

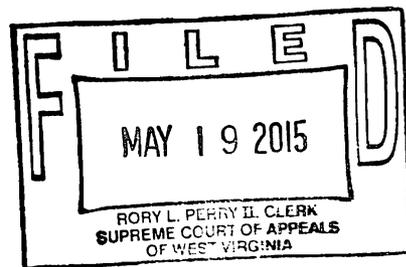
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 15-0013

JOHN DOE, an unknown driver,
and STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Petitioner,
Defendant Below,

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

HASIL PAK,
Respondent,
Plaintiff Below.



RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondent Pak directs this Court to a significant omission in Petitioner's "Statement of the Case."

The central argument of this appeal is that Petitioner is entitled to credit for a payment of \$30,628.15 to Respondent Pak. However, Petitioner omits that in the proceedings below, Petitioner did not advance any arguments regarding the "credit" until two months after conclusion of the jury trial. In fact, Petitioner raised this issue for the first time on November 11, 2013, at which time Petitioner served "Defendant's Objections to Plaintiff's Proposed Jury Order," stating, in pertinent part: "Defendant objects to Plaintiff's proposed Jury Order due to the failure to reflect the payments made to Plaintiff prior to trial." (J.A. at 07-12.)

As further clarification of the post-trial narrative set forth in Petitioner's "Statement of the Case," Respondent Pak provides herein the following summary of relevant procedural history and rulings by the Circuit Court of Monongalia County in its Amended Jury Order and Order Addressing Motion(s) to Alter/Amend, entered December 4, 2014:

Following the trial of this matter, Plaintiff, Hasil Pak, presented a proposed *Jury Order* to the Court for entry, reflecting a total jury verdict of One Hundred One Thousand Dollars and Zero Cents (\$101,000.00), exclusive of statutory pre-judgment interest. The Defendant objected to the proposed *Jury Order* on several grounds, including the fact that the proposed *Jury Order* did not reflect a Twenty-Five Thousand Dollar (\$25,000.00) payment made to Plaintiff by State Farm Mutual Automobile Insurance Company pursuant to the medical payments coverage of Plaintiff's uninsured motorist coverage; did not reflect an advance payment of Thirty Thousand Six Hundred Twenty-Eight Dollars and Fifteen Cents (\$30,628.15) made to Plaintiff prior to trial by State Farm; 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 Plaintiff's award of past household services.

On May 14, 2014, the Court entered an Order, finding that State Farm was entitled to deduct the Twenty-Five Thousand Dollar (\$25,000.00) payment made to Plaintiff pursuant to the medical payments coverage of Plaintiff's uninsured

motorist coverage. The court further found that the Twenty-Five Thousand Dollar (\$25,000.00) payment would not be included in the pre-judgment interest calculation, meaning that the Twenty-Five Thousand Dollars (\$25,000,00) paid by State Farm for medical payments coverage would be deducted from the jury verdict before any pre-judgment interest was calculated. However, the Court ruled that the advance payment made by State Farm of Thirty Thousand Six Hundred Twenty-Eight Dollars and Fifteen Cents (\$30,628.15) should not be deducted from the amount of the verdict

because it is wholly unclear as to what this payment actually *is* or for what purpose it was paid out. Pursuant to ¶3 of the Plaintiff's Response to Defendant's Objections to Plaintiff's Proposed Jury Order, 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. (Italicized emphasis provided by the circuit court.)

May 14, 2014 Order at 2. For the same reason, the Court found that the advance payment could not be deducted before calculating pre-judgment interest. *Id.* The Court also 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). *Id. at 3.* (Emphasis added by the court.)

As the Court's May 14, 2014 Order did not permit a deduction for the advance payment made to the Plaintiff in the amount of Thirty Thousand Six Hundred Twenty-Eight Dollars and Fifteen Cents (\$30,628.15), the Defendant filed with this Court *the Motion to Alter or Amend May 14, 2014 Order*. On June 16, 2014, a hearing was held on Defendant's *Motion to Alter or Amend May 14, 2014 Order*. On the 28th day of July, 2014, the Court entered an Order denying the Defendant's Motion to Alter or Amend May 14, 2014 Order.

Thereafter, on October 3, 2014, the Court entered its *Jury Order* in the captioned matter. However, the *Jury Order* did not reflect the Court's rulings in the May 14, 2014 Order. Specifically, the October 3, 2014 *Jury Order*, and the judgment entered in favor of the Plaintiff, did not reflect any deduction whatsoever for the Twenty-Five Thousand Dollar (\$25,000.00) payment made to Plaintiff pursuant to the medical payments coverage of Plaintiff's uninsured motorist coverage. Moreover, since the *Jury Order* did not reflect any deduction for the medical payments coverage to Plaintiff, the pre-judgment interest included in the *Jury Order* was incorrect as it was calculated without taking any deduction for medical payments coverage paid to Plaintiff, as per the Court's May 14, 2014 Order. Consequently, the Defendant filed a *Motion to Alter or Amend Jury Order*. A hearing was held on the *Motion to Alter or Amend Jury Order* on November 3, 2014, at which time the Court granted the *Motion to Alter or Amend Jury Order*

without objection by Plaintiff's counsel to reflect the Court's rulings in the May 14, 2014 Order. (J.A. at 65-67.)

II. SUMMARY OF ARGUMENT

Respondent Hasil Pak respectfully requests that this Court affirm the rulings of the Circuit Court of Monongalia County. The central focus of this appeal is Petitioner's claim that it is entitled to credit for a payment of \$30,628.15 to Respondent Pak. However, Petitioner did not advance any arguments with regard to the "credit" until two months after the jury trial concluded. Moreover, Petitioner does not address or identify the standard of review pursuant to applicable case law with regard to a motion to alter or amend a judgment under Rule 59(e) of the West Virginia Rules of Civil Procedure. Clearly, Petitioner's arguments do not satisfy any of the four criteria for amending earlier judgments, stated by this Court in *Cecil v. Bluestone Coal Corp.*, 2014 W.Va. LEXIS 304 at *8-9. That is, Petitioner has not established an intervening change in controlling law; the emergence of new evidence; a clear error of law, or obvious injustice, as required by this Court to overcome Petitioner's failure to advance a single argument or pleading prior to entry of judgment asserting that Petitioner is entitled to "credit" for payment to Respondent Pak. Moreover, there is no valid basis upon which this Court could hold that the Circuit Court abused its discretion or made clearly erroneous factual findings in its refusal to credit the advance payment to the verdict amount and in its calculations of pre-judgment interest in the proceedings below.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Respondent Hasil Pak submits that oral argument is not necessary for this appeal. Petitioner John Doe's arguments have no merit; the dispositive issues have been authoritatively decided; the facts and

legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT AND RESPONSE TO ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT OF MONONGALIA COUNTY DID NOT COMMIT REVERSIBLE ERROR “IN REFUSING TO CREDIT THE AMOUNT OF THE ADVANCE PAYMENT TO THE VERDICT AMOUNT,” AS PETITIONER ASSERTS.

1. Standard of Review

First, Petitioner does not identify the appropriate standard of review for this Court’s determination herein. (*See* Petitioner’s Brief, p. 7)

The Circuit Court of Monongalia County’s Amended Jury Order and Order Addressing Motion(s) to Alter/Amend, from which Petitioner now appeals, is postured on Rule 59(e) of the West Virginia Rules of Civil Procedure.

In *Cecil v. Bluestone Coal Corp.*, 2014 W.Va. LEXIS 304 * 8-9, this Court recently addressed the applicable standard of review with regard to a motion to alter or amend a judgment under Rule 59(e) as follows:

We have previously held that “[t]he standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.” Syl. Pt. 1, *Wicklind v. Am. Travellers Life Ins. Co.*, 204 W.Va. 430, 513 S.E.2d 657 (1998). “A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Under Rule 59(e), petitioners face a significant burden:

While Rule 59(e) does not itself provide a standard under which a circuit court may grant a motion to alter or amend, other courts and commentators have set forth the grounds for amending earlier judgments. For instance, the *Litigation Handbook on West Virginia Rules of Civil Procedure* states that a Rule 59(e) motion should be granted where: “(1) there is an intervening change in the

controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice." Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 59(e) at 1178-1179 (3d. Ed.2008). Under Rule 59(e), a party who relies on newly discovered evidence "must produce a legitimate justification for not presenting the evidence during the earlier proceeding." *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir.1996). Under Rule 59(e), the reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. See *Palmer v. Champion Mortgage*, 465 F.3d 24, 29 (1st Cir.2006); *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir.2004); *Pacific Ins. Co. v. Amer. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir.1998). See also *11 Wright et. al., Federal Practice and Procedure* § 2810.1 (3d ed.2010).

Mey v. Pep Boys-Manny, Moe & Jack, 228 W.Va. 48, 56-57, 717 S.E.2d 235, 243-44 (2011).

Secondly, pursuant to *Cecil, supra*, Respondent Pak submits that Syllabus Point 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997) supplies the standard applicable to the "underlying judgment" upon which Petitioner's Rule 59(e) motion is based and from which Petitioner has filed this instant appeal. The *Walker* Court held:

2. 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. (Emphasis added)

2. Discussion

Clearly, under the *Cecil* Court's analysis, *supra* (discussing the four criteria set forth in the *Litigation Handbook on West Virginia Rules of Civil Procedure*), the trial court did not err in denying Petitioner's Rule 59(e) motion to permit a deduction for the "advance payment" made to the Plaintiff in the amount of \$30,628.15.

A review of the record shows that in the pre-trial and pre-judgment proceedings below, Petitioner failed to advance a single argument via motion or other pleading wherein Petitioner made the requisite pre-judgment assertion that Petitioner is entitled to credit for the payment of \$30,628.15 to Respondent Pak. As discussed in greater depth *supra*, the issue was raised for the first time two months after trial *vis-a-vis* “Defendant’s Objections to Plaintiff’s Proposed Jury Order.” Moreover, Petitioner’s Brief does not identify any other instance wherein it raised this argument in the proceedings below.

This error presents a significant procedural obstacle for Petitioner herein.

The updated *Litigation Handbook on West Virginia Rules of Civil Procedure*, (4th Ed. 2012), *supra*, at p. 1285, states that a motion made pursuant to Rule 59(e) “is not appropriate for presenting new issues or evidence that could have previously been argued,” citing *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003). The *Litigation Handbook* further states:

Motions under the rule must clearly establish manifest error of law or must present newly discovered evidence. The rule may not be used to argue a new legal theory (citing *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55 [1st Cir. 2003] and quoting *Freeman v. Busch*, 349 F.3d 582 [8th Cir. 2003]: (“Arguments and evidence which could, and should, have been raised or presented at an earlier time in the proceedings cannot be presented in a Rule 59(e) motion.”). . . . **Rule 59(e) is not a vehicle for a party to undo his/her own procedural failures or to advance arguments that could and should have been presented to the trial court prior to judgment** (quoting *Corporation of Harpers Ferry v. Taylor*, 227 W.Va. 501, 711 S.E.2d 571 [2011] (per curiam): (“When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of the trial . . . he or she ordinarily must [timely] object then and there or forfeit any right to complain at a later time.”))
(*Id.*)

Accordingly, pursuant to the “two-prong deferential standard of review” set forth in Syllabus Point 2, *Walker, supra*, the Circuit Court of Monongalia County did not abuse its discretion in rendering its final order and disposition. Nor were the circuit court’s “underlying factual findings” clearly erroneous.

The circuit court's rationale for denying Petitioner's Rule 59(e) motion to permit a deduction for the claimed "advance payment" to Plaintiff was initially provided in its May 14, 2014 Order, as follows:

However, this Court does not believe that the \$30,628.15 "advance payment" should be similarly deducted because it is wholly unclear as to what this payment actually is or for what purpose it was paid out. Pursuant to ¶3 of the Plaintiff's Response to Defendant's Objections to Plaintiff's Proposed Jury Order, 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. For these reasons, this Court cannot find that this payment should be deducted from the jury verdict. (J.A. at 17.)

In its Brief, Petitioner cites several decisions by this Court as to general principles regarding double recovery, fundamentals of a legal contract, and public policy — none of which are on point to the issue at hand. Additionally, Petitioner is categorically incorrect in the following assertion: "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, **expressly agreed** that the amount of the advance payment would be credited against a final determination of damages by negotiating the check." (*Id.* at p. 9) (Emphasis added) 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.

Petitioner acknowledges, and Respondent's research confirms, that an "issue of first impression is involved." Petitioner offers an overview of decisions from several other jurisdictions ostensibly supportive of its position herein. (*See* Petitioner's Brief, at p. 7 and pp. 9-14) None of these decisions constitute mandatory precedent or binding authority herein. In light

of the procedural obstacle to Petitioner's appeal imposed by Rule 59(e) of the West Virginia Rules of Civil Procedure, an analysis of these disparate decisions from other jurisdictions is not necessary for this Court's determination.

Nevertheless, there is a common thread as to critical Rule 59 (e) considerations between the case *sub judice* and at least one of the decisions discussed by Petitioner. In *Douglas v. Adams Trucking Company*, 345 Ark. 203, 209, 46 S.W.3d 512, 515 (2001), the Supreme Court of Arkansas made specific reference to *Matthews v. Watkins Motor lines, Inc.*, 419 So. 2d 1321, 1982 Miss. LEXIS 2085, stating: **"Supreme Court denied credit for advances made where defendant/tort-feasor did not raise issue of credit due until after the jury verdict."** (See Petitioner's Brief, p. 9-10), discussing *Douglas*. (Emphasis added) Petitioner did not address the *Matthews* decision in its Brief.) In *Matthews*, credit against plaintiff's judgment in a tort action was ordered upon defendants' post-trial motion to reduce the judgment by the amount of payments advanced by defendants' insurance carrier. The *Matthews* Court decided that the "Motion for Credit" should not have been sustained by the trial court and reversed, stating:

Although it will not affect our ruling in this case, we would point out that advance payments made to injured persons serve a very desirable humanitarian purpose and should be encouraged in instances where appropriate. In such cases, if the defendant or insurer seeks credit for such advance payments against a possible verdict in a lawsuit, **the amount of advance payments made should be affirmatively pled so that the defendant will be placed on notice of the claim.** After making such affirmative plea, it would then be proper for the defendant or insurer to make **a motion in limine to exclude any evidence of the advance payments during the trial of the case before the jury.** If a judgment is thereafter rendered against the defendant in favor of the plaintiff, it would be proper for the court to conduct a hearing without a jury to determine the amount of credit to be allowed against the judgment because of the advance payments. See *Ferris v. Anderson*, 255 N.W.2d 135 (Iowa 1977) and *Byrd v. Stuart*, 224 Tenn. 46, 450 S.W.2d 11 (1969).

419 So 2d 1321, 323, 1982 Miss. LEXIS 2085 at *8. (Emphasis added)

B. THE CIRCUIT COURT OF MONONGALIA COUNTY DID NOT COMMIT REVERSIBLE ERROR “BY CALCULATING PRE-JUDGMENT INTEREST PRIOR TO DEDUCTING THE AMOUNT OF THE ADVANCE PAYMENT,” AS PETITIONER ASSERTS.

Petitioner’s second assignment of error appears to be a corollary to its first assignment of error and is dependent upon a determination by this Court sustaining Petitioner on the first assignment of error. Therefore, in response to this second assignment of error, Respondent Pak incorporates all of her arguments set forth with regard to the first assignment of error, *supra*.

Moreover, as provided in the “Statement of Case” section, *supra*, the circuit court’s Amended Jury Order and Order Addressing Motion(s) to Alter/Amend, entered December 4, 2014, sets forth the following findings and conclusions with regard to this issue:

On May 14, 2014, the Court entered an Order, finding that State Farm was entitled to deduct the Twenty-Five Thousand Dollar (\$25,000.00) payment made to Plaintiff pursuant to the medical payments coverage of Plaintiff’s uninsured motorist coverage. The court further found that the Twenty-Five Thousand Dollar (\$25,000.00) payment would not be included in the pre-judgment interest calculation, meaning that the Twenty-Five Thousand Dollars (\$25,000.00) paid by State Farm for medical payments coverage would be deducted from the jury verdict before any pre-judgment interest was calculated. **However, the Court ruled that the advance payment made by State Farm of Thirty Thousand Six Hundred Twenty-Eight Dollars and Fifteen Cents (\$30,628.15) should not be deducted from the amount of the verdict**

because it is wholly unclear as to what this payment actually *is* or for what purpose it was paid out. Pursuant to ¶3 of the Plaintiff’s Response to Defendant’s Objections to Plaintiff’s Proposed Jury Order, 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. (Italicized emphasis provided by the circuit court.)

May 14, 2014 Order at 2. **For the same reason, the Court found that the advance payment could not be deducted before calculating pre-judgment interest.** (Emphasis added by the author.)

(J.A. at 65-66.)

Therefore, in accordance with Syllabus Point 2, *Walker v. West Virginia Ethics Comm'n*, *supra*, there is no basis for this Court to hold that under the two-prong deferential standard of review, the circuit court abused its discretion in its final order and ultimate disposition of the case; nor that the circuit court's underlying factual findings were clearly erroneous.

C. THE CIRCUIT COURT OF MONONGALIA COUNTY DID NOT COMMIT REVERSIBLE ERROR “BY FINDING THAT RESPONDENT WAS ENTITLED TO PRE-JUDGMENT INTEREST ON DAMAGES RECOVERED FOR THE LOST VALUE OF HOUSEHOLD SERVICES,” AS PETITIONER ASSERTS.

In its Order, entered May 14, 2014, the Circuit Court of Monongalia County ordered that “[p]re-judgment interest shall accrue on the Plaintiff’s loss of household services award.” (J.A. at 18.) In ruling, the court engaged in a well-considered analysis, as follows:

The Defendant has also argued that pre-judgment interest shall not accrue on damages concerning the Plaintiff’s loss of household services. Counsel contends that these are not out-of-pocket expenditures paid by the Plaintiff, as contemplated by West Virginia Code § 56-6-31. Pursuant to that code section, specifically subsection (a), “[s]pecial damages includes lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court.” However, the Supreme Court’s holding in *Wilt v. Buracker* mandates a conclusion contrary to the position the Defendant advocates. The Court found that such expenditures *were* included in the concept of “out-of-pocket expenditures” and thus were special damages for the purposes of the statute. *Wilt v. Buracker*, 191 W.Va. 39, 51-52 [,] 443 S.E.2d 196, 208-09 (1994). In Syllabus Point 8 of that opinion, the Court clearly stated: “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.” *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1994). Further, pre-judgment interest is not a “cost,” but a form of compensatory damages intended to make an injured party whole as far as loss of use of funds is concerned. Syl. Pt. 1, *Buckhannon-Upshur Cnty. Airport Auth. v. R & R Coal Contracting Inc. et al.*, 186 W.Va. 583, 413 S.E.2d 404 (1991). For these reasons, this Court finds that the Plaintiff’s award of loss of household services shall be included in the pre-judgment interest calculation.”

(J.A. at 17-18.)

Additionally, in its Amended Jury Order and Order Addressing Motion(s) to Alter/Amend, entered December 4, 2014, referencing its May 14, 2014 Order, the Circuit Court stated: "The court also 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).) *Id. at 3.*" (J.A. 66.)

Furthermore, it is useful to provide additional discussion on this issue from *Buckhannon-Upshur County Airport Auth. v. R & R Coal Contractor*, 413 S.E.2d 404, 407- 408, 1991 W.Va. LEXIS 244 at *9-10 (1991), as follows:

This Court has indicated that the purpose of a rule allowing prejudgment interest *as part of damages* for ascertainable pecuniary loss is "to fully compensate the injured party for the loss of the use of funds that have been expended." *Bond v. City of Huntington*, 166 W. Va. 581, 598, 276 S.E.2d 539, 548 (1981), *superseded by statute as stated in Rice v. Ryder*, W. Va. , 400 S.E.2d 263 (1990) (emphasis added). (Footnote omitted) (Italicized emphasis by the Court.)

Then in 1981, the West Virginia Legislature amended *West Virginia Code § 56-6-31* to provide, in pertinent part, that:

Except where it is otherwise provided by law, every judgment or decree for the payment of money 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 such special or liquidated damages shall bear interest from the date the right to bring same shall have accrued, as determined by the court. 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.

Subsequent to the enactment of this statutory provision, this Court continued to indicate that prejudgment interest was a form of compensatory damages. *See Beard v. Lim*, W. Va. , 408 S.E.2d 772 (1991); *Grove ex rel. Grove v. Myers*, W. Va. , , 382 S.E.2d 536, 540 n. 4 (1989). Even the statute provides for prejudgment interest on special damages which includes compensatory damages. *See W. Va. Code § 56-6-31*. Hence, prejudgment interest, according to *W. Va. Code § 56-6-31* and the decisions of this Court interpreting that statute, is not a cost, but is a form of compensatory damages intended to make an injured plaintiff whole as far as loss of use of funds is concerned.

Thus, in accordance with Syllabus Point 2, *Walker v. West Virginia Ethics Comm'n*, *supra*, there is no basis for this Court to hold that under the two-prong deferential standard of review, the circuit court abused its discretion in its final order and ultimate disposition of the case; nor that the circuit court's underlying factual findings were clearly erroneous.

V. CONCLUSION

Therefore, based on the authorities and argument discussed above, Respondent Hasil Pak respectfully requests that this Honorable Court affirm the decisions of the Circuit Court of Monongalia County.

Respectfully Submitted,

HASIL PAK,
Respondent, By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2015, I served a true and actual copy of the foregoing Respondent's Brief on Tiffany R. Durst, Pullin Fowler Flanagan Brown & Poe, PLLC, Counsel for State Farm Mutual Automobile Insurance Company, by depositing the same in the United States Mail, postage prepaid and addressed to her at 2414 Cranberry Square, Morgantown, WV 26508.

A handwritten signature in black ink, appearing to read 'DJS', written over a horizontal line.

David J. Straface
Counsel for Plaintiff