

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

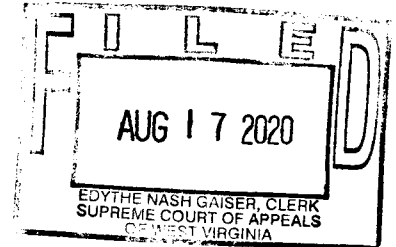
DOCKET NO. 20-0041

**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' REPLY TO RESPONDENT'S RESPONSE TO PETITION  
FOR APPEAL**

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**II. TABLE OF AUTHORITIES**

**A. Cases**

Ortiz v. Wilmington Sav. Fund Soc'y, Civil Action No. 2:18-cv-1129 (S.D.W. Va. Aug. 1, 2019)). . . . . 1

Richards v. EQT Prod. Co., CIVIL ACTION NO. 1:17CV50 (N.D.W. Va. Aug. 29, 2019) . . . . 1

**B. Statutes and Other Authorities**

W. Va. Code § 56-6-27 . . . . . 1

W. Va. Code Sec. 56-6-29 . . . . . 2

W.Va. Code § 56-6-31 [2017] . . . . . 1

## I. Summary Response

The 2017 version of W. Va. Code § 56-6-31 is the superior vehicle for calculating awards of prejudgment interest for tort cases and contract cases alike.

A. The supposedly primacy of W. Va. Code § 56-6-27 is not as apparent as WesBanco would have it. At first blush, it appeared as if WesBanco agreed with Petitioners' position that § 31 applied here. The applicability of § 31 was only raised as an apparent afterthought more than a week after the parties had first discussed the draft of a final judgment order. (A.R. 177 and 183-184).

B. § 27 makes no reference to an interest rate. No guidance is provided to either the jury, the litigants or the trial court. The lack of any guidance, such as § 31 has, presents a potential risk of prejudice to Plaintiffs and Defendants alike. Judge Keeley of the USDC for the Northern District noted the oddity. Granted she did acknowledge that her interest calculation would be based on § 27. (*Richards v. EQT Prod. Co.*, CIVIL ACTION NO. 1:17CV50 (N.D.W. Va. Aug. 29, 2019)). In the Southern District, however, Judge Copenhaver simply chose to apply the prejudgment interest formula of § 31 in awarding a plaintiff prejudgment interest: "From the date of contract to the date of judgment." (*Ortiz v. Wilmington Sav. Fund Soc'y*, Civil Action No. 2:18-cv-1129 (S.D.W. Va. Aug. 1, 2019)).

C. WesBanco's interpretation would allow many litigants with contract claims to have the trial judge assess prejudgment interest under W. Va. Code § 56-6-31(b)<sup>1</sup>, whereas many others in contract cases would not. There is no logical reason that the Millers should be denied their chosen

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<sup>1</sup>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.

option for calculation of prejudgment interest by the trial court pursuant to §31 simply because no apt interest rate is set forth within the parameters of their contract with WesBanco. Instead, their claim for prejudgment interest is left to the vagaries of what a jury might do without any guidance, training or aid in terms of what interest rates are applicable. That is unlike what was well thought out by the legislature just a few years ago with the changes made to §31.

D. It is also not logical that the Millers should be restricted from pursuing optional remedies for postjudgment interest calculation through either § 27 or § 31 when tort litigants, on the other hand, are afforded the option of two statutes for calculating postjudgment interest. Furthermore, § 31(a) provides for interest on every judgment, including those sounding in tort. So does West Virginia § 56-6-29: “In any action founded on a tort, if the verdict be for the plaintiff, the judgment shall be for the amount of the verdict with interest thereon from the date of the verdict.”

E. The award of prejudgment interest pursuant to § 27 is permissive: “The jury, in any action founded on contract, may allow interest on the principal due . . . .” “In any action” should not be interpreted to mean every action — particularly when recent, significant modifications to the structure of § 31 totally ruptured any preexisting rationale for deferring to § 27.

F. Looking again to § 29, it provides that

When there is a recovery on a bond conditioned for the payment of money, as well as in all cases where a judgment or decree is rendered or made for the payment of money, it shall be for the aggregate of principal and interest due at the date of the verdict, if there be one, otherwise at the date of the judgment or decree, with interest thereon from the date of such verdict, if there be one, otherwise from the date of such judgment or decree, except in cases where it is otherwise provided.

W. Va. Code § 56-6-29

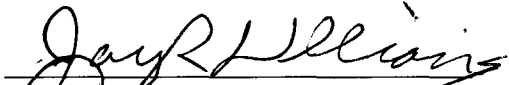
Once past the specific language pertaining to bonds, the balance of the statute is essentially an

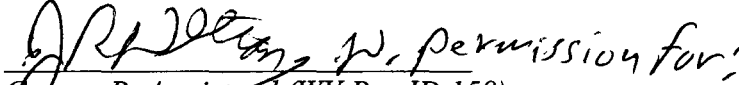
abbreviated version of § 31.<sup>2</sup> It pertains to judgments for “the payment of money.” It addresses the possibility of “principal and interest due at the date of the verdict,” and it provides for interest from the date of the verdict. No jury involvement is specified or even hinted at in § 29. Would the waiver ruling which was imposed on the Millers have applied had they chosen to proceed instead with the more obscure provisions of § 29 as opposed to § 31? The melange of options offered by the nearly century old provisions of W. Va. Code § 56-6-27 and W. Va. Code § 56-6-29 are inadequate. They pale in comparison to the comprehensive framework of § 31.

Conclusion

For these reasons the Petitioners ask this Honorable Court to endorse allowing successful litigants the option of having the trial court consider awards of prejudgment interest in contract cases.

Respectfully submitted this 14<sup>th</sup> day of August 2020.

  
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<sup>2</sup> Or, better put, §31 is an updated, thorough blend of §27 & § 29.

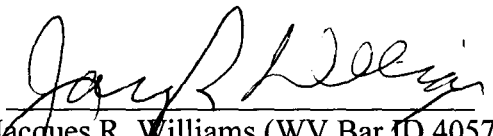
## CERTIFICATE OF SERVICE

I hereby certify that on this 14<sup>th</sup> day of August 2020, true and accurate copies of the foregoing **Petitioners' Reply To Respondent's Response to Petition for Appeal** 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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