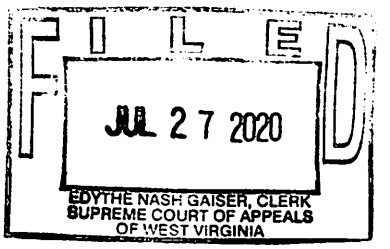
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0041



Thomas B. Miller and
Jamie Miller,

Plaintiffs Below, Petitioners,

v.

(Circuit Court of Marion County
Civil Action No. CC-24-2017-C-119)

WesBanco Bank, Inc.,

Defendant Below, Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

After their contractor quit work on their new home and declared bankruptcy, Dr. Thomas "Brad" Miller and Dr. Jamie Miller sued their lender, WesBanco.[1] By trial, the Millers' claims were limited to two breach-of-contract theories:[2] that (1) WesBanco had paid their contractor for unfinished work[3] and (2) WesBanco had failed to obtain lien waivers before releasing draw payments.[4] The jury agreed and returned a verdict for the Millers awarding them $404,500 in damages[5]—about $105,000 more than the Millers told the jury they had proved.[6]

The jury's damages award did not include prejudgment interest[7] because the Millers had never asked the trial court for an instruction on that component of damages.[8] And so, in an effort to overcome their omission, ten days after the trial court entered judgment,[9] the Millers moved the trial court to alter or amend the judgment to include prejudgment interest under W. Va. Code § 56-6-31 (§ 31).[10] The trial court properly denied the request,[11] holding that W. Va. Code § 56-6-27 (§ 27) is the exclusive source for an award of prejudgment interest in breach-of-contract cases and the Millers waived their right to prejudgment interest when they failed to request a jury instruction under that statute. This appeal followed.

SUMMARY OF THE ARGUMENT

The Millers brought two breach-of-contract claims to trial. Under nearly 40 years of precedent, they were on notice to request a jury instruction on prejudgment interest under § 27 or else

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[1] A.R. 1-11 (Compl.).
[2] *See, e.g.*, A.R. 89-90 (Jury Verdict)
[3] *See, e.g.*, A.R. 86 (Jury Charge)
[4] *Id.*
[5] A.R. 89-90 (Jury Verdict)
[6] *See id.*
[7] *See id.*
[8] *See* A.R. 55-74 (Pls.' Proposed Jury Instructions).
[9] A.R. 190-93 (Judgment Order)
[10] A.R. 390-415 (Pls.' Mot. to Alter or Am.).
[11] A.R. 481-482 (Order Denying the Parties' Post-Trial Mots.).

waive that claim. The Millers failed to do so, and they bore the consequences of their omission: the trial court denied their Rule 59(e)[12] motion seeking to add prejudgment interest under § 31—a statute that this Court has repeatedly held does not apply to breach-of-contract claims. The Millers now appeal and ask the Court to overrule its precedents or hold that they were overturned by the Legislature with the 2017 enactment of § 31.

This Court's precedents on § 27 exclusivity were properly decided; the *proviso* authorizing prejudgment interest in § 31 is syntactically linked to the phrase that excludes that statute's operation *where it is otherwise provided by law*, as it is in breach-of-contract cases under § 27. There similarly is no reason to depart from this Court's precedents following the 2017 amendments to § 31. More than a year before the Millers' trial, this Court referred to those amendments as stylistic and put the Millers on notice that § 27 exclusivity would continue to be the rule in breach-of-contract cases. And even if this Court had not spoken on this matter, the continuation of § 27 exclusivity is supported by the text, structure, purpose, and history of the § 31 amendments.

Once this Court reaches the conclusion that § 27 provides the exclusive source for an award of prejudgment interest, the result is clear: the Millers waived any right to prejudgment interest by failing to request an instruction. The sole decision the Millers cite to support remand is inconsistent with this Court's other precedents and the text of § 27 itself. Nor is there any unfairness from this result: the law on § 27 exclusivity is well-developed and was affirmed even after the 2017 enactment of § 31.

For any one or all of these reasons, this Court should affirm. If the Court reverses the trial court on waiver, however, the amount of special damages and their accrual date should be decided first by the jury, if under § 27, or by the trial court, if under § 31. This Court should thus decline

[12] W. Va. R. Civ. P. 59(e).

to consider those issues from the Millers' brief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal may be resolved in a memorandum decision, without oral argument, because it involves the application of settled law on the Millers' waiver of prejudgment interest in this breach-of-contract case.

ARGUMENT

Standard of Review

"The 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."[13] Because the applicability of § 27 or § 31 to the Millers' breach-of-contract claims presents a question of law, a *de novo* standard applies to that component of the trial court's ruling.

A. The trial court properly denied the Millers' Rule 59(e) motion because they waived their right to prejudgment interest when they failed to request a jury instruction under W. Va. Code § 56-6-27.

1. Under nearly 40 years of precedent, prejudgment interest in breach of contract cases is controlled by W. Va. Code § 56-6-27, rather than W. Va. Code § 56-6-31.

In a line of cases stretching back nearly 40 years, the Supreme Court of Appeals has held that plaintiffs in contract cases must look exclusively to § 27 for an award of prejudgment interest, and they will waive that right if they fail to request an appropriate jury instruction.

The rule originates in *Thompson v. Stuckey*,[14] where this Court considered the case of Carl Edward Thompson, who had obtained a $100,000 judgment against William Stuckey and Witcher

[13] Syl. Pt. 1, *Wickland v. American Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998).
[14] *Thompson v. Stuckey*, 171 W. Va. 483, 300 S.E.2d 295 (1983).

Creek Coal Company for breach of contract. Stuckey and Witcher Creek Coal Company appealed the judgment award, and Thompson cross-appealed the trial court's refusal to give a jury instruction on prejudgment interest.[15]

On Thompson's cross-appeal, this Court looked to two statutes as a potential source for prejudgment interest. The first statute that the *Thompson* court considered was the 1923 enactment of § 27 then in effect (as it is now):

> 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.[16]

The second statute that the *Thompson* court considered was the 1981 enactment of § 31:

> **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. ...[17]

The result in *Thompson* was the creation of a new syllabus point: "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."[18]

Six years after this Court decided *Thompson*, it considered the case of *City National Bank*

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[15] *Id.* at 485 & 488, 300 S.E.2d at 297 & 300.
[16] W. Va. Code § 56-6-27 (emphasis added).
[17] W. Va. Code § 56-6-31 [1981] (emphasis added).
[18] Syl. Pt. 4, *Thompson*, 171 W. Va. 483, 300 S.E.2d 295.

of Charleston v. Wells,[19] where Leonard Wells obtained a judgment against Bud Young Toyota for breach of warranty. Bud Young Toyota appealed the judgment, and Wells cross-appealed the trial court's refusal to award him prejudgment interest and attorney's fees.[20]

On his cross-appeal, Wells relied on cases interpreting the 1981 enactment of § 31 for his claim to prejudgment interest. Citing to *Thompson*, however, the *City National Bank* court held that § 31 does not apply to breach-of-contract claims because "the right to prejudgment interest is dependent on the provisions of W. Va. Code [§] 56–6–27 [1923], which leaves the determination to the jury."[21] And because Wells had not requested a jury instruction on prejudgment interest under § 27, the court held that "[h]is failure to do so must be deemed a waiver of that right."[22]

Seventeen years after this Court decided *City National Bank*, the Legislature amended § 31 in 2006 to change the calculation of interest and move language relating to interest rates into a new subsection:

> (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. ...
>
> (b) [Relating to interest rates]
>
> (c) [Establishing effective date][23]

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[19] *City Nat. Bank of Charleston v. Wells*, 181 W. Va. 763, 766, 384 S.E.2d 374, 377 (1989).
[20] *Id.* at 766-67, 384 S.E.2d at 377-78.
[21] *Id.* at 778, 384 S.E.2d at 389.
[22] *Id.*
[23] W. Va. Code § 56-6-31 [2006] (emphasis added).

It took six years from the 2006 enactment of § 31 for this Court to consider another contract case with a prejudgment interest issue. In *Ringer v. John*,[24] Richard Ringer had obtained judgment on a counterclaim against Joseph John for unjust enrichment, and the trial court had awarded him prejudgment interest under the 2006 enactment of § 31.[25] Believing the trial court had applied the wrong interest rate and accrual date, however, Ringer appealed.[26]

The *Ringer* court held on its own motion that Ringer's unjust enrichment claim was "founded on contract" and the trial court had erred by awarding prejudgment interest under § 31.[27] The Court acknowledged that the 2006 amendments to § 31 added the phrase *whether in an action sounding in tort, contract or otherwise*.[28] But because the Legislature had retained the phrase *except where it is otherwise provided by law*, the Court held there was no reason to revisit its holding from *Thompson*.[29]

In sum, for nearly 40 years, this Court has held that, because § 31 only applies if not otherwise provided by law, § 27 is the exclusive source for an award of prejudgment interest in cases founded on contract. And *City National Bank* holds that contract plaintiffs waive that right when they fail to request a jury instruction under § 27.

2. This Court's precedents on the exclusive application of W. Va. Code § 56-6-27 in breach-of-contract cases remain good law.

a. This Court's precedents were correctly decided.

The Millers urge this Court to overrule *Thompson* and its progeny because, they argue, the

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[24] *Ringer v. John*, 230 W. Va. 687, 742 S.E.2d 103 (2013) (*per curiam*).
[25] *Id.* at 689, 742 S.E.2d at 105.
[26] *Id.*
[27] *Id.* at 690, 742 S.E.2d at 106.
[28] *Id.* at 691 n.6, 742 S.E.2d at 107 n.6.
[29] *Id.*

phrase *except where it is otherwise provided* refers only to postjudgment interest and imposes no limitation on the award of prejudgment interest.[30] This is a radical argument: this Court has consistently held that it should not depart from prior decisions, let alone nearly 40 years of precedent, unless there was serious judicial error or changed circumstances would make the application unjust.[31] But more to the point, the Millers' interpretation is unsupportable.

Under both the 1981 and 2006 enactments of § 31, the authority for an award of prejudgment interest is included as a *proviso*, which operates to "condition[] the principal matter that it qualifies—almost always the matter immediately preceding."[32] Even without this *proviso* canon of construction, however, § 31 is structured so that *the judgment or degree* in the conditional clause refers back to *every judgment or degree for the payment of money* in the main clause.

1981 enactment of § 31	2006 enactment of § 31
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. ...[33]	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 ...[34]

Whether understood as a *proviso* or as a referent, the authority for prejudgment interest in the 1981 and 2006 enactments of § 31 is subject to the same condition found in the main clause: it

[30] *See* Pet'rs' Br. 6-7.
[31] *State ex rel. W. Va. Dept. of Transp. v. Reed*, 228 W. Va. 716, ___, 724 S.E.2d 320, 324 (2012) (quoting *Woodrum v. Johnson*, 210 W. Va. 762, 766 n.8, 559 S.E.2d 908, 912 n.8 (2001)).
[32] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 154 (2012).
[33] W. Va. Code § 56-6-31 [1981].
[34] W. Va. Code § 56-6-31 [2006].

does not apply where it is otherwise provided by law. And so this Court properly adopted this conclusion in *Thompson* when it held that § 27—and not § 31—is the exclusive source of prejudgment interest in breach-of-contract cases.[35] The Court thus should reject the Millers' invitation to overrule *Thompson* and its progeny.

b. The Legislature did not overturn this Court's precedents when it amended W. Va. Code § 56-6-31 in 2017.

If the Court will not overrule its *Thompson* line of precedent, the Millers alternatively ask it to hold that the Legislature overturned those cases with the 2017 enactment of § 31:

> (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) [Relating to prejudgment interest rates]
>
> (2) [Relating to prejudgment interests rates for causes of action that accrued before 2009]
>
> (c) [Relating to postjudgment interest rates]
>
> (d) [Establishing effective date].[36]

[35] Syl. Pt. 4, *Thompson*, 171 W. Va. at 483, 300 S.E.2d at 295.
[36] W. Va. Code § 56-6-31 [2017] (emphasis added).

The Millers acknowledge that the 2017 enactment retained the phrase *where it is otherwise provided by law*, which provided the basis for decision in *Thompson* and its progeny. But they argue that phrase now only limits the authority for postjudgment interest in § 31(a), leaving the authority for prejudgment interest in § 31(b) without any corresponding limitation. As a practical matter, this means that a trial court in breach-of-contract cases could apply § 31 to award prejudgment interest but not postjudgment interest. Not only would this result be illogical, it would conflict with the precedent, text, structure, purpose, and history governing the interpretation of § 31.

To start with **precedent**, this Court affirmed the *Thompson* line of precedent in its only case to cite § 31 since the 2017 enactments. The petitioners in *Tri-State Petroleum Corp. v. Coyne*[37] argued that the trial court had erred when it found that a jury verdict included special damages that could accrue prejudgment interest under § 31. The trial court's order had applied the 2006 enactment of § 31, but by the time this Court issued its decision, § 31 had been amended as part of the 2017 enactment.[38] Reviewing the amendment, however, this Court found no substantive difference between the two enactments: "The amendment was stylistic in nature and does not impact our analysis."[39] Citing to *Ringer*, the Court likewise recognized that, while § 31 controls in tort actions, § 27 "controls awards of prejudgment interest in cases founded on contract."[40] The extension of *Thompson* to the 2017 enactment of § 31 was thus settled more than a year before the Millers' case was tried.

Moving on to the **text**, it is significant that the Legislature retained the phrase *except where it is otherwise provided by law*, which since *Thompson*[41] has been interpreted to foreclose the

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[37] *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 814 S.E.2d 205 (2018).
[38] *Id.* at 566 n.84, 814 S.E.2d at 229 n.84.
[39] *Id.*
[40] *Id.* at 566 n.87, 814 S.E.2d at 229 n.87.
[41] Syl. Pt. 4, *Thompson*, 171 W. Va. at 483, 300 S.E.2d at 295.

application of § 31 to breach-of-contract cases. And though the phrase is included in § 31(a), and the authority for prejudgment interest has been moved to a new § 31(b), the two remain syntactically linked: the set of judgments and decrees referenced in § 31(b) is simply a subset of the set of judgments and decrees referenced in § 31(a). For that reason, § 31(b) has the same limitations as § 31(a)—it does not apply *where it is otherwise provided by law*.

Not only is this conclusion compelled by a plain reading of § 31, it is supported by the prior-construction canon, which holds that "the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained."[42] Indeed, if the Legislature had intended § 31 to authorize an award of prejudgment interest in *all* cases—including breach of contract cases—it would not have carried over the very phrase that this Court has interpreted for nearly 40 years to reject that interpretation. The far more reasonable conclusion is the one that this Court already reached in *Tri-State Petroleum*:[43] the placement of language relating to prejudgment interest in a separate subsection was done as part of a modern restyling, and nothing else.

Turning to **structure**, when multiple statutes could apply to a particular case, this Court traditionally has applied three canons of construction to identify which one prevails. Under the prior-enactment canon, the Court presumes that the Legislature was aware of its prior enactments when adopting new statutes.[44] Under the redundancy canon, the Court presumes that the Legislature will not enact unnecessary or redundant statutes.[45] And under the general/specific canon, the Court will apply a specific statute over the general statute when the two cannot be reconciled.[46]

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[42] *Visitation of Cathy L.(R.)M v. Mark Brent R.*, 217 W. Va. 319, 325 617 S.E.2d 866, 872 (2005) (*per curiam*), (quoting *Knight-Ridder Broadcasting, Inc. v. Greenberg*, 70 N.Y.2d 151, 157, 511 N.E.2d 1116, 1119 (1987)).
[43] *Tri-State Petroleum Corp.*, 240 W. Va. at 566 n.84, 814 S.E.2d at 229 n.84.
[44] Syl. Pt. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908).
[45] *Newark Ins. Co. v. Brown*, 218 W. Va. 346, 352, 624 S.E.2d 783, 788 (2005)'.
[46] *Id.* at 351-52, 624 S.E.2d at 788-89.

Applying those canons here leads to an unambiguous result: in breach-of-contract cases, § 27 is the exclusive source of an award for prejudgment interest because (1) unlike § 31, it relates specifically to that single cause of action; (2) it provided for prejudgment interest nearly six decades earlier than § 31; and (3) it has never been repealed.

Without addressing these canons by name, the Millers argue against them when they urge the Court to interpret the word *principal* in § 27 as limiting that statute to cases involving financial instruments.[47] If this were true, it almost certainly would have been raised much earlier in § 27's nearly 80-year history. But it is not, and it has not for that reason. In its first statutory appearance, *principal* is used to refer to the amount on which the jury may allow prejudgment interest. And in its second statutory appearance, *principal* is used, together with the interest due at the time of the trial, to refer to the aggregate amount on which judgment should be entered. In both cases, it is clear that the Legislature used *principal* to refer to what today would be called the base judgment amount on which prejudgment interest is awarded.

Continuing to **purpose**, this Court has consistently described § 31 as codifying its holding in *Bond v. City of Huntington*[48] that extended the common law to allow for prejudgment interest in tort cases.[49] This is true even for the 2017 enactment, which this Court likewise described in *Tri-State Petroleum* as controlling the award of prejudgment interest in tort actions.[50] And it is in the context of that purpose that this Court should interpret the reference in § 31(b) to obligations based upon written agreements: rather than authorizing prejudgment interest on breach-of-contract claims, it is an acknowledgement that many types of tort damages, such as medical expenses, are

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[47] Pet'rs' Br. 15.
[48] *Bond v. City of Huntington,* 166 W. Va. 581, 276 S.E.2d 539 (1981).
[49] *See Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 175 n.6, 332 S.E.2d 127, 137 n.6 (1985); *Grove ex rel. Grove v. Myers*, 181 W. Va. 342, 346 n.4, 382 S.E.2d 536, 540 n.4 (1989).
[50] *Tri-State Petroleum Corp.*, 240 W. Va. at 566, 814 S.E.2d at 229.

based on written agreements that carry their own interest rates. The Millers simply stand alone in arguing that § 31 provides an alternate source of prejudgment interest in contract; this Court has never recognized that as the statute's purpose.

Concluding with **history**, the legislative intent underlying the 2017 enactment was far less radical than the Millers suggest in their brief.[51] The committee substitute for the 2017 enactment gave its purpose as "chang[ing] the amounts of prejudgment and post-judgment interest to reflect today's economic conditions."[52] Nothing in this anodyne description or the remaining legislative history suggests that the Legislature considered, let alone intended, that the 2017 enactment might overturn the *Thompson* line of precedent.

In short, precedent, text, structure, purpose, and history all stand in firm rebuttal to the Millers' argument that the 2017 enactment of § 31 overturned *Thompson* and its progeny. Those cases remain good law, and this Court should affirm their holding that § 27 provides the exclusive source for an award of prejudgment interest in breach-of-contract cases.

3. The consequence for failing to request a jury instruction under W. Va. Code § 56-6-27 is waiver of any claim to prejudgment interest.

Once the Court rejects the Millers' invitations to overrule or abrogate its *Thompson* line of precedent, this case leads to a straightforward result. In its 1989 *City National Bank* opinion, this Court held that, when breach-of-contract plaintiffs fail to request a jury instruction on prejudgment interest under § 27, the "failure to do so must be deemed a waiver of that right."[53]

Though citing *City National Bank* in their brief,[54] the Millers never address its holding on waiver. Instead, they present *Ringer* as if it were the only case on point and argue that it entitles

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[51] *See, e.g.*, Pet'rs' Br. 7-8.
[52] H.B. 2678, 2017 Reg. Sess. (W. Va. 2017) (committee substitute), *available at* https://bit.ly/2qatHFd.
[53] *City Nat. Bank*, 181 W. Va. at 778, 384 S.E.2d at 389.
[54] *See* Pet'rs' Br. 7.

them to remand if § 27 applies to this case. It is true that *Ringer* ordered a remand for the calculation of prejudgment interest in a case much like this: the appellant had failed to request a jury instruction under § 27 on his breach-of-contract action and relied on § 31 instead. But this remedy is in direct conflict with *City National Bank*, which the *Ringer* court cited approvingly, and § 27, which reserves the calculation of prejudgment interest for the jury. For these reasons, the remedy component of *Ringer* should be disregarded in favor of the clear holding on waiver from *City National Bank.*

The Millers complain, of course, that it would be unfair to enforce their waiver against them. It is not apparent how. West Virginia law has been clear for nearly 40 years that a breach-of-contract plaintiff must request a jury instruction under § 27 or else waive its right to prejudgment interest. And if there were any doubt about the validity of those precedents after the 2017 enactment of § 31, this Court settled the question by reaffirming them in *Tri-State Petroleum*[55] more than a year before this case was tried. Nor were the Millers denied an opportunity to request an instruction under § 27 or object to its omission.

At bottom, this is not a case of first impression or denied opportunity. The Millers were on notice that they had to request a jury instruction under § 27 to preserve their claim to prejudgment interest. They failed to do so, and this Court has held that the consequence of that omission is waiver. So it should be here, too.

B. If the Court reverses the trial court's order, the amount of special damages, if any, and their accrual date should first be considered by the jury, if under W. Va. Code § 56-6-27, or the trial court, if under W. Va. Code § 56-6-31.

Anticipating, optimistically, that this Court will reverse the trial court, the Millers include

[55] *Tri-State Petroleum Corp.*, 240 W. Va. at 566 n.87, 814 S.E.2d at 229 n.87.

arguments about the amount of their special damages and when they accrued. They ask too much. Even if the Millers proved special damages, neither § 27 nor § 31 entitles them to prejudgment interest. An award is discretionary with the factfinder—the jury in the case of § 27 and the trial court in the case of § 31—and this Court should not supplant their role.

For those reasons, if this Court is inclined to reverse the trial court, it should reserve any ruling on the amount of special damages, if any, and their accrual date for the appropriate factfinder to decide in the first instance after WesBanco has presented its arguments and objections.

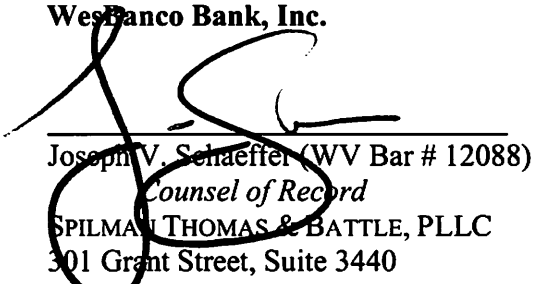
CONCLUSION

The Millers were on notice that § 27 provided the exclusive source for an award of pre-judgment interest in breach-of-contract cases, even after the 2017 enactment of § 31. They nonetheless failed to request a jury instruction and preserve that claim. Faced with the consequences of their decision—waiver—the Millers ask this Court to overrule nearly 40 years of precedent or, alternatively, find that the Legislature overturned those precedents with the 2017 enactment of § 31. Neither of these arguments is persuasive. This Court's pre-2017 precedents correctly interpret § 31 to not apply *where it is otherwise provided by law*, and this Court's post-2017 precedent, as well as the statutory text, structure, history, and purpose, supports hewing to this long-standing rule. The trial court thus correctly held that the Millers waived any claim to prejudgment interest by failing to request a jury instruction under § 27. This Court should affirm.

Signature Appears on Following Page

Dated: July 27, 2020

WesBanco Bank, Inc.



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Jamie Miller,

Plaintiffs Below, Petitioners,

v. **(Circuit Court of Marion County**
Civil Action No. CC-24-2017-C-119)

WesBanco Bank, Inc.,

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Joseph V. Schaeffer, hereby certify that on this the 27th day of July, 2020, I served the foregoing **Respondent's Brief** via electronic mail and U.S. Mail, postage pre-paid, addressed as follows:

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