No. 101556 - *State Farm Mutual Automobile Insurance Company v. Sheila Ann Rutherford*

FILED
November 23, 2011
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Justice, concurring, in part, and dissenting, in part:

The instant proceeding concerns the calculation of prejudgment interest upon a verdict awarding special damages. In rendering its ruling, the majority of the Court correctly determined that prejudgment interest should be awarded from the date Ms. Rutherford's cause of action accrued as required by W. Va. Code § 56-6-31 (1981) (Repl. Vol. 2005); I concur with this portion of the Court's opinion.

However, I part ways with the majority's opinion with respect to the manner in which it has calculated the amount of Ms. Rutherford's award of prejudgment interest. Much like a fishmonger prepares to display his catch-of-the-day, the majority of the Court, with painstaking attention to detail and great pride, has laid out its analysis of the prejudgment interest statute and has concluded that W. Va. Code § 56-6-31 permits the calculation of prejudgment interest upon that portion of a special damages verdict remaining after the application of offsetting settlements. Unfortunately, instead of serving up a piscine delicacy, the majority, through its untenable interpretation of the governing statute and its further inexplicable failure to follow this Court's prior decisions interpreting the same, has produced a seven-week-old unrefrigerated dead fish.

Both the plain language of W. Va. Code § 56-6-31 and this Court's interpretive decisions demonstrate that the majority of the Court incorrectly calculated the amount of prejudgment interest to which Ms. Rutherford is entitled. Rather than basing Ms. Rutherford's prejudgment interest award upon the entire amount of the special damages verdict returned against State Farm, the majority first deducted the settling defendants' settlement payments from the total special damages verdict and then calculated prejudgment interest upon only that portion of the special damages verdict remaining after the offset. In other words, instead of calculating prejudgment interest upon the entire $170,000 special damages verdict, the majority of the Court subtracted the $130,000 Ms. Rutherford received from the settling defendants and calculated prejudgment interest based upon the difference of $40,000. This manner of calculating prejudgment interest is not authorized by, and is, in fact, contrary to, the law of this State. Simply stated, the majority's opinion is wrong, wrong, wrong. I cannot condone such a deviation from our settled law. Therefore, I strongly dissent.

A party's right to receive an award of prejudgment interest is governed by statute. The statute applicable to the facts of the case *sub judice*, W. Va. Code § 56-6-31 (1981) (Repl. Vol. 2005), provides, in pertinent part:

> 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 the 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.

(Emphasis added). Because the award of prejudgment interest is guaranteed by statute, the meaning of this provision may be ascertained by resort to the rules of statutory construction. Where the language of a statute is plain, the statute should be applied as it is written and need not be construed. Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation."). *See also Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995) ("We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.").

The plain language of W. Va. Code § 56-6-31 states that "the *amount* of such special or liquidated damages shall bear interest." (Emphasis added). The word "amount," though not defined by statute, is commonly understood[1] to mean "aggregate," "full value,"

---

[1] Where the Legislature fails to define words used in one of its enactments, we resort to the common, ordinary, and accepted meaning of such words to supply their intended meaning: "In the absence of any definition of the intended meaning of words or terms used (continued...)

"total," or "the whole." *See, e.g.*, *Random House Webster's Unabridged Dictionary* 69 (2d ed. 1998) (defining "amount" as "the sum total of two or more quantities or sums; aggregate" and as "the full . . . value"); I *The Oxford English Dictionary* 411 (2d ed. 1991 reprt.) (construing "amount" as "[t]he full value" and "[a] quantity or sum viewed as a total"); *Webster's Third New International Dictionary Unabridged* 72 (1970) (interpreting "amount" as "the total number or quantity: aggregate . . .: sum" and "the whole"). Thus, it is clear that W. Va. Code § 56-6-31 requires the calculation of prejudgment interest upon the *entire* amount of the special damages verdict. This Court is bound to apply and enforce statutes, *as they are written*, according to their plain meaning. *See, e.g.*, Syl. pt. 2, in part, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent . . . will be given full force and effect."). Here, W. Va. Code § 56-6-31 required the majority to calculate prejudgment interest upon the *total* amount of the special damages verdict *before* the settlements were applied as an offset. I disagree with the majority's contrary approach which directly

---

[1](...continued)
in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. pt. 1, *Miners in Gen. Grp. v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982). *Accord In re Cesar L.*, 221 W. Va. 249, 256, 654 S.E.2d 373, 380 (2007) ("[W]here the Legislature has failed to provide a statutory definition for a word used in one of its enactments, the common, ordinary meaning of the word is relied upon to give meaning to the statute."); Syl. pt. 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.").

contradicts the expressly prescribed calculation method and shows callous disregard for the Legislature's intent.

This own Court's opinions also have recognized that, consistent with the mandate of W. Va. Code § 56-6-31, prejudgment interest should be calculated upon the total amount of a verdict awarding special damages. In the seminal case of *Grove ex rel. Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989), we recognized that, "[u]nder *W. Va. Code*, 56-6-31, as amended, prejudgment interest on special or liquidated damages is recoverable as a matter of law[.]" Syl. pt. 1, in part, *Grove*, 181 W. Va. 342, 382 S.E.2d 536. With respect to the manner of calculating prejudgment interest, the *Grove* opinion instructs as follows:

> Because prejudgment interest under *W. Va. Code*, 56-6-31 [1981] is to be recovered only on special or liquidated damages, a special interrogatory should be submitted to the jury for it to designate *the amount of special or liquidated damages*. . . . When this procedure is not followed and only a general verdict is returned, the plaintiff is entitled to prejudgment interest *on the entire amount of the general verdict containing special or liquidated damages* in unspecified amounts.

Grove, 181 W. Va. at 348, 382 S.E.2d at 542 (emphasis added) (internal citations and footnote omitted).[2] *Accord* Syl. pt. 3, *Kirk v. Pineville Mobile Homes, Inc.*, 172 W. Va. 693,

[2]Rule 49 of the West Virginia Rules of Civil Procedure explains the differences between special verdicts and general verdicts. *See* W. Va. R. Civ. P. 49(a) (describing "special verdicts") and W. Va. R. Civ. P. 49(b) (detailing "general verdicts").

310 S.E.2d 210 (1983) ("Where a general verdict is returned for loss or damage to real and personal property which includes an amount for loss of use arising from annoyance and inconvenience, *the plaintiff is entitled to prejudgment interest on the entire amount of the general verdict unless the jury has by separate finding established an amount for such loss of use*." (emphasis added)). *See also* Syl. pt. 3, *Beard v. Lim*, 185 W. Va. 749, 408 S.E.2d 772 (1991) ("*It is the duty of the trial court to ascertain where possible, the amount of special damages proved at trial* as well as the actual accrual date of the damages. Prudent defense counsel should continue to seek a special interrogatory on the issue of special damages where it would aid the trial court in its determinations, but failure to submit a special interrogatory will not necessarily justify an award of prejudgment interest on the entire verdict by the trial court. However, *in the face of such failure to submit a special interrogatory, the trial court should give the plaintiff the benefit of any doubt in the calculation of prejudgment interest.*" (emphasis added)).

Under either of these types of verdicts, it is clear that the Court, both in *Grove* and in its progeny, has contemplated calculating prejudgment interest upon the *total* award of special or liquidated damages, and not on the amount remaining after the application of any offsetting settlements. *See* Syl. pt. 3, in part, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984) ("[T]he familiar maxim *expressio unius est exclusio alterius* [means] the express mention of one thing implies the exclusion of another[.]"); Syl. pt. 3, in part, *Bischoff*

v. Francesa, 133 W. Va. 474, 56 S.E.2d 865 (1949) ("[T]he express mention of one thing implies exclusion of another, *expressio unius est exclusio alterius*." (internal quotations and citation omitted)).

Absent some compelling justification for deviation, such as a change in the law or a distinguishable fact pattern, the doctrine of *stare decisis* requires this Court to follow its prior opinions. In this regard, we specifically have recognized that

> [t]he doctrine of *stare decisis* rests upon the principle that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority.

In re Proposal to Incorporate Town of Chesapeake, 130 W. Va. 527, 536, 45 S.E.2d 113, 118 (1947) (internal quotations and citation omitted). *Accord* Syl. pt. 2, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974) ("An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law."). *See also Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202, 112 S. Ct. 560, 564, 116 L. Ed. 2d 560 (1991) ("[W]e will not depart from the doctrine of *stare decisis* without some compelling justification." (citation omitted)); *Dailey*, 157 W. Va. at 1029, 207 S.E.2d at 173 ("Stare decisis is not a rule of law but is a matter of judicial policy. . . . It is a policy which promotes

certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. . . . In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted." (internal quotations and citation omitted)). The allegiance to this Court's prior opinions that is required by *stare decisis* applies with equal force to both the Court's actual holdings and to the legal analysis that underlies and is necessary to achieve such holdings. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129, 134 L. Ed. 2d 252 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668, 109 S. Ct. 3086, 3141, 106 L. Ed. 2d 472 (1989) (Kennedy, J., concurring and dissenting) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

Such adherence to our prior decisions, and the consistency among the rulings of this Court that necessarily results therefrom, is particularly warranted where our prior decisions involve a matter of statutory construction. In this regard, we have vowed that "[o]nce this Court determines a statute's clear meaning, we will adhere to that determination under the doctrine of *stare decisis*." *Appalachian Power Co. v. State Tax Dep't of West*

Virginia, 195 W. Va. at 588 n.17, 466 S.E.2d at 439 n.17. *Accord Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S. Ct. 2363, 2370, 105 L. Ed. 2d 132 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated[.]").

Here, no circumstances have changed so as to require a departure from our prior precedent interpreting the statutory right to recover prejudgment interest secured by W. Va. Code § 56-6-31. The majority of the Court in the case *sub judice*, however, has chosen to ignore the maxim of *stare decisis* by failing to afford our prior opinions, which define the law applicable to the instant controversy and provide predictability and guidance for the resolution thereof, the deference and respect which they are due. From this refusal to comply with such an esteemed tenet of judicial policy and the consequent marked departure from this Court's own holdings, I vehemently dissent.

Finally, I would be remiss if I did not also discuss this Court's longstanding recognition of the remunerative aspect of an award of prejudgment interest. In this regard, we have held that "[p]rejudgment interest, according to West Virginia Code § 56-6-31 (1981) 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." Syl. pt. 1, *Buckhannon-Upshur Cnty. Airport Auth. v. R & R Coal Contracting, Inc.*, 186 W. Va. 583, 413 S.E.2d 404 (1991). *See also Miller v. Fluharty*, 201 W. Va. 685, 700, 500 S.E.2d 310, 325 (1997) ("Prejudgment interest is a 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." (internal quotations and citations omitted)). This holding demonstrates this Court's express acknowledgment of the public policy underlying the Legislature's recognition of a victorious party's right to receive prejudgment interest as a means of compensating an injured party for the losses he/she has incurred as a result of another's actions.

As the foregoing analysis shows, the Legislature explicitly has stated that prejudgment interest is to be calculated based upon the *entire* amount of the special damages awarded. When the Legislature states its intention with regard to a matter of public policy, this Court is bound to respect and uphold such intent, just as it is bound to enforce the Legislature's statutes and this Court's prior decisions. *See Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W. Va. 209, 217, 672 S.E.2d 345, 353 (2008) ("As to statements of public policy, this Court is not at liberty to substitute our policy judgments for those of the Legislature." (internal quotations and citation omitted)). *See also* Syl. pt. 2, in part, *State v. Scott*, 36 W. Va. 704, 15 S.E. 405 (1892) ("In construing a statute, we are not at liberty, where the language is free from ambiguity, to substitute one word for another, and thereby

change and reverse the express language of the act[.]"). In this case, however, the majority nevertheless has, in its esteemed wisdom, determined that it is better versed than the Legislature to determine the public policy of this State vis-a-vis the statutorily-created right to prejudgment interest. With the majority's ill-advised decision, I simply cannot agree.

For the foregoing reasons, I respectfully concur, in part, with the majority's decision to award prejudgment interest from the date Ms. Rutherford's cause of action accrued as required by W. Va. Code § 56-6-31. Nevertheless, I dissent from that portion of the majority's opinion in this case that deviates from the plain language of W. Va. Code § 56-6-31 and improperly calculates the amount of prejudgment interest to which Ms. Rutherford is entitled. I remain hopeful that the Court's next consideration of prejudgment interest will indeed be an entree worthy of praise rather than something which imparts an unwelcome and indelible stench that lingers indefinitely until it is has been attended to properly.