does not seem entirely clear to Petitioner which of these two statutes would apply to actions based on contracts. However, an examination of the law and the facts in this case indicates that West Virginia Code § 56-6-31 [2006] applies to the case at hand. Furthermore, as set forth below, the result in this case would be the same even if West Virginia Code § 56-6-27 were to apply.

First, the case at hand is not “founded on contract” as required to trigger the applicability of § 56-6-27. Petitioner’s damages in this case are based on the legal doctrine of unjust enrichment for unpaid services rendered. There is no dispute that there never was any written contract in this case. While unjust enrichment is sometimes

referred to as “quasi-contract,” § 56-6-27 refers only to contracts, not quasi-contracts. Although the Verdict Form is somewhat confusing, in that it lumps the Petitioner’s purported “breach of contract” claim and Petitioner’s “unjust enrichment” claim into the same question⁶, it is clear from the evidence presented at trial that Petitioner’s claim was ultimately quasi-contractual in nature. Ultimately, as Question 2 on the Verdict Form makes clear, the jury determined that Petitioner was unjustly enriched by Respondent’s excavation work and road improvements. Thus, Petitioner’s claim was for unjust enrichment and Petitioner’s damages are not “founded on contract,” and, as such, § 56-6-27 is inapplicable to this case. Furthermore, even if this Court determines that Petitioner’s claim is contractual in nature, then Petitioner still asserts that § 56-6-31 is applicable to this case because said section clearly applies to any action sounding in “contract or otherwise[.]” *See* W. Va. Code § 56-6-31. As such, Petitioner asserts that, regardless of whether Petitioner recovered under a breach of contract theory or an unjust enrichment theory, that § 56-6-31 is applicable to this case.

Secondly, recent West Virginia case law clarifies that an award of prejudgment interest for “special damages” is a statutory right under W. Va. Code § 56-6-31. State Farm Mut. Auto. Ins. Co. v. Rutherford, 229 W.Va. 73, 726 S.E.2d 41, 52 (2011). In the case at hand, there is no dispute that Petitioner’s damages are “special damages.” Indeed, the Trial Court’s July 2011 Judgment Order explicitly finds that Petitioner’s

⁶See the Verdict Form, Question 2, at pages 1-2 of the Appendix attached to Petitioner’s Appeal brief.

damages are “special,” and this finding was never identified as an assignment of error by either party. Judgment Order, Appendix at p. 6. Thus, since Petitioner’s damages are “special” under W. Va. Code § 56-6-31 he is entitled to prejudgment interest as a matter of right.

Thirdly, this Court has recently discussed prejudgment interest as within the purview of the judge and not the jury. Specifically, this Court has recently held that “payment of prejudgment interest shall be on the special damages portions of judgments or decrees for the payment of money, not on verdicts.” State Farm Mut. Auto. Ins. Co., 726 S.E.2d at 46; *See Also Grove By and Through Grove v. Myers*, 181 W.Va. 342, 347, 382 S.E. 2d 536, 541 (1989). In fact, Respondent even concedes this in his brief. *See Respondent’s Brief*, p. 5.

Perhaps even more importantly, the Circuit Court specifically found that “the damages awarded by the jury to Defendant Ringer were special damages under W. Va. Code § 56-6-31.” *See Judgment Order at Appendix*, p. 6. To this point, Respondent has never asserted that the Circuit Court was incorrect in ruling that W. Va. Code § 56-6-31 applied to Petitioner’s award of damages against Respondent. As such, Petitioner asserts that Respondent has waived his right to now claim that W. Va. Code § 56-6-27 is applicable to this matter. Furthermore, as set forth herein, the Circuit Court was correct in its initial determination that W. Va. Code § 56-6-31 is applicable to this case.

Finally, it is immaterial whether W. Va. Code § 56-6-27 or W. Va. Code § 56-6-31 applies in this case. West Virginia law is absolutely clear that under § 56-6-31,

prejudgment interest occurs from the date of the accrual of the cause of action. State Farm Mut. Auto. Ins. Co., 726 S.E.2d at 48 ; Grove By and Through Grove, 382 S.E. 2d at 537 (1989). Importantly, courts interpreting § 56-6-27 have come to the exact same conclusion as those courts interpreting § 56-6-31. Corte Co., Inc. v. County Com'n of McDowell County, 299 S.E.2d 16, 171 W.Va. 405 (1982) (holding that when one wrongfully receives, holds or diverts money or property to which it is not entitled, it becomes liable for interest *during the period in which wrong is committed*) (emphasis added); Morton v. Godfrey L. Cabot, Inc., 63 S.E.2d 861, 134 W.Va. 55 (1949) (holding that interest accrues that time debt is due, regardless of a dispute as to the liability for the debt). Thus, it is immaterial whether § 56-6-31 or § 56-6-27 applies, because, under either statute, Petitioner is entitled to prejudgment interest from the date his cause of action against Respondent accrued, i.e. July 19, 2007.

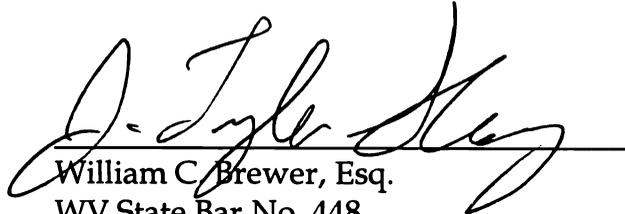
III. Conclusion

WHEREFORE, for the reasons set forth herein, and for the reasons set forth in Petitioner's original appeal brief, 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 W. Va. § 56-6-31 applies to Petitioner's award of damages against Respondent, that this Court rule that prejudgment interest runs from the time a cause of action begins to accrue, 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, 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,
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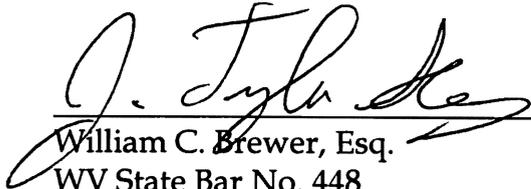
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true copy of the within **SUPPLEMENTAL BRIEF OF PETITIONER, RICHARD RINGER**, on the 29th day of November, 2012, via United States mail, postage prepaid, upon the following:

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