

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**JOHN DOE, an unknown driver,  
Defendant below,**

**Petitioner,**

**v.**

**No. 15-0013**

**Appeal from a final order of the  
Circuit Court of Monongalia County  
(Civil Action No. 11-C-621)**

**Hasil Pak, Plaintiff below,**

**Respondent.**

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**PETITIONER'S BRIEF**

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## ASSIGNMENTS OF ERROR

- I. The trial court erred by refusing to credit the amount of the advance payment to the verdict amount.
- II. The trial court erred by calculating pre-judgment interest prior to deducting the amount of the advance payment.
- III. The trial court erred by finding that Respondent was entitled to pre-judgment interest on damages recovered for the lost value of household services.

## STATEMENT OF THE CASE

This case arises out of a motor vehicle accident which occurred on November 23, 2009. On that date, Respondent, Hasil Pak (“Respondent”), was involved in an accident with an unknown, “John Doe” driver (“Petitioner”). Thereafter, Respondent asserted a claim for uninsured motorist coverage provided to Respondent by State Farm Mutual Automobile Insurance Company (“State Farm”). Respondent filed her complaint on September 30, 2011 and the case proceeded through discovery.

Prior to being represented by her current counsel, Respondent was represented by Edmund J. Rollo, Esq. (“Attorney Rollo”). *Joint Appendix at 000021-22, 000031 (hereinafter “J.A. at \_\_\_”)*. During the pendency of the underlying case, Attorney Rollo asserted an attorney lien. *J.A. at 000028*. He advised State Farm that he was willing to accept \$2,500.00 as full and complete satisfaction of the attorney lien. *Id.*

By correspondence dated May 4, 2012, State Farm, through its claims representative, Debbie Clem (“Ms. Clem”), confirmed a conversation she had with Respondent’s then and current counsel, John R. Angotti (“Attorney Angotti”), wherein Ms. Clem advised that State Farm was “prepared to pay [Plaintiff] the amount of the initial offer of uninsured motorist coverage; which was \$30,628.15.” *J.A. at 000029*. The May 4, 2012 correspondence also sought approval to issue

\$2,500.00 of the advance payment amount to Attorney Rollo to satisfy the attorney lien. *Id.* The

May 4, 2012 correspondence further stated:

The advance payment for the amount of our offer is made without prejudicing your client's right to receive a higher amount in the future through continued negotiation or alternative means of resolution.

The remaining coverage available will be reduced by the amount of this payment and this amount will also be credited against any final determination of damages. Regardless of the final determination of damages, the amount of the advance payment will be your client's minimum recovery under the policy. The claim will remain ongoing for a final determination of damages.

*Id. (emphasis added).*

By correspondence dated June 29, 2012, Ms. Clem confirmed another conversation with Attorney Angotti wherein Attorney Angotti had "advised [his] client has agreed to the \$2,500.00 attorney lien of [Attorney Rollo]." *J.A. at 000032.* The same correspondence again expressed the understanding that the amount of the advance payment would be credited against any final determination of damages:

Your client's current demand is \$100,000.00; which is the policy limit. At this time, it appears we have reached an impasse. I am enclosing our payment for the amount of the initial offer since our last evaluation. The initial offer amount was \$30,628.15. From this amount, I have paid the attorney lien of \$2,500.00 to Mr. Rollo. As such, a payment of \$28, 128.15 is enclosed.

The remaining coverage available will be reduced by the enclosed advanced payment. This payment will also be credited against any final determination of damages.

This payment should be considered an advance without prejudicing your client's right to receive a higher amount in the future through continued negotiations. State Farm® is committed to paying the amount reasonably owed our insureds under the uninsured motorist coverage as soon as practicable. This offer or your acceptance thereof, does not waive any defenses, we may have now or in the future, under the policy.

The claim remains open subject to a final determination of damages, and I will continue to reassess Ms. Pak's claim as new information becomes available. If you wish to discuss this matter further, please contact me.

*Id. (emphasis added).*

On January 18, 2013, Respondent's counsel negotiated the check for \$28,128.15. *J.A. at 000023, 000041-000042.* As explained above, the amount of the advance payment of \$30,628.15 was reduced by the amount of the \$2,500.00 attorney fee lien which was paid to Attorney Rollo. Additionally, prior to trial, State Farm also paid to or on behalf of Respondent the sum of \$25,000.00 pursuant to the medical payments coverage of Respondent's uninsured motorist coverage. *J.A. at 000007.*

State Farm defended in the name of "John Doe" at trial and both liability and damages were disputed. Respondent claimed damages for, *inter alia*, loss of household services. However, Respondent's claim was not for money paid out-of-pocket for such household services. Rather, Respondent's economic expert, Clifford B. Hawley, PhD ("Dr. Hawley"), testified as to the lost value of such past household services to date and the value of the household services which Respondent would allegedly not be able to perform in the future. *J.A. at 000124-000159.*

The jury ultimately found that John Doe was seventy-percent (70%) negligent in the accident and found Respondent to be thirty-percent (30%) negligent. The jury awarded damages totaling \$101,000.00, including \$10,000.00 for "loss of household services to date." *J.A. at 000064-000065.*

Following trial, Respondent presented a proposed Jury Order to the Court for entry, reflecting a total jury verdict of \$101,000.00, exclusive of statutory pre-judgment interest. Petitioner objected to the proposed Jury Order on several grounds, including the fact that the proposed Jury

Order did not reflect the \$25,000.00 payment made to Respondent pursuant to the medical payments coverage of Respondent's uninsured motorist coverage; did not reflect the advance payment of \$30,628.15 made prior to trial; did not deduct the two (2) payments referenced above before computing the amount of pre-judgment interest; and, included pre-judgment interest to be calculated on Respondent's award for loss of household services. *J.A. at 000007-000012.*

On May 14, 2014, the trial court entered an Order, ruling that the \$25,000.00 payment made to Respondent pursuant to the medical payments coverage would be deducted from the verdict and not be included in the pre-judgment interest calculation. *J.A. at 000016-000018.* However, the trial court ruled that the advance payment of \$30,628.15 should not be deducted from the amount of the verdict. According to the trial court, it was "wholly unclear as to what this payment actually is or for what purpose it was paid out." *J.A. at 000017* (italics in original). The trial court further found that "this amount was gratuitously paid by State Farm, without requiring a release of claim from Ms. Pak or her counsel; this payment could very well be found to constitute a gift, and the Court is without sufficient knowledge to decidedly find otherwise." *Id.* For the same reason, the court found that the advance payment could not be deducted before calculating pre-judgment interest. *J.A. at 000018.* The trial court also ruled that pursuant to *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1994) Respondent was entitled to prejudgment interest on the damages for loss of household services. *J.A. at 000017-000018.*

Petitioner subsequently filed a *Motion to Alter or Amend May 14, 2014 Order*, and provided documentation to the trial court demonstrating the purpose of the advance payment. *J.A. at 000019-000033.* Petitioner provided the trial court with copies of the above-referenced correspondence which clearly demonstrated the intention that the amount of the advance payment be

deducted from any jury verdict and further demonstrated that the advance payment was certainly not a spontaneous “gift” to Respondent. *J.A. at 000028-000032.*

Respondent filed no written response to Petitioner’s *Motion to Alter or Amend May 14, 2014 Order*, which contested any of the contentions and/or documentation regarding the advance payment. A hearing on said motion was held on June 16, 2014. *J.A. at 000037-000048.* At the hearing, Respondent maintained the position that the advance payment was a “gratuitous offer.” *J.A. at 000041.* However, Respondent’s counsel admitted that the check for the advance payment was negotiated after receipt of the above-described correspondence from State Farm. *J.A. at 000041-000042.*

On July 28, 2014, the trial court entered an *Order* denying Petitioner’s *Motion to Alter or Amend May 14, 2014 Order*. *J.A. at 000036.* The trial court denied the *Motion to Alter or Amend May 14, 2014 Order* “for the reasons as cited in the May 14<sup>th</sup> Order[.]” *Id.* Thus, the trial court’s only basis for ruling that Petitioner was not entitled to a reduction in the verdict for the advance payment was that it was “wholly unclear as to what this payment actually *is* or for what purpose it was paid out” and that it “ could very well be found to constitute a gift[.]” *J.A. at 000017.*

On October 3, 2014, the trial court entered its *Jury Order*. *J.A. at 000049-000054* The *Jury Order* did not reflect any deduction for the \$25,000.00 payment made to Respondent pursuant to the medical payments coverage. *Id.* As noted above, the trial court had already ruled that such a deduction was proper. Thus, Petitioner filed another *Motion to Alter or Amend* on October 20, 2014. *J.A. at 000055-000060.* Respondent filed no written response to this motion. Following a November 3, 2014 hearing, the trial court entered an *Amended Jury Order and Order Addressing Motion(s) to Alter/Amend* on December 4, 2014 and corrected this oversight without

objection from Respondent. *J.A. at 000061-000068*. The December 4, 2014 *Amended Jury Order and Order Addressing Motion(s) to Alter/Amend* did not provide credit for the \$30,628.15 advance payment. *Id.* Additionally, said order also provided for pre-judgment interest on the amount of the advance payment as well as the damages for past lost household services. *Id.*

### **SUMMARY OF ARGUMENT**

Petitioner presents this appeal respectfully requesting that the rulings of the Circuit Court of Monongalia County be reversed. Petitioner should be granted credit for the advance payment of \$30,628.15. In order to avoid duplicate recovery, the amount of the advance payment should have been deducted from the amount of the jury verdict. Additionally, by negotiating the advance payment check, Respondent expressly agreed to the terms of the May 4, 2012 correspondence and June 29, 2012 correspondence, including the understanding that the advance payment amount would “be credited against any final determination of damages.” Public policy also weighs in favor of providing a credit for advance payments. For these reasons, several courts of other jurisdictions which have addressed this issue have determined that advance payments should be deducted from a final verdict.

Based on the failure to provide a credit for the amount of the advance payment, the trial court also erred in finding that the amount of the advance payment was subject to pre-judgment interest. Established legal authority provides that pre-judgment interest should be calculated after deducting all credits and advance payments.

Last, the trial court erred in ruling that Respondent was entitled to pre-judgment interest on the amount of damages awarded for “loss of household services to date.” Respondent did not make any out-of-pocket payments nor incur any expenses in relation to such damages. Rather, the damages were awarded for the lost value of such household services.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is appropriate in this case because some of the issues have not been authoritatively decided by this Court and the decisional process would be aided by oral argument. Petitioner further asserts that Rule 20 argument is appropriate in this case because an issue of first impression is involved.

### **ARGUMENT**

Petitioner appeals three (3) issues. The first issue, the failure of the trial court to provide a credit for the amount of an advance payment, is a question of law which this Court should review *de novo*. With respect to the final two (2) issues, the proper calculation of prejudgment interest is a question of law which is also subject to a *de novo* review. *See State Farm Mut. Auto. Ins. Co. v. Rutherford*, 229 W. Va. 73, 76, 726 S.E.2d 41, 44 (2011).

#### **I. The trial erred by refusing to credit the amount of the advance payment to the verdict amount.**

“The term advance payment refers to the laudable practice of expediting relief to an injured party by making payment prior to, and in anticipation of, a future settlement or judgment.” 47 Am. Jur. 2d Judgments § 822 (2015) (internal quotations omitted).

In this case, failing to provide a credit for the amount of the advance payment made to Respondent grants a windfall to Respondent and amounts to the double recovery of damages. This Court has long found that double recovery of damages is violative of public policy. *State Farm Mut.*

*Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 737 S.E.2d 229 (2012). “It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury.” Syl. Pt. 7, in part, *Harless v. First Nat’l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982). See also *McDavid v. U.S.*, 213 W. Va. 592, 584 S.E.2d 226 (2003); *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 505 S.E.2d 454 (1998); *Smithson v. United States Fid. & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991); *Meade v. Slonaker*, 183 W. Va. 66, 394 S.E.2d 50 (1990). In this case, allowing a deduction for the advance payment would prevent an impermissible double recovery of damages by Respondent.

Moreover, as explained above, the advance payment was provided to Respondent on the condition that the amount of the advance payment be credited against any final determination of damages. *J.A. at 000029-30, J.A. at 000032*. After being advised of this condition, Respondent, through her counsel, negotiated the check. *J.A. at 000023, J.A. at 000041-000042*.

By negotiating the check for the advance payment, Respondent, through her counsel, expressly agreed to the terms of the advance payment. “[T]he fundamentals of a legal ‘contract’ are competent parties, legal subject-matter, valuable consideration, and mutual assent.” *Ways v. Imation Enterprises Corp.*, 214 W. Va. 305, 313, 589 S.E.2d 36, 44 (2003) (quoting Syl. Pt. 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W. Va. 559, 131 S.E. 253 (1926)). Mutual assent requires an offer on the part of one party and an acceptance on the part of the other. *Bailey v. Sewell Coal Co.*, 190 W. Va. 138, 140-141, 437 S.E.2d 448, 450-451 (1993). “Both the offer and acceptance may be by word, act or conduct that evince the intention of the parties to contract.” *Id.*

In this case, competent parties, legal subject matter, and valuable consideration should not be in dispute. Moreover, mutual assent is easily shown. State Farm, through its May 4, 2012 and June 29, 2012 correspondence, offered to make an advance payment in the amount of \$30,628.15 with the condition that the amount of the advance payment would be credited against any final determination of damages. Respondent's conduct in negotiating the check through her counsel clearly evinced an acceptance of the conditions attached to the advance payment. Thus, Respondent, through her counsel, expressly agreed that the amount of the advance payment would be credited against a final determination of damages by negotiating the check. *See* 47 Am. Jur. 2d Judgments § 822 (2015) ("An advance payment made on the condition that it will be credited toward any final settlement or judgment in favor of a tort claimant must be so credited.").

Moreover, public policy weighs in favor of allowing the amount of an advance payment to be deducted from a jury verdict. "The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation[.]" Syl. Pt. 1, in part, *Sanders v. Roselawn Mem'l Gardens, Inc.*, 152 W. Va. 91, 159 S.E.2d 784 (1968). If the Court were to find that advance payments cannot be credited toward a jury verdict, then insurers would simply have no reason to make any advance payments in the future. This would needlessly encourage litigation and prevent plaintiffs in our State from accessing funds which they may need for medical treatment, repairs to property damage, to replace lost wages, or other similar needs. Allowing a credit for the advance payment in this case towards the jury verdict would further the public policy of this State which encourages settlement and compromise.

For the above stated reasons, numerous courts from other jurisdictions have held that advance payments should be deducted from a jury verdict. In *Douglas v. Adams Trucking Company*,

*Inc.*, the plaintiff's vehicle was struck from behind by a tractor trailer owned by a trucking company. 345 Ark. 203, 206, 46 S.W.3d 512, 513 (2001). Following the accident, the insurer for the trucking company made several advance payments to the plaintiff. *Id.* The matter subsequently went to trial and the jury awarded an amount greater than the total of the advance payments. *Id.* at 207-208, 514-515. The trial court found that an offset for the total amount of the advance payments was appropriate. *Id.* at 208, 515.

On appeal, the Supreme Court of Arkansas noted that advance payment arrangements

have been designed to avoid criticisms which have been leveled at the liability insurance system on the ground that the injured party is normally in no financial position to await the outcome of a trial which might be long delayed and that therefore liability insurers are in a position to exert leverage in forcing a settlement more favorable than might otherwise be available because of the pressure of the injured party's financial necessities.

*Id.* at 211, 517 (quoting W.E. Shipley, Annotation, *Effect of Advance Payment by Tortfeasor's Liability Insurer to Injured Claimant*, 25 A.L.R.3d 1091 (1969)). The *Douglas* court also reasoned that allowing a credit for advanced payments favored the amicable settlement of controversies and was necessary to prevent a double recovery. *Id.*

The plaintiff argued that the advance payments were voluntarily paid and, therefore, a credit for such payments against the judgment should not be allowed. The court noted that even though "there was no agreement that the insurer would receive full credit" for making the advanced payments, it was "clear from the outset that the liability carrier was paying advances against future settlement or any damage award resulting from the liability of the [trucking company] to mitigate such damages." *Id.* at 212-213, 518. Therefore, the court rejected the "voluntary payment" argument and found that a credit was appropriate.<sup>1</sup>

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<sup>1</sup>The Court went on to hold that the set off could only be applied to damages for medical expenses, property

Similarly, in *Keating*, after a motor vehicle accident an insurer made payments to the plaintiff and to health care providers on his behalf for medical expenses and lost wages. *Keating v. Contractors Tire Service, Inc.*, 428 So.2d 624, 625 (Ala. 1983). There was no agreement between the plaintiff and the insurer that the advance payments would be credited against any judgment the plaintiff might receive. *Id.* The matter went to trial and a jury returned a verdict in excess of the total amount of the advance payments. *Id.* The court reasoned that the plaintiff “accepted advances for the corporate Defendant’s insurer, endorsed the drafts of payment, and received credit for his medical expenses with full knowledge of both the source and purpose of these advances.” *Id.* at 626. The court further reasoned that the advance payments “undoubtedly spar[ed] Plaintiff the economic pressure which otherwise may have caused him to settle out of court to his disadvantage.” *Id.* The court ultimately found that a credit for the advance payments was appropriate.

In *Russell*, the plaintiff was injured when a pallet of bricks at defendant’s business collapsed on him. *Russell v. Ashe Brick Co.*, 267 S.C. 640, 642, 230 S.E.2d 814 (1976). The defendant’s insurer sent plaintiff a check for \$5,500. *Id.* Suit was subsequently filed and a jury returned a verdict for \$2,000 in actual damages and \$5,000 in punitive damages. *Id.* at 643, 814. The trial court denied a motion for an offset and credit for the \$5,500 advance payment. *Id.*

On appeal, the Supreme Court of South Carolina observed that there was a “common thread running through all cases [that have addressed advance payments] which needs no precedential support and is particularly persuasive”: “Why should the [plaintiff] be allowed to collect \$12,500.00 on a judgment that the jury has assessed at \$7,000.00?” *Id.* at 643, 815. The court also

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losses, and lost income because “the advance payments were earmarked for lost income and [...] the other payments went to medical expenses and property losses[.]” *Douglas*, 345 Ark at 214, 46 S.W.3d at 519. However, in the case *sub judice*, the advance payment was not earmarked for certain categories of damages. Therefore, the amount of the advance payment should be offset in full.

found that the lack of a receipt signed by the plaintiff for the advance payment “was without legal significance.” *Id.* Therefore, the court held that the defendant was entitled to an offset and credit of the amount of the advance payment. *Id.*

In *Edwards v. Passarelli Bros. Automotive Service, Inc.*, 8 Ohio St. 2d 6, 221 N.E.2d 708 (1966), the plaintiff and defendant were involved in a motor vehicle accident. Sums totaling \$1,574.25 were paid either directly to plaintiff or to a hospital in payment of plaintiff’s medical expenses. *Id.* at 6, 709. The plaintiff had signed a written agreement for each payment which noted that the payment was “to be credited to the total amount of any final settlement or judgment[.]” *Id.* at 7, 709. The matter subsequently went to trial and which resulted in a verdict for plaintiff in the amount of \$10,000.00.

The defendant sought to offset the amount of the verdict by the amount of the advance payment and the plaintiff resisted. The court astutely observed that “[i]n essence, plaintiff is attempting to recover \$11,574.25 from a \$10,000 judgment.” *Id.* at 8, 710. The court easily found that an offset was appropriate, holding

that where an advance payment is made to possible tort-claimant upon condition that such payment is to be credited to the amount of any final settlement or judgment in favor of such tort-claimant, such sum may be credited to any such final settlement or judgment; and, if judgment is rendered, the proper procedure is to ask by post-judgment motion for a credit toward satisfaction of the judgment.

*Id.* at 9, 711.

In *Howard v. Abernathy*, the defendant’s insurer paid \$1,407.00 prior to trial. 751 S.W.2d 432, 433 (Tenn. 1988). The insurer did not require that any agreement or receipt be signed in relation to the advance payment. *Id.* at 434. The Court of Appeals of Tennessee noted that the “humanitarian practice of making advance payments to or for injured parties is to be commended and

encouraged.” *Id.* at 435. The court further reasoned that there was no valid reason why the defendant should not receive credit for the payment “despite the lack of an express agreement for credit[.]” *Id.* at 436.

Along the same lines, in *Ferris v. Anderson*, the plaintiff’s insurer made an advance payment of \$3,524.32. 255 N.W.2d 135 (Iowa 1977). Subsequent to trial, the trial court found that the advance payment should be applied against the verdict “in order to prevent a windfall double recovery for these expenses.” *Id.* at 136. The Supreme Court of Iowa affirmed the trial court’s decision, recognizing that

[s]everal jurisdictions have now held that the absence of a specific advance payment statute on post judgment motions of this nature does not bar a trial court from incorporating the partial satisfaction in its judgment; to do otherwise permits a plaintiff to recover twice [for] the same damages.

*Id.* at 137 (emphasis added). The Supreme Court of Iowa found that the advance payment concept should be encouraged because of the plain economic need of an injured person and the delays in the court system. *Id.* at 138. Thus, Supreme Court of Iowa found that the defendant was entitled to a credit for the amount of the advance payment. *Id.*

Additionally, this Court addressed an analogous situation in *State Farm Mutual Automobile Ins. Co. v. Schatken*, 230 W. Va. 201, 737 S.E.2d 229 (2012). In *Schatken*, the Schatkens were injured in a motor vehicle accident with an underinsured motorist. *Id.* at 203, 231. The Schatkens were insured by State Farm and carried a policy which contained \$5,000.00 in medical payments coverage as well as \$250,000.00 in underinsured motorist coverage. *Id.* Ms. Schatken incurred \$29,368.47 in medical expenses as a result of the accident. *Id.* The liability carrier of the underinsured motorist paid its policy limits of \$25,000.00, to which State Farm consented and waived subrogation. *Id.*

During settlement negotiations between the Schatkens and State Farm, State Farm advised that their settlement offer was based “on the ‘net’ value of the claim after reduction of the \$25,000.00 liability limits and \$5,000.00 medical payments already received by Ms. Schatken from the full settlement value pursuant to the ‘non-duplication’ provision in the State Farm policy[.]” *Id.* The Schatkens argued that the reduction for the medical payments coverage contemplated by the policy language violated W. Va. Code § 33-6-31(b).<sup>2</sup>

This Court ultimately concluded that the application of the non-duplication language “prevent[ed] double recovery of damages[.]” *Id.* at 206-207, 234-235 (emphasis added). As a result, the Court permitted State Farm to reduce the insured’s damages by the amount received under medical payments coverage. *Id.* at Syl. Pt. 4.

In the case at hand, Respondent is attempting to recover \$131,628.15 on a \$101,000.00 verdict. There is simply no legitimate reason why the amount of the advance payment should not be credited toward the amount of the jury verdict. Thus, for all the reasons set forth above, Petitioner respectfully requests that this Court reverse the decision of the trial court and order that the amount of the advance payment be credited toward the amount of the jury verdict.

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<sup>2</sup> W. Va. Code § 33-6-31(b) states, in pertinent part:

That such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall legally be entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle up to an amount not less than limits of bodily injury liability insurance and property damage liability insurance purchased by the insured without setoff against the insured's policy or any other policy. [...] No sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy.

**II. The trial court erred by calculating pre-judgment interest prior to deducting the amount of the advance payment.**

As explained above, because the trial court found that the advance payment could not be deducted from the jury verdict, the trial court awarded prejudgment interest on the amount of the advance payment. However, the Court erred in this regard as “[a]ll credits, payments, and set-offs should be deducted before computing the award of pre-judgment interest.” *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.*, 2013 WL 5352844 (N.D. W.Va. September 24, 2013) (citing *State Farm Mut. Automobile Ins. C. v. Rutherford*, 229 W. Va. 73, 726 S.E.2d 41 (2011)).

In *Rutherford*, the plaintiff filed suit against two (2) defendants, Olive McLanahan and the Kanawha County Commission, following a motor vehicle accident. *Rutherford*, 229 W. Va. at 75, 726 S.E.2d at 43. The plaintiff received \$100,000 from Olive McClanahan, which represented the policy limits of her liability insurance coverage. She also received \$30,000 from the Kanawha County Commission. The plaintiff then proceeded against her underinsured motorist carrier, State Farm. *Id.* A jury eventually returned a verdict in the amount of \$175,000, which included \$170,000 in special damages. The trial court found that State Farm was entitled to a *pro tanto* offset of \$130,000 in light of the prior settlements. *Id.*

The plaintiff and State Farm then disputed the proper method the trial court should use in determining the amount of special damages. *Id.* at 75-76, 43-44. The plaintiff asserted that she was entitled to prejudgment interest on the entire amount of the special damages award. State Farm asserted that the pretrial settlement proceeds should be deducted before prejudgment interest is calculated. The trial court rejected both arguments and applied a third method.<sup>3</sup> *Id.*

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<sup>3</sup> The circuit court calculated the prejudgment interest as follows:

This Court finds that as a matter of law the figure used to calculate the Plaintiff's prejudgment

State Farm then appealed to this Court and asserted that the trial court should have determined prejudgment interest on the special damages portion of the judgment against State Farm after deducting the \$130,000 in settlements from the \$175,000 verdict. *Id.* at 77, 45. This Court agreed. The Court relied on the language of the prejudgment interest statute, W. Va. Code § 56-6-31, which provides for the payment of prejudgment interest on the special damages portion of “every judgment or decree for the payment of money.” *Id.* at 78, 46. The Court reasoned that this language “plainly indicates that payment of prejudgment interest shall be on the special damages portions of *judgments* or *decrees* for the payment of money, not on verdicts.” *Id.* (italics in original). The judgment against State Farm was for \$45,000, not \$175,000. *Id.* The Court further reasoned that it was not unreasonable to presume that prejudgment interest was either included in the settlements agreed to by the plaintiff or that the plaintiff waived the right to prejudgment interest by agreeing to the settlements. *Id.* at 79, 47. Therefore, the Court held that the \$130,000 in settlements should have been deducted from the \$175,000 before the calculation of prejudgment interest. *Id.*

*Rutherford* was decided under the 1981 version of W. Va. Code § 56-6-31 because that version of the statute was in effect when the plaintiff’s cause of action accrued. *Id.* at 45, 77, n. 1. The statute was subsequently amended in 2006 which is the version in effect at present day. However, the 2006 version of the statute contains the same operative language on which *Rutherford*

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interest for the period of July 13, 2002 through March 9, 2004 is \$170,000. This Court further finds that for the period of March 10, 2004, the date upon which plaintiff received \$100,000 from Defendant Olive McClanahan's liability carrier, to March 16, 2008, the figure used to determine the plaintiff's prejudgment interest is \$70,000. This Court further finds that for the period from March 17, 2008, the date upon which the Plaintiff received \$30,000 from the Defendant, Kanawha County Commission, through September 29, 2008, the date of the jury verdict, the figure used to determine plaintiff's prejudgment interest is \$40,000. Therefore, the Plaintiff, Sheila Rutherford, is entitled to prejudgment interest in the amount of \$58,517.81.

*Id.* at 76, 44.

relied. The statute provides for the payment of prejudgment interest on the special damages portions of “every judgment or decree for the payment of money[.]” W. Va. Code § 56-6-31(a) (2006).

In this case, the total amount of the jury verdict was \$101,000.00. *J.A. at 000064-000065*. However, after the amount of the verdict is reduced by Respondent’s comparative negligence, the amount of the medical payments coverage monies, and the amount of the advance payment, the “judgment [...] for the payment of money” is \$15,071.85. *J.A. at 000010*. Thus, Respondent is only entitled to prejudgment interest on the special damages portion of the \$15,071.85.

Accordingly, Petitioner respectfully requests that this Honorable Court reverse the decision of the trial court and find that prejudgment interest is to be calculated after deducting the amount of the \$30,628.15 advance payment.

**III. The trial court erred by finding that Respondent was entitled to pre-judgment interest on damages recovered for the lost value of household services.**

The prejudgment interest statute provides for prejudgment interest on special damages, “includ[ing] lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures, as determined by the court.” W. Va. Code § 56-6-31(a) (emphasis added.) This Court has explained that prejudgment interest “is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned.” Syl. Pt. 1, in part, *Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc.*, 186 W. Va. 583, 413 S.E.2d 404 (1991). “Prejudgment interest is part of a plaintiff’s damages awarded for ascertainable pecuniary losses, and serves ‘to fully compensate the injured party for the loss of the use of funds that have been expended.’” *Miller v. Fluharty*, 201 W.

Va. 685, 500 S.E.2d 310 (1997) (quoting *Bond v. City of Huntington*, 166 W. Va. 581, 598, 276 S.E.2d 539, 548 (1981)).

As explained *supra*, in finding that Respondent was entitled to prejudgment interest for the damages awarded for loss of household services, the trial court primarily relied on *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1994). However, *Wilt* is distinguishable from the facts of this case. In *Wilt*, the plaintiff paid her cousin to perform household services which she could not perform as a result of her injuries. The plaintiff paid her cousin “significantly less” than “the going rate for those services.” *Id.* at 51, 208. In finding that the plaintiff was entitled to prejudgment interest for the payments for household services, the Court reasoned:

It is clear to us that expenditures for household services are included within the phrase ‘similar out-of-pocket expenditures’ used in W. Va. Code, 56-6-31, and prejudgment interest may be awarded under that section. They are out-of-pocket funds the plaintiffs lost due to the negligence of the defendant’s decedent and are intended to make the plaintiffs whole.

*Id.* at 51-52, 208-209 (emphasis added). Thus, the Court held: “Expenditures for household services are included within the phrase ‘similar out-of-pocket expenditures’ used in W. Va. Code 56-6-31 (1981), and prejudgment interest may be awarded under that section.” *Id.* at Syl. Pt. 8 (emphasis added).

This Court has also held that in a suit to recover *Hayseeds* damages for first-party underinsured motorist coverage, prejudgment interest could not be awarded on attorney’s fees and costs where there was “no evidence in the record that these fees and costs were ‘out-of-pocket’ expenditures’ for which prejudgment interest could be awarded.” *Miller v. Fluharty*, 201 W. Va. 685, 701, 500 S.E.2d 310, 326 (1997).

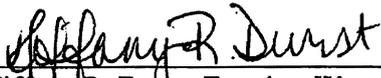
In this case, unlike *Wilt*, there was no evidence that Respondent made any out-of-pocket “expenditures” for her loss of household services. There was no evidence that Plaintiff hired anyone to perform household services that she was unable to perform. Rather, Dr. Hawley simply opined as to the value of the household services which Respondent was allegedly unable to perform as a result of her injuries *J.A. at 000124-000159*. Thus, Respondent never lost the use of any funds related to the lost household services.

Moreover, this was not a situation where Respondent had incurred the cost of paying someone to perform such household services, but simply had not paid the amount incurred prior to trial. *See Syl. Pt. 1, Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989) (“[P]rejudgment 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 [...] [i]f there is sufficient evidence to demonstrate that the injured party is obligated to pay for medical expenses or other expenses incurred by the time of trial[.]”). Rather, the household services were simply never performed by anyone and Dr. Hawley opined as to the value of such lost household services. Therefore, there was no out-of-pocket expenditure by Respondent in relation to these damages nor was there any loss of use of funds.

In light of the reasons set forth above, Petitioner respectfully requests that this Honorable Court reverse the decision of the trial court and find that Respondent is not entitled to prejudgment interest on the damages awarded by the jury for loss of household services.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Honorable Court reverse the above-described decisions of the Circuit Court and find that (1) the \$30,628.15 advance payment should be deducted from the amount of the jury verdict; (2) prejudgment interest should be calculated after deduction of the advance payment; and (3) Respondent is not entitled to prejudgment interest on the damages recovered for loss of household services.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN DOE, an unknown driver,  
Defendant below,

Petitioner,

v.

No. 15-0013

Appeal from a final order of the  
Circuit Court of Monongalia County  
(Civil Action No. 11-C-621)

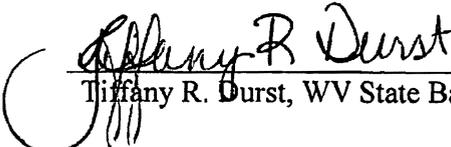
Hasil Pak, Plaintiff below,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioner, does hereby certify on this 6<sup>th</sup> day of April, 2015, that a true copy of the foregoing "*PETITIONER'S BRIEF*" was served upon opposing counsel via e-mail and by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

John R. Angotti, Esq.  
Angotti & Straface, LC  
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