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

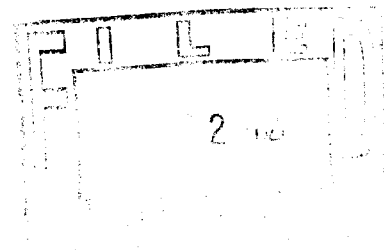
**DOCKET NO. 20-0041**

**THOMAS B. MILLER and JAMIE MILLER,**  
Plaintiffs Below, Petitioners

vs.)

**Docket No. 20-0041**

**WESBANCO BANK, INC.,**  
Defendant Below, Respondent



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**PETITIONERS' BRIEF**

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## **I. ASSIGNMENT OF ERROR**

The Trial Court had authority to award prejudgment interest pursuant to the provisions of W. Va. Code § 56-6-31(b). The Court erred by denying the Petitioners' Motion to Alter or Amend the Judgment on the grounds that W. Va. Code § 56-6-27 provided them with the exclusive means to obtain an award of pre-judgment interest in a contract case.

## **II. STATEMENT OF THE CASE**

### **A. Statement of Relevant Facts.**

This case arises from the failure of the Petitioners' mortgage lender to exercise good faith and fair dealing in the execution of its obligations in a Construction Loan Agreement. Thomas (Brad) and Jamie Miller are a married couple who were constructing a house for their family in Marion County, West Virginia (A.R. 1). They obtained a construction loan from the Respondent WesBanco Bank, Inc. The Construction Loan Agreement was signed in October 2015 (A.R. 84). Construction was underway in November 2015. In May 2016 the Petitioners were informed that their building contractor had not paid a materialman: O.C. Cluss Lumber Company (A.R. 226). They also learned that the contractor had filed for bankruptcy (A.R. 227), and that it was halting work. At closing, WesBanco had given the Petitioners a packet of forms to periodically deliver to their contractor for his completion and submission to the bank when requesting draws (A.R. 244). These included "Waiver of Lien Material or Labor" and "Builder's Affidavit" forms (A.R. 139-161). The affidavit specifically stated that it was to be accompanied by waivers of lien by contractors, subcontractors and suppliers of material used in the project. However, no such material waivers were ever supplied. WesBanco paid draws to the contractor without ever inquiring about, let alone seeing, material waivers. This led to a \$117,500 mechanic's lien being filed against the Millers' property (A.R. 162-175,227). The Petitioners also eventually learned that, even though WesBanco

was having the construction project regularly inspected by an appraiser, when the contractor filed for bankruptcy 80% of the construction loan had been disbursed, but only 53% of construction had been completed (A.R. 127, 324). This resulted in the Petitioners having to spend an additional \$287,000 out of their own funds in order to complete the house — albeit to a lesser quality due to financial considerations (A.R. 232).

**B. Proceedings and Rulings Below.**

On April 7, 2017 the Petitioners filed a four-count complaint against the Respondent (A.R. 1). Those were for breach of contract; negligence; gross negligence in performance of duties and special relationships; and violation of trust relationship. Count II, alleging negligence, and Count III, alleging gross negligence in performance of duties and special relationship were dismissed by Order entered March 13, 2018 (A.R. 14). On February 11, 2019 Wesbanco filed a motion for summary judgment (Docket entry 65, A.R. 487). That motion was denied by Order entered July 31, 2019. (A.R. 24 - 37).

The case was tried to a jury beginning on August 21, 2019. On August 23, 2019 the jury returned a verdict finding that the Respondent had breached its contract with the Millers and that, as a direct and proximate result of the breach of contract, the Millers had sustained damages in the amount of \$404,500 (A.R. 89-90). The entirety of the jury award was for special damages.

The trial court entered judgment in favor of the Millers on September 6, 2019. The Order did not include prejudgment interest on the special damages in the jury's verdict (A.R. 177-193). Eventually, the Court ruled that the Petitioners should have asked for the jury to award prejudgment interest pursuant to the provisions of W. Va. Code § 56-6-27; and by not having done so they waived their right to prejudgment interest (A.R. 481- 482). The Petitioners maintained that, in light of

amendments to W. Va. Code § 56-6-31 made in 2017, the trial court was also permitted to award prejudgment interest. (A.R. 390 - 415).

By Order entered December 18, 2019 the trial judge denied the Petitioners' Motion to Alter or Amend the Judgment so as to include prejudgment interest (*Id.*). The Petitioners filed their Notice of Appeal on January 17, 2020. A Scheduling Order originally called for the Petitioners' Appeal to be perfected on or before April 20, 2020. However, by operation of various Administrative Orders addressing the COVID-19 crisis, including the "Resumption of Operations" Administrative Order entered on May 6, 2020, the deadline for Petitioners to perfect their appeal was extended to June 12, 2020.

### **III. SUMMARY OF ARGUMENT**

The Judgment which was entered on September 6, 2019 did not include prejudgment interest. The Petitioners filed a timely motion to amend or alter the judgment on the basis of W. Va. Code § 56-6-31 [2017]. This statute permits prejudgment interest on that portion of a verdict which is for either special or liquidated damages. The Court denied the Motion on the grounds that Petitioners had waived any entitlement to prejudgment interest by not having resorted to W. Va. Code § 56-6-27 instead. In so doing, however, the Court mistakenly applied the reasoning from a line of cases interpreting W. Va. Code § 56-6-31 that are nearly forty years old — reasoning which no longer applies due to changes the Legislature enacted in 2017.

The jury's verdict assessed the Petitioner's damages at Four Hundred Four Thousand Five Hundred Dollars (\$404,500). Two Hundred Eighty-Seven Thousand Dollars (\$287,000) of the Millers' judgment can be attributed to cash outlays they had to personally expend in order to finish their home. This included \$125,000 of their own funds and \$162,000 Brad Miller's parents loaned

them from retirement funds (A.R. 233 - 234). The balance of the verdict was for the mechanic's lien in the amount of One Hundred Seventeen Thousand Five Hundred Dollar (\$117,500) which has been filed against their property (A.R. 164-175). Clearly, each of those components to the verdict are special damages as contemplated by W. Va. Code § 56-6-31. Therefore, the Petitioners were entitled to have the Court make the award of prejudgment interest in addition to their judgment which was all for special damages.

The Petitioners seek reversal of the trial court's final order, and remand with direction to award prejudgment interest on the entirety of the jury's verdict at the rate of seven percent (7%) per annum.

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

This case is suitable for oral argument pursuant to Rule 20 of the Rules of Appellate Procedure because it involves an issue of first impression concerning the application of W. Va. Code § 56-6-31 which was amended in 2017. These amendments significantly altered the structure of that statute. They clarify that prejudgment interest on special damages, even in contract cases, can be awarded by the trial court.

#### **V. ARGUMENT**

##### **Standard of Review**

This case involves the interpretation of W. Va. Code § 56-6-31[2017]. That statute significantly rewrote key provisions of the law concerning awards of prejudgment interest. Thus, the standard of review must be *de novo*: "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). Syllabus

**Assignment of Error**

THE TRIAL COURT HAD AUTHORITY TO AWARD PREJUDGMENT INTEREST PURSUANT TO THE PROVISIONS OF W. VA. CODE § 56-6-31(b). THE COURT ERRED BY DENYING THE PETITIONERS' MOTION TO ALTER OR AMEND THE JUDGMENT ON THE GROUNDS THAT WEST VIRGINIA CODE § 56-6-27 PROVIDED THEM WITH THE EXCLUSIVE MEANS TO OBTAIN AN AWARD OF PRE-JUDGMENT INTEREST IN A CONTRACT CASE.

For nearly forty years, W. Va. Code § 56-6-31 has been the statute most typically invoked as authority for a court to award prejudgment interest. The statute has been amended twice since 1981. The 2017 iteration of W. Va. Code § 56-6-31 contains — for the first time — a separate subsection concerning prejudgment interest. This is important. It states in pertinent part:

(b) *Prejudgment* – In any judgment or decree that contains special damages, as defined below, or for liquidated damages, the court may award prejudgment interest on all or some of the amount of the special or liquidated damages, as calculated after the amount of any settlements... Special damages include lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court.

The jury's verdict assessed the Petitioner's damages at Four Hundred Four Thousand Five Hundred Dollars (\$404,500). Two Hundred Eighty-Seven Thousand Dollars (\$287,000) of the Millers' judgment can be attributed to cash outlays they had to personally expend in order to finish their home. The balance of the verdict was for a mechanic's lien in the amount of One Hundred Seventeen Thousand Five Hundred Dollars (\$117,500) which has been filed against their property. Those figures were both presented in evidence. Clearly, each of those components to the verdict are special damages as contemplated by W. Va. Code § 56-6-31.

It would seem that the trial court was persuaded by a series of decisions holding — possibly



mistakenly — that a court lacks authority to award prejudgment interest in any case which has elements of breach of contract and that, pursuant to W. Va. Code § 56-6-27, only a jury may award prejudgment interest in such cases.<sup>1</sup> Dating back to 1983, the reason is said to be that since W. Va. Code § 56-6-31[1981]

provides that "[e]xcept where it is otherwise provided by law, every judgment or decree for payment of money entered by any court of this State shall bear interest from the date thereof...: **Provided, that if the judgment or decree, or any part thereof, is for special or liquidated damages, the amount of such liquidated changes shall bear interest from the date the right to bring the same shall have accrued...**" Since this action was "founded on contract," we consider Code, 56-6-27 [1923] to apply to the matter of prejudgment interest, and not Code, 56-6-31 [1981], which by its own terms only applies where the rule concerning interest is not otherwise provided by law. (**Emphasis added**)

*Thompson v. Stuckey*, 171 W.Va. 483, 488, 300 S.E.2d 295, 300 (1983)

Most respectfully, this interpretation appears unsound since the "except where it is otherwise provided by law" provision of W. Va. Code § 56-6-31 [1981] did not pertain to prejudgement interest. It was directed to interest on "every judgment;" that is to say post-judgment interest. The *Thompson* court applied the *proviso* which, on its face, seems designed to specify a plaintiff's automatic entitlement to prejudgment interest on special damages in a manner that actually restricted automatic awards of pre-judgment interest if the case involved a contract.<sup>2</sup> A comparable *proviso*

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<sup>1</sup> The full text of W. Va. Code § 56-6-27 states:

"The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict."

<sup>2</sup>

The *proviso* being: "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...."

was retained in the 2006 rewrite of W. Va. Code § 56-6-31.<sup>3</sup> The *proviso* is the only possible explanation for this line of reasoning, as the phrase “except where it is otherwise provided by law” so clearly applies to what “every judgment” shall bear; and only indirectly at best to what “special or liquidated damages” shall bear. *Thompson* was cited as precedent in two subsequent opinions issued by this Honorable Court: *City Nat. Bank of Charleston v. Wells*, 181 W.Va. 763, 384 S.E.2d 374 (1989), and *Ringer v. John*, 230 W.Va. 687, 742 S.E.2d 103 (2013).

However, in 2017 the Legislature restructured W. Va. Code § 56-6-31 in a manner that is particularly important to the issue presented in this appeal. Postjudgment interest and prejudgment interest are now addressed in two separate and distinct subsections. The familiar phrase “except where it is otherwise provided by law” as found in earlier versions of the statute was retained in a sentence likewise describing the types of judgments and actions which are eligible for an award of interest. But, it now stands totally alone as a separate subsection. That sentence, which is now the entirety of W. Va. Code § 56-6-31(a), stipulates only that interest on every judgment shall be simple, and not compound. The topic of prejudgment interest is now addressed solely, and without any conceivable qualifier, link, or *proviso*, in subsection (b) of W. Va. Code § 56-6-31 [2017]. *Infra*, pg. 10.

Thus, the trial court should have taken into consideration that the legislature rewrote W. Va. Code § 56-6-31 [2017] so as to unequivocally permit the award of prejudgment interest in “any judgment or decree that contains special damages.” (Emphasis added). “Any judgment” indicates

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3

The 2006 version is only slightly altered: “*Provided*, That if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of special or liquidated damages shall bear interest....”

the statute's applicability to all judgments, whether arising in contract or in tort. Therefore, the Petitioners were equally at liberty to choose whether to ask the jury to award prejudgment interest, or the trial court after the jury had returned its verdict. It was error for the trial court to rule that W.Va. Code § 56-6-27 was the exclusive means by which the Petitioners could have obtained prejudgment interest.

The Legislature's modification to W. Va. Code § 56-6-31 was significant. Based on the authority of W. Va. Code § 56-6-31 [2017] "any judgment or decree that contains special damages" is now eligible for prejudgment interest — even in contract actions. The line of cases, starting with *Thompson*, which have held that W. Va. Code § 56-6-31 can not be resorted to in any contract case should no longer apply.

The Prejudgment Interest Statute, W.Va. Code § 56-6-31, has a somewhat convoluted history, having been significantly amended three times beginning in 1981. Each amendment has contained material modifications which require some scrutiny and comparison from version to version in order to correctly ascertain what the current state of law is in regards to prejudgment interest awards, including in contract cases. The situation may also appear a bit murky because the Supreme Court has in the past stated that prejudgment interest in contract cases must be awarded pursuant to the provisions of W. Va. Code § 56-6-27, as opposed to the versions of § 56-6-31 which were then in effect. As will be explained below, the most recent amendment to W. Va. Code § 56-6-31 makes it clear that prejudgment interest for contract damages can be awarded under either of the two statutes.

\* \* \* \* \*

In order to conveniently show the evolution of W.Va. Code § 56-6-31 the entire text for each

amendment is cited immediately below:

**W.Va. Code § 56-6-31 [1981]**

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. The rate of interest shall be ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time, notwithstanding any other provisions of law.

**W.Va. Code § 56-6-31 [2006]**

(a) Except where it is otherwise provided by law, every judgment or decree for the payment of money, whether in an action sounding in tort, contract or otherwise, entered by any court of this state shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: *Provided*, That if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of special or liquidated damages shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued, as determined by the court and that established rate shall remain constant from that date until the date of the judgment or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree. 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. If an obligation is based upon a written agreement, the obligation shall bear a prejudgment interest at the rate set forth in the written agreement until the date the judgment or decree is entered and, thereafter, the judgment interest rate shall be the same rate as provided for in this section.

(b) Notwithstanding the provisions of section five, article six, chapter forty-seven of this code, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the judgment or decree is entered: Provided, That the rate of prejudgment and post-judgment interest shall not exceed eleven percent per annum or be less than seven percent per annum. The administrative office of the Supreme Court of Appeals shall annually determine the interest rate to be paid upon judgments or decrees for the payment of money and shall take appropriate measures to promptly notify the courts and members of the West Virginia State Bar of the rate of interest in effect for the calendar year in question. Once the rate of interest is established by a judgment or decree as provided in this section, that established rate shall thereafter remain constant for that particular judgment or decree, notwithstanding changes in the

Federal Reserve District discount rate in effect in subsequent years.

(c) Amendments to this section enacted by the Legislature during the year two thousand six regular session shall become effective the first day of January, two thousand seven.

### **W.Va. Code § 56-6-31 [2017]**

(a) Except where it is otherwise provided by law, every judgment or decree for the payment of money, whether in an action sounding in tort, contract, or otherwise, entered by any court of this state shall bear simple, not compounding, interest, whether it is stated in the judgment decree or not.

(b) Prejudgment - In any judgment or decree that contains special damages, as defined below, or for liquidated damages, the court may award prejudgment interest on all or some of the amount of the special or liquidated damages, as calculated after the amount of any settlements. Any such amounts of special or liquidated damages shall bear simple, not compounding, interest. Special damages include lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court. If an obligation is based upon a written agreement, the obligation bears prejudgment interest at the rate and terms set forth in the written agreement until the date the judgment or decree is entered and, after that, the judgment interest is the same rate as provided for below in subsection (c) of this section.

(1) Notwithstanding the provisions of section five, article six, chapter forty-seven of this code, the rate of prejudgment interest is two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2, of the year in which the right to bring the action has accrued, as determined by the court and that established rate shall remain constant from that date until the date of the judgment or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree: Provided, That the rate of the prejudgment interest may not exceed nine percent per annum or be less than four percent per annum. The administrative office of the Supreme Court of Appeals shall annually determine the prejudgment interest rate to be paid upon judgment or decrees for the payment of money and shall take appropriate measures to notify the courts and members of the West Virginia State Bar of the rate of interest in effect for the calendar year in question. Once the rate of prejudgment interest is established as provided in this section, that established rate shall remain constant for the prejudgment interest for that particular judgment or decree, notwithstanding changes in the Federal Reserve District discount rate in effect in subsequent years.

(2) Notwithstanding subsection (b)(1) of this section and section five, article six, chapter forty-seven of this code, for all cases in which the right to bring the action accrued prior to 2009, the court may award prejudgment interest on all or some of the amount of the special or liquidated damages, as calculated after the amount of any settlement, at the interest rate that was in effect as of January 2, of the year in which the right to bring the action accrued.

(c) Post-judgment - Notwithstanding the provisions of section five, article six, chapter forty-seven

of this code, the rate of post-judgment interest on judgments and decrees for the payment of money is two percentage points above the Fifth Federal Reserve District secondary discount rate in effect on January 2, of the year in which the judgment or decree is entered: Provided, That the rate of post-judgment interest may not exceed nine percent per annum or be less than four percent per annum. The administrative office of the Supreme Court of Appeals shall annually determine the post-judgment interest rate to be paid upon judgments or decrees for the payment of money and shall take appropriate measures to promptly notify the courts and members of the West Virginia State Bar of the rate of interest in effect for the calendar year in question. Once the rate of interest is established by a judgment or decree as provided in this section that established rate shall after that remain constant for that particular judgment or decree, notwithstanding changes in the Federal Reserve District discount rate in effect in subsequent years.

(d) Amendments to this section enacted by the Legislature during the 2017 regular session become effective January 1, 2018.

\* \* \* \* \*

A. The 1981 amendment of W. Va. Code § 56-6-31.

The 1981 amendment was a partial codification of the Supreme Court's holding in *Bond v.*

*City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539 (1981):

the above quoted part of W.Va.Code, 56-6-31 [1981] is a partial codification of our holding in *Bond v. City of Huntington*, 166 W. Va. 581, 276 S.E.2d 539 (1981), with respect to prejudgment interest in tort cases. In *Bond*, we extended to a particular type of damages in tort actions the traditional rule in contract actions that prejudgment interest is to be recovered. In both contexts prejudgment interest is to be recovered by a litigant as an element of compensatory damages "where there is an ascertainable pecuniary loss[.]" (Citations omitted).

Footnote 4, *Grove By and Through Grove v. Myers*, 382 S.E.2d 536, 181 W.Va. 342 (1989).

Soon after the 1981 amendment, in 1983, the Supreme Court ruled that

In an action founded on contract, a claimant is entitled to have the jury instructed that interest may be allowed on the principal due, W.Va.Code, 56-6-27 [1923], but is not entitled to the mandatory award of interest contemplated by W.Va.Code, 56-6-31 [1981], since this statute does not apply where the rule concerning interest is **otherwise provided by law. (Emphasis added).**

Syllabus Pt. 4, *Thompson v. Stuckey*, 300 S.E.2d 295, 171 W.Va. 483 (1983).

That case involved an oral promise to a Mr. Thompson that, in exchange for doing site preparation for a coal mine, he would be paid \$1,200 a month, and be eligible for a formula derived bonus of at least \$100,000. *Id.*, at 171 W. Va. 485. There was a breach which resulted in a law suit, and verdict to the contractor Mr. Thompson. However, Thompson was deprived of prejudgment interest on his judgment. The trial judge had declined to instruct the jury to add prejudgment interest pursuant to W. Va. Code § 56-6-27. The Supreme Court said that should have been done; and that prejudgment interest could not be awarded via W. Va. Code § 56-6-31 [1981]. The case was remanded with the option given to the successful plaintiff to retry the case on damages if he so chose.

W.Va. Code § 56-6-27 reads:

The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict.

Unlike here, in *Stuckey* some principal amount in the form of either \$1,200 per month or the potential \$100,000 bonus was actually identified in the parties' agreement to serve as a basis for calculating "interest on the principal due." Another reason the Supreme Court held that § 56-6-27 was suitable in *Stuckey* instead of W. Va. Code § 56-6-31 is that the 1981 version of § 56-6-31 began:

**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. (Emphasis added).**

The *proviso* in W. Va. Code § 56-6-31 [1981] that special damages "shall bear interest" flowed

seamlessly from the language at the top of the paragraph “[e]xcept where it is otherwise provided by law.” This is what the Supreme Court emphasized in *Stuckey*, namely that W. Va. Code § 56-6-27 was an example of the exception “provided by law” in the 1981 version of W. Va. Code § 56-6-31:

Appellee Thompson submits a cross-assignment of error on the basis of the trial court's refusal to instruct the jury regarding prejudgment interest on the award. W.Va.Code, 56-6-27 [1923] provides that “[t]he jury, in any action founded on contract, may allow interest on the principal due...”, and W.Va.Code, 56-6-31 [1981] provides that “[e]xcept where it is otherwise provided by law, every judgment or decree for payment of money entered by any court of this State shall bear interest from the date thereof...: **Provided, that if the judgment or decree, or any part thereof, is for special or liquidated damages, the amount of such liquidated changes shall bear interest from the date the right to bring the same shall have accrued....**” Since this action was “founded on contract,” we consider Code, 56-6-27 [1923] to apply to the matter of prejudgment interest, and not Code, 56-6-31 [1981], which by its own terms **only applies where the rule concerning interest is not otherwise provided by law. (Emphasis Added).**

*Id.*, at [171 W.Va. 487-488.

The “except where” language, in that identical context, was retained in the 2006 amendment.

B. The 2006 amendment of W. Va. Code § 56-6-31.

Of significance with the 2006 amendment, language was added to the effect: “whether in an action sounding in tort, contract or otherwise.”<sup>4</sup> Nevertheless, that clause was still tied to a specific

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<sup>4</sup> The introductory paragraph of the 2006 amendment read:

**(a) Except where it is otherwise provided by law, every judgment or decree for the payment of money, whether in an action sounding in tort, contract or otherwise, entered by any court of this state shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: *Provided, That if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of special or liquidated damages shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued, as determined by the court . . . (Emphasis added).***



*proviso* setting the prejudgment interest rate to a special formula based on the Federal Reserve discount rate, and giving the court discretion to determine the date on which such special or liquidated damages accrued. Therefore in 2013, when the Supreme Court again had the opportunity to address the issue of prejudgment interest in an action sounding in contract, the Court reiterated that W. Va. Code § 56-6-27 applied — notwithstanding the specific reference to contract in the 2006 amendment of W. Va. Code § 56-6-31.

*Ringer v. John*, 230 W. Va. 687, 742 S.E.2d 103 (2013) was a case involving a contractor and a landowner. When a dispute arose over their verbal agreement, the landowner (John) filed suit. The contractor (Ringer) filed a counterclaim for unjust enrichment. Each party received something of value from the jury. Ringer received a monetary award of \$42,100 representing the cost of materials that he had purchased, and the value of labor he had performed. Ringer was awarded prejudgment interest pursuant to W. Va. Code § 56-6-31. The Supreme Court held that since Ringer’s claim sounded in contract, prejudgment interest could only be awarded by the jury pursuant to W. Va. Code § 56-6-27. This, notwithstanding the addition of the language “whether in an action sounding in tort, contract or otherwise.” That was because the phrase “[e]xcept where it is otherwise provided by law” was retained:

When this Court decided Stuckey, West Virginia Code § 56–6–31 did not include the language “whether in an action sounding in tort, contract or otherwise.” This language was added when the statute was amended in 2006. Despite the insertion of this language, the phrase “[e]xcept where it is otherwise provided by law” was retained. Accordingly, we do not find that this statutory amendment provides any basis to revisit our holding in Stuckey.

Footnote 6, *Id.*

There are two things about the *Ringer* case which suggest that the literal application of W.

Va. Code § 56-6-27 to the Millers' case is not sound, and is unfair. First, the word "principal" which appears in W. Va. Code § 56-6-27 is a term typically applied to financial instruments such as notes, deeds of trust, or contractual undertakings where there is a clear, defined amount owed/to be paid as stated within the four corners of the document. Those are not the type of damages that either the contractor Ringer, or the Petitioners Brad and Jaime Miller, were awarded. Second, at least Mr. Ringer was given an opportunity to eventually seek prejudgment interest on remand. Without this Court's intervention the Petitioners will be denied that opportunity. This Court's ruling in *Ringer* was that the case was reversed "to the extent it denied Mr. Ringer's motion to amend the judgment order" and "for reconsideration of the amount of prejudgment interest owed to Mr. Ringer in accordance with W. Va. Code § 56-6-27." *Id.* at 230 W. Va. 691. Thus, even if this Honorable Court were to rule that W. Va. Code § 56-6-31 is inapplicable, the Millers are entitled to a remand so that they might have the same opportunity that was afforded to Mr. Ringer.<sup>5</sup>

Finally, the 2006 Amendment of W. Va. Code § 56-6-31 incorporated the following language for the first time:

If an obligation is based upon a written agreement, the obligation shall bear a (*sic*) prejudgment interest at the rate set forth in the written agreement until the date the judgment or decree is entered and, thereafter the judgment interest rate shall be the same rate as provided for in this section. W. Va. Code § 56-6-31(a) [2006].

C. The 2017 amendment of W. Va. Code § 56-6-31.

The 2017 amendment to W. Va. Code § 56-6-31 is perhaps the most significant one to date as all passages have been substantially revised. Petitioners submit that these revisions clarify that

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<sup>5</sup> In *Ringer*, following remand, an evidentiary hearing was conducted in the Circuit Court of Preston County. The result was an Order entered October 8, 2013 which awarded Mr. Ringer prejudgment interest in addition to his original judgment. (A.R. 434 - 442).

the Millers are entitled to an award of prejudgment interest calculated pursuant to the provisions of W. Va. Code § 56-6-31. Here are what appear to be the most substantial changes to the statute which are relevant to this discussion:

1. The 2017 amendment contains an entirely new subsection (a).<sup>6</sup> That subsection retains the “except where it is otherwise provided by law” language which the Supreme Court found significant in both *Stuckey* and *Ringer*. However, now the emphasis is placed on specifying that interest on judgments shall be calculated at the simple rate, and not compounded. More importantly still, the “except where it is otherwise provided by law” language is divorced from the *proviso* that had been present in the 1981 and 2006 versions. The language which follows in subsection (b) of the 2017 amendment — **“in any judgment or decree that contains special damages as defined below, or liquidated damages, the court may award prejudgment interest on all or some of the amount of the special or liquidated damages ....”** — now stands entirely on its own.

Here is why this is important. Implicit in *Stuckey* and *Ringer* is that W. Va. Code § 56-6-31 did not permit a post-judgment award of prejudgment interest because of the “except where it is otherwise provided by law” language which preceded the *proviso*. The *proviso* appears in both the 1981 and the 2006 amended versions. W. Va. Code § 56-6-27 was an exception “otherwise provided by law” which had to be resorted to in lieu of W. Va. Code § 56-6-31. Presently, the language of subsections (a) and (b) have been separated. They can be interpreted in isolation as they each address different issues. They are no longer bound by a *proviso*. This then makes it reasonable

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<sup>6</sup> “(a) Except where it is otherwise provided by law, every judgment or decree for the payment of money, whether in an action sounding in tort, contract, or otherwise, entered by any court of this state shall bear simple, not compounding, interest, whether it is stated in the judgment decree or not.”

to simply apply the language of (b) to “**any** judgment or decree that contains special damages as defined below or for liquidated damages . . .” (**Emphasis added**).

2. The 1981 and 2006 versions of the statute mandated an award of prejudgment interest on special or liquidated damages. The 2017 version of the statute awards the court discretion: “. . . the court may award prejudgment interest on all or some of the amount of the special or liquidated damages. . . .”

3. Language in subsection (a) of the 2006 statute “the obligation shall bear a (*sic*) prejudgment interest at the rate set forth in the written agreement” was changed to “The obligation bears prejudgment interest at the rate **and terms** set forth in the written agreement . . .” (**Emphasis added**).

4. In addition to the changes noted above, new subsection (b) in the 2017 amendment is where much of the language that appeared after the *proviso* in the 2006 amendment can be found. Additional detail was added concerning what interest rate would be applied from year-to-year. Subsection (d) stated that the effective date of the 2017 Amendment was January 1, 2018.

These latest revisions to W. Va. Code § 56-6-31 are significant in several ways, including areas where provisions that formed the basis of the Supreme Court’s decisions in *Stuckey* and *Ringer* have been modified. In light of this, even though, W. Va. Code § 56-6-27 unquestionably applies to contract cases where a plaintiff has suffered a readily ascertainable loss of principal; a successful plaintiff in a contract case is also able to invoke the trial court’s discretion to award prejudgment interest pursuant to W. Va. Code § 56-6-31. That is because the phrase “any judgment or decree that contains special damages . . . or for liquidated damages” in Subsection (b) of the 2017 revised statute must include those in any contract case.

D. The entirety of the jury's verdict for the Petitioners consists of special or liquidated damages.

The Millers are entitled to additional compensation in the form of prejudgment interest due to the significant loss of funds they have experienced over the past four years. They have been out of pocket nearly \$300,000. The O. C. Cluss lien will most likely have interest added to the underlying \$117,500 claim. This Court has 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.” Syllabus Pt. 1, *Buckhannon-Upshur County Airport Authority v. R & R Coal Contracting, Inc.*, 413 S.E.2d 404, 186 W.Va. 583 (1991).

The jury's **\$404,500** verdict is composed of two distinct elements. The jury was presented with evidence that the Millers had to spend **\$287,000** to complete their home. This money was derived from personal savings and a family loan. The other item of evidence was the O.C. Cluss Lumber Company's Mechanic's Lien for **\$117,500**, not including interest (A.R. 164-175). On its face, the 2017 version of W. Va. Code § 56-6-31 makes it plain that those are either special or liquidated damages:

Special damages include lost wages and income, medical expenses, damages to tangible personal property and **similar out-of-pocket expenditures**, as determined by the court.” (**Emphasis added**)

This is also clear from prior case-law. This Honorable Court has interpreted W. Va. Code § 56-6-31 for the principle that prejudgment interest can be added for expenses incurred, whether they have been paid or not:

Under W.Va.Code, 56-6-31, as amended, prejudgment 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. If there is sufficient evidence to

demonstrate that the injured party is obligated to pay for medical or other expenses incurred by the time of the trial, and if the amount of such expenses is certain or reasonably ascertainable, prejudgment interest on those expenses is to be recovered from the date the cause of action accrued.

Syllabus Pt. 3, *Grove By and Through Grove v. Myers*, 382 S.E.2d 536, 181 W.Va. 342 (1989)

The Millers testified that they actually spent \$287,000. The O.C. Cluss lien is an example of an incurred expense for which prejudgment interest can be recovered. The various iterations of W. Va. Code § 56-6-31 have not altered that principle of law from *Grove*.

E. The Millers are entitled to prejudgment interest in the amount of \$90,843.83.

*Grove* also established the principle that the calculation of prejudgment interest for all special or liquidated damages shall be computed from the date the cause of action accrued. “Accrual” language — which was also present in the 1981 and the 2006 versions of the statute — is now found at W. Va. Code § 56-6-31(b)(1). Syllabus point 2 of *Grove* states:

Under W.Va.Code, 56-6-31, as amended, prejudgment interest on special or liquidated damages is calculated from the date on which the cause of action accrued, which in a personal injury action is, ordinarily, when the injury is inflicted. Syllabus Pt. 2, *Id.*

In the body of the decision, the *Grove* court elaborated as follows:

We agree with what was said in *State v. Phillips*, 470 P.2d 266 (Alaska 1970), with respect to when prejudgment interest begins to run: "For a cause of action to accrue, one party must have breached a duty to the other, and the other must have been injured. At the moment the cause of action accrued, the injured party was entitled to be left whole and became immediately entitled to be made whole." *Id.* at 274. Therefore, prejudgment "interest [runs] from the time the cause of action accrues," *id.*, that is, from the date of injury. [Foreign citations omitted].

By providing in W.Va.Code, 56-6-31 [1981] that prejudgment interest on special or liquidated damages is to be computed from the date the cause of action accrued, the legislature implicitly decided to avoid the complications inherent in calculating prejudgment interest on each element of special or liquidated damages from the

respective dates on which each element was incurred. "We recognize that damages are typically incurred intermittently throughout the prejudgment period.... [para.] [A] system which would force litigants to determine precisely when each element of a plaintiff's damage award was incurred would impose an onerous burden on both the trial bench and bar." [Foreign citations omitted].<sup>7</sup>

*Id.*, at 181 W.Va. 349.

The O. C. Cluss Mechanic's Lien provides two possible dates on which the Petitioners' cause of action accrued. One such date would be November 11, 2015 which is when the first of many unpaid transactions with O. C. Cluss occurred (A.R. 167, 176, 412). That is the date on which the Millers first actually became indebted to O. C. Cluss due to the Respondent's breach of their agreement. An alternative date is June 23, 2016 which is when the O. C. Cluss lien was filed with the Marion County Clerk (A.R. 176). The latter date is what Petitioners' have used in their calculation. Prejudgment interest was calculated at the rate of 7% *per annum*, in light of an administrative order signed by then Chief Justice Menis E. Ketchum on January 4, 2016 (A.R. 413).

Thus:

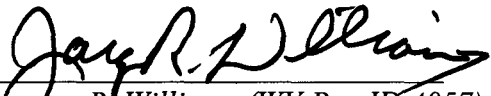
- $7\% \times \$404,500 = \$28,315$  per year.
- $\$28,315$  per year / 12 months =  $\$2,359.58$ /month.
- June 23, 2016 through September 6, 2019 = 38.5 months.
- 38.5 months  $\times$   $\$2,359.58 = \mathbf{\$90,843.83}$ .

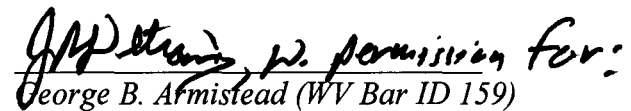
## VI. CONCLUSION

For the reasons stated above, the Petitioners seek reversal of the Trial Court's December 18, 2019 Order denying their motion for prejudgment interest. This case should be remanded to the Circuit Court of Marion County, West Virginia with instruction to consider entry of an amended judgment to include prejudgment interest in the amount of \$90,843.83. In the alternative, Petitioners

seek a remand as was done in *Ringer* for the purpose of conducting an evidentiary hearing that would lead to a calculation of prejudgment interest pursuant to W. Va. Code § 56-6-27.

Respectfully submitted this 11<sup>th</sup> day of June 2020.

  
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## CERTIFICATE OF SERVICE

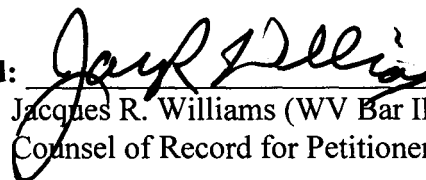
I hereby certify that on this 11<sup>th</sup> day of June 2020, true and accurate copies of the foregoing **Petitioners' Brief and Appendix** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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