

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.

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. **Respondent's arguments to the contrary notwithstanding, the advance payment was conditioned upon the amount of the advance payment being credited against any final determination of damages and by negotiating the check Respondent agreed to the same.**

Respondent asserts that Petitioner is "categorically incorrect" in stating that the amount of the advance payment was conditioned upon the advance payment being credited toward any final determination of damages. *Resp. Br. at 7*. Respondent argues: "A review of the language of the correspondence identified by Petitioner fails to show any conditional language on the part of the drafter of the correspondence nor does it evidence any 'express' agreement by Ms. Pak." *Id.*

While the term "condition" may not have been explicitly used, the letters are quite clear. The May 4, 2012 letter explained that State Farm was "prepared to pay [...] the amount of the initial offer of uninsured motorist coverage; which was \$30,628.15." *J.A. at 000029*. The same letter states: "[T]his amount will also be credited against any final determination of damages." *J.A. at 000029*. On June 29, 2012, a check for the advance payment was sent to Respondent's counsel. *J.A. at 000032*. The June 29, 2012 letter enclosing the check stated:

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.

J.A. at 000032 (emphasis added).

Thus, although the word "condition" was not expressly utilized, the intent of the advance payment was clear from the letters referenced above. Respondent's counsel admits that after receiving these letters he accepted and negotiated the check for the advance payment:

The Court: But you accepted the check, and you cashed the check, correct?

Mr. Angotti: Well, yeah. I'll tell the Court that I asked many, many counsel across the state – I called it them. [*sic*] I put it on the trial website, I'm like, "Folks, what do you do?" And everybody said, "Well, if there's money out there, take it." And we held it for a long time because I didn't know – I didn't know what –

The Court: Well, you took it but you took it conditionally didn't you, I mean, if the letter says this is what you're getting up front and this is the result and this is what happens for a final judgment?

Mr. Angotti: I'll be honest with you Judge, I still don't know – I still don't know the terms of my accepting it. I talked to my client. I advised –

The Court: Well, if you – if she's saying in a letter to you that we're giving you this money contingent upon these facts – factors, and you accept it and don't respond and you take it –

Mr. Angotti: We did do that. That's correct.

The Court: All right. Well, isn't that a – I mean, if you objected, you send it back –

Mr. Angotti: I debated –

The Court: -- or you send the letter back and say, no, we'll take it, but we're not taking it under these conditions.

Mr. Angotti: I mean, I understand that, Your Honor. [...]

J.A. at 000041-000042 (emphasis added).

Cases discussing accord and satisfaction are illustrative for the proposition that the negotiation of a check constitutes acceptance of the terms and conditions sent with the check. The elements of accord and satisfaction are as follows:

To show an accord and satisfaction, the person asserting the defense must prove three elements: (1) Consideration to support an accord and satisfaction; (2) an offer of partial payment in full satisfaction of a disputed claim; and (3) acceptance of the partial payment by the creditor with knowledge that the debtor offered it only upon the condition that the creditor accept the payment in full satisfaction of the disputed claim or not at all.

Syl. Pt. 1, *Charleston Urban Renewal Authority v. Stanley*, 176 W. Va. 591, 346 S.E.2d 740 (1985).

“If a check is tendered bearing the words ‘payment in full’ or some other words of similar purport, the payee may either accept the check and acknowledge the accord and satisfaction, or return the check to the payor.” *Id.* at Syl. Pt. 6.

In *Painter v. Peavy*, a check was sent to a plaintiff from the defendant’s insurance company which contained the notation: “For full settlement of all claims.” 192 W.Va. 189, 191, 451 S.E.2d 755, 757 (1994). The check was endorsed and deposited in the plaintiff’s attorney’s bank account. “Deposited under protest” was written on the back of the check. *Id.* The Court recognized: “The creditor of an unliquidated claim must either accept or reject the debtor’s offer; he is not free unilaterally to modify the debtor’s original offer and then proceed to accept the offer so modified.” *Id.* at 194, 760 (citing *Stanley*, 176 W. Va. at 593-94, 346 S.E.2d at 743). The Court further recognized: “Without the debtor’s express or tacit consent, the creditor cannot make use of the check and then renounce the condition upon which the debtor made the offer[.]” *Id.* (citing *RTL Corp. v.*

Manufacturer's Enterprises, Inc., 429 So.2d 855, 856-857 (La. 1983)). The Court ultimately concluded that the plaintiff's retention and use of the check constituted an accord and satisfaction and the notation "deposited under protest" could not defeat such a finding. *Id.* Therefore, the Court found that the negotiation of the check was an acceptance of the terms and conditions sent with said check.

In this case, Respondent has failed to argue why she should be permitted to accept the benefit of the advance payment while simultaneously rejecting the terms and conditions sent therewith. Respondent has failed to explain how she did not consent to the terms and conditions sent with the check when the check was negotiated. If Respondent did not agree that the advance payment should be credited against any final determination of damages as explicitly stated in two (2) separate letters, Respondent's recourse would have been to simply not negotiate the check and return it.

This case is the perfect example of the saying: "No good deed goes unpunished." In this case, State Farm made an advance payment prior to trial to its insured for the amount at which the case had been valued with the understanding that it would receive a credit for the same after a jury verdict. Respondent now seeks to take advantage of State Farm's goodwill and recover \$131,628.15 on a \$101,000.00 verdict. State Farm should not be punished for its goodwill. The amount of the advance payment should be credited to the jury verdict.

II. Contrary to Respondent's assertions, Petitioner's objections to the Circuit Court's failure to credit the amount of the advance payment to the verdict amount were timely.

Respondent repeatedly alleges throughout her brief that Petitioner did not advance any arguments regarding the advance payment until two (2) months after the conclusion of the jury trial.

Resp. Br. at iv, 3, 6. However, this is simply not the case.

The jury rendered its verdict in this matter on September 12, 2013. *J.A. at 000007*. On October 15, 2013, Respondent's counsel provided a proposed *Jury Order* to the Court via hand delivery. On October 23, 2013, eight (8) days after the proposed *Jury Order* was provided to the Court, Petitioner sent a letter to the Circuit Court (with a copy to Respondent's counsel) advising the Circuit Court of objections to the Respondent's proposed *Jury Order*.¹ On October 28, 2013, the Circuit Court set a hearing on objections to the *Jury Order* for November 7, 2013 at 3:00 p.m. *J.A. at 000004*. At the hearing, the Circuit Court directed Petitioner to file formal objections to Respondent's proposed *Jury Order* by November 11, 2013. Therefore, contrary to Respondent's assertions, the issue of the credit for the advance payment was not "raised for the first time two months after trial[.]"

In accordance with the Court's directive at the November 7, 2013 hearing, on November 11, 2013, Petitioner filed *Defendant's Objections to Plaintiff's Proposed Jury Order*. *J.A. at 000007-000012*. Respondent filed a response thereto on November 22, 2013. *J.A. at 000015*.

On May 14, 2014, the Circuit Court ruled on the matter, finding that the \$25,000.00 paid pursuant to medical payments coverage would be deducted from the jury's award, the advance payment of \$30,628.15 would not be deducted from the jury's award, and prejudgment interest accrued on the award for loss of household services.² *J.A. at 000018*. On May 29, 2014, Petitioner timely filed *Defendant's Motion to Alter or Amend May 14, 2014 Order*. *J.A. at 000019-000027*.

¹This correspondence was not included within the Joint Appendix. Respondent did not argue below that the issue of the advance payment was not timely raised. Therefore, Petitioner did not request that this letter be included in the Joint Appendix as Petitioner was unaware that Respondent intended on advancing such an argument.

²The Court took no action on the issue immediately after the hearing. On February 5, 2014, Respondent's

Rule 59(e) of the West Virginia Rules of Civil Procedure requires that a motion to alter or amend a judgment be filed “no later than ten (10) days after the entry of the judgment.” Because the period of time prescribed is fewer than eleven (11) days, weekends and legal holidays are excluded in the computation of time. *W. Va. R. Civ. P. 6(a)*. Memorial Day was May 27, 2013. When weekends and holidays are excluded from the computation of time, Petitioner’s *Motion to Alter or Amend May 14, 2014 Order* was filed within ten (10) days after the entry of the order.

Thereafter, on July 28, 2014, the Circuit Court entered the *Order* denying Petitioner’s *Motion to Alter or Amend May 14, 2014 Order*. *J.A. at 000036*. On October 3, 2014, the Circuit Court entered its *Jury Order*. *J.A. at 000049-000054*. However, the *Jury Order* did not reflect the Circuit Court’s prior ruling that the \$25,000.00 payments under medical payments coverage would be deduced from the jury’s award. *Id.* Thus, Petitioner filed another *Motion to Alter or Amend* on October 20, 2014. *J.A. at 000055-000060*. October 13, 2014 was Columbus Day. When weekends and Columbus Day are excluded from the calculation pursuant to Rule 6(a), Petitioner’s *Motion to Alter or Amend* was timely filed.

Thus, all of Petitioner’s objections to the Circuit Court’s rulings were timely preserved. Respondent argues that a motion to alter or amend is not an appropriate vehicle for presenting new matters which could have been previously argued. *Resp. Br. at 6*. However, Petitioner raised the issue of credit for the advance payment prior to ever filing a motion to alter or amend by way of *Defendant’s Objections to Plaintiff’s Proposed Jury Order*. *J.A. at 000007-000012*.

counsel filed a Notice of Hearing for a status conference on the matter for February 12, 2014. *J.A. at 000004*. An *Amended Notice of Hearing* was subsequently filed changing the time of the hearing. *J.A. at 000004*. At the hearing, the parties advised the Circuit Court that the objections to the proposed *Jury Order* were still

In support of her argument that the issue of the advance payment should have been raised before verdict, Respondent relies on a single case from the Supreme Court of Mississippi.³ In *Matthews*, the plaintiff filed suit after the defendant's truck rear-ended the vehicle in which the plaintiff and her minor son were riding. *Matthews v. Watkins Motor Lines, Inc.*, 419 So.2d 1321 (1982). The jury awarded \$43,000.00. The defendants filed a motion for credit against the judgment, seeking credit for all monies paid by defendants and their insurers prior to the trial for medical treatment and expenses related to the plaintiff's son. *Id.* at 1322.

The trial court allowed a credit for such expenses. On appeal, the defendants argued that the credit was proper because "the medical bills incurred by her son were not a proper part of her lawsuit as no demand was made for them in the suit." *Id.* However, the defendants never sought to preclude the admission of evidence related to the son's medical expenses at trial. *Id.* On these facts, the Supreme Court of Mississippi found that the amount of credit that should be applied to the plaintiff's award as bills relating to her son was essentially a question of fact for the jury. *Id.* at 1323. The court noted that "[i]n the context presented, we will not second guess jurors as to how they arrived at their \$43,000 verdict." *Id.* It was in this context that the Supreme Court of Mississippi found that the amount of the advance payment should have been raised prior to the jury verdict.

outstanding.

³Interestingly, Respondent never argued that Petitioner did not timely raise the issue of the credit at the Circuit Court level. Rather, the only argument raised by Respondent at the Circuit Court level in opposition to crediting the advance payment against the judgment was that "State Farm gratuitously made [the] advance payment [...] without requiring a release of claim[.]" *J.A. at 000014*. Similarly, the only argument raised by Respondent's counsel during the hearing on this matter was that the advance payment was a "gratuitous offer." *J.A. at 000041*.

In this case, however, there is no question of fact as to whether the amount of the advance payment was to be credited to Respondent or to another injured party in this matter as was the case in *Matthews*. Moreover, in this case, Respondent cannot claim that she and her counsel were not aware of the issue of the advance payment prior to trial and the expectation that the advance payment be credited against a jury verdict. In two (2) separate letters prior to trial, Respondent's counsel was advised that the amount of the advance payment would be credited against any final determination of damages. *J.A. at 000029-000030, 000032-000033*. Respondent fails to argue how she was prejudiced in any respect by having this matter handled post-verdict as opposed to pre-verdict.⁴

The *Matthews* case upon which Respondent relies for the proposition that the advance payment should have been raised prior to verdict seems to be *sui generis* due to the unique facts of that case. As set forth in Petitioner's Brief, other courts that have addressed this topic have found a post-verdict credit for an advance payment to be appropriate. See *Douglas v. Adams Trucking Company*, 345 Ark. 203, 46 S.W.3d 512 (2001); *Howard v. Abertnathy*, 751 S.W.2d 432 (Tenn. 1988); *Russell v. Ashe Brick Co.*, 267 S.C. 640, 230 S.E.2d 814 (1976); *Edwards v. Passarelli Bros. Automotive Service, Inc.*, 8 Ohio St. 2d 6, 221 N.E.2d 708 (1966) (“[D]efendant's only recourse is to assert his right to credit for advance payments after final judgment is rendered.”).

⁴Additionally, as a matter of common sense, Petitioner did not have any reason to believe that the amount of the advance payment would not be credited to the amount of the jury verdict until after Respondent prepared a proposed *Jury Order* which did not reflect the same. As previously explained, Respondent negotiated the advance payment check. Respondent did not send any letter to state that she was rejecting the terms and conditions that accompanied the check. Therefore, Petitioner had no indication that Respondent was not going to agree to a credit for the advance payment until after trial. When it became apparent that Respondent was not going to agree to a credit for the advance payment, the issue was timely raised with the Circuit Court.

Thus, contrary to Respondent's arguments, all objections to the Circuit Court's rulings regarding the propriety of a credit for the advance payment were timely raised and there is no legitimate reason why the issue could not have been handled by a post-verdict credit.

III. Respondent incorrectly states the appropriate standard of review to be applied by this Court.

Respondent's Brief repeatedly refers to the "two-prong deferential standard of review" in Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997), which provides:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Yet, Respondent ignores the portion of this syllabus point which notes that "[q]uestions of law are subject to a de novo review." *Id.* This Court has explicitly held that the proper calculation of prejudgment interest is a question of law which is subject to *de novo* review. *State Farm Mut. Auto. Ins. Co. v. Rutherford*, 229 W. Va. 73, 76, 726 S.E.2d 41, 44 (2011); *see also* Syl. Pt. 2, *Hensley v. West Virginia Dep't of Health & Human Resources*, 203 W. Va. 456, 508 S.E.2d 616 (1998) ("When [...] a circuit court's award of prejudgment interest hinges, in part, on an interpretation of our decisional or statutory law, we review *de novo* that portion of the analysis.").

With respect to the Circuit Court's decision that Petitioner could not receive a credit for the amount of the advance payment, this is also a question of law which is subject to de novo review. Respondent does not explain which portion of the Circuit Court's decision was a factual finding. There was no factual dispute with respect to whether or not Respondent's counsel received

the letters sent with the advance payment check or whether Respondent's counsel negotiated the advance payment check. In fact, Respondent's counsel admitted to both receiving the correspondence sent with the advance payment check and negotiating the advance payment check. *J.A. 000040-000044*. Thus, the refusal to allow a credit for the advance payment was a decision of law – not fact.

The only portion of the Circuit Court's decision with respect to the advance payment which could even arguably be considered a factual determination was the Circuit Court's finding that "this payment could very well be found to constitute a gift[.]" *J.A. at 000017*. However, even if this was considered a factual determination and not a legal conclusion, it was clearly erroneous in light of the letters sent to Respondent's counsel which explicitly stated that the advance payment was expected to be credited against any final determination of damages and not simply a "gift." *J.A. at 000029-000030, 000032-000033*. It would clearly be an error for the Circuit Court to have concluded that the advance payment was simply a gift presented to Respondent by her insurer at a time when litigation was ongoing between the parties.

IV. The Circuit Court's inclusion of the amount of the advance payment in its calculation of pre-judgment interest was reversible error.

With respect to the inclusion of the amount of the advance payment in the Circuit Court's calculation of pre-judgment interest, Respondent's only argument in relation thereto is that this assignment of error "is dependent upon a determination by this Court sustaining Petitioner on the first assignment of error." *Resp. Br. at 9 (emphasis omitted)*. The flipside of Respondent's argument is that if the Court sustains Petitioner on the first assignment of error (the failure to allow a credit for

the advance payment), the Court should also find that the Circuit Court erred by including the amount of the reverse payment in the calculation of prejudgment interest.

Aside from arguing that this assignment of error is dependent on the Court's finding as to the failure to credit the advance payment, Respondent does not advance any argument or cite any legal authority to refute Petitioner's argument that all credits, payments, and set-offs should be deducted before computing pre-judgment interest. See *State Farm Mut. Automobile Ins. Co. v. Rutherford*, 229 W. Va. 73, 726 S.E.2d 41 (2011); W. Va. Code § 56-6-31(a) (2006). Thus, because Petitioner should have been granted a credit for the amount of the advance payment, the amount of the advance payment should not have been included in the calculation of pre-judgment interest.

V. **The Circuit Court's inclusion of the amount of the Respondent's damages for the lost value of household services in its calculation of pre-judgment interest was reversible error.**

Instead of advancing an independent argument on this assignment of error, Respondent simply quotes from the Circuit Court's May 14, 2014 and December 14, 2014 Orders. In said Orders, the Court simply found that pre-judgment interest should accrue on the award for loss of household services under the Court's decision in *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E. 2d 196 (1994). See *J.A. at 000066*. However, the Circuit Court failed to address Petitioner's argument that this case is distinguishable from *Wilt* as Respondent in this case claimed damages for the lost value of household services as opposed to money expended out-of-pocket to pay for household services. Respondent also fails to refute this distinction from *Wilt*.

Respondent quotes heavily from *Buckhannon-Upshur County Airport Auth. v. R & R Coal Contractor*, 186 W. Va. 583, 413 S.E.2d 404 (1991). Yet, Respondent fails to explain how *R & R Coal* supports her argument herein. In fact, the language quoted from *R & R Coal* by Respondent

supports Petitioner's argument. As Respondent notes, the purpose of prejudgment interest as a form of compensatory damages is "to fully compensate the injured party for the loss of the use of funds that have been expended." *Id.* at 586, 407 (quoting *Bond v. City of Huntington*, 166 W. Va. 581, 598, 276 S.E.2d 539, 548 (1981)) (emphasis added). Along the same lines, the Court further stated, 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." *R & R Coal*, 186 W. Va. at 587, 413 S.E.2d at 408 (emphasis added).

In this case, there was no loss of use of funds. Respondent offers no argument to the contrary. In this case, Respondent merely sought to recover the lost value of the household services which she was unable to perform. Respondent did not hire someone to perform such household services; moreover, the household services were not gratuitously performed by another. Rather, the household services were simply never performed by anyone and Respondent's economic expert opined as to the value of such lost household services. *J.A. at 000124-000159*. Therefore, there was no "loss of use of funds" by Respondent in relation to these damages. As a result, the Court erred in including damages awarded for the lost value of Respondent's household services in the calculation of prejudgment interest.

CONCLUSION

For all the foregoing reasons and all the reasons set forth in *Petitioner's Brief*, Petitioner respectfully requests that this Honorable Court reverse the decisions of the Circuit Court at issue herein and find (1) the \$30,628.15 advance payment should be credited to 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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**JOHN DOE, an unknown driver,
Defendant below,**

Petitioner,

v.

No. 15-0013

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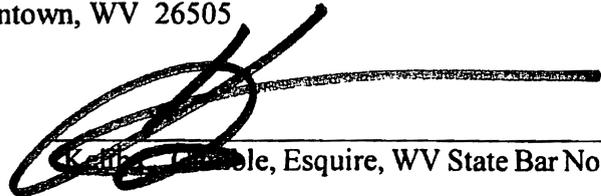
Hasil Pak, Plaintiff below,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioner, does hereby certify on this 8th day of June, 2015, that a true copy of the foregoing "**PETITIONER'S REPLY 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:

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