Nos. 07 –CV-1407 & 07-CV-1420

IN THE

District of Columbia Court of Appeals

SHARON K. BURKE, *Appellant*

v.

GROOVER, CHRISTIE & MERRITT, P.C., *et al., Appellees*

On Appeal from the Superior Court of the
District of Columbia
(Civil Division)

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

1. Whether the trial court erred, in determining the post-judgment interest owed to plaintiff Sharon Burke, when the court decided to relieve the defendants of a large portion of the interest that had accrued over three years on the plaintiff's judgment under D.C. Code § 28-3302(c), by applying the statute's "good cause" exception.
2. Whether the trial court erred by failing to address the plaintiff's request for prejudgment interest on the unpaid post-judgment interest for the period of time between payment of the principal judgment and resolution by the trial court of what interest rate was to apply to the post-judgment interest, and if so, whether the plaintiff is entitled to prejudgment interest because the amount owed constituted a liquidated debt under D.C. Code § 15-108.

STATEMENT OF THE CASE

This medical malpractice action was filed on September 25, 2002 in the Superior Court of the District of Columbia by appellant-plaintiff Sharon Burke against appellee-defendants Drs. Groover, Christie and Merritt, P.C., and William Higgins, M.D., and other defendants. (JA 27-29.) Ms. Burke alleged that Dr. Higgins, a radiologist employed by Groover Christie, had negligently misinterpreted Ms. Burke's MRI brain study in July 2000, failing to discover Ms. Burke's high risk for stroke due to an overlooked blockage in her right internal carotid artery. (JA 28.) In October 2000, three months after the misdiagnosis, Ms. Burke suffered a severe stroke, which caused significant and permanent brain damage, leaving her seriously disabled and unable to perform daily activities for herself. (JA 28, 29.)

On March 19, 2004, a jury returned a verdict in Ms. Burke's favor in the amount of $5,774,156.07. The trial court accordingly directed entry of judgment in Ms. Burke's favor "with interest thereon from March 19, 2004 at the statutory rate." (JA 6.) On April 8, 2004, defendants Groover Christie and Higgins moved for judgment as a matter of law or, in the alternative, for a new trial, on the applicability of the Maryland damages cap and other issues. (JA 5.) The trial court decided the motion a year later, denying defendants' motion in its entirety on April 20, 2005. (JA 3.)

On May 24, 2005, Groover Christie and Higgins noticed an appeal on the applicability of the Maryland damages cap and other issues. (JA 3.) This Court decided the appeal in March 2007, reversing on the applicability of the Maryland damages cap but otherwise affirming the judgment. *See Drs. Groover, Christie & Merritt, P.C. v. Burke*, 917 A.2d 1110 (D.C. 2007). [1] The parties then calculated that with the credit for applicability of the Maryland damages cap (a reduction of $1,410,000) and a credit for the amount paid by a co-defendant of $1 million, the defendants owed Ms. Burke $3,364,156.07. This principal sum was owed to her as of March 19, 2004, the effective date of the judgment, but was not paid until March 23, 2007, three years later. With this payment, the only remaining issue was how much post-judgment interest these defendants owed the plaintiff for withholding payment of the judgment for three years. Since the parties could not agree on whether a fixed or variable rate of interest should

[1] The other two issues raised by the defendants were whether the judgment should be reduced on a *pro rata* basis for an alleged settlement with a co-defendant, and whether the defendants were entitled to a new trial on the ground that the plaintiff should not have been allowed to elicit testimony from a Groover Christie radiologist as an expert witness. This court disposed of the judgment reduction issue in a footnote, 917 A.2d at 1112 n.1, and held that any error in allowing the expert opinion to come into evidence was harmless because for a variety of reasons its admission constituted neither surprise nor unfair prejudice to Groover Christie. 917 A.2d at 1115-16.

apply, they agreed to file cross-motions for summary judgment after remand to the trial court.

In cross-motions filed on June 15, 2007 (JA 2), the defendants argued for a fixed rate of interest, set as of the prevailing interest rate on the date of the judgment in 2004, whereas Ms. Burke argued that the plain language of D.C. Code § 28-3302(c) required the court to use a variable rate of interest tracking the federal short-term interest rate, as calculated quarterly by the Internal Revenue Service. (JA 54-56.) The plaintiff further requested an award of pre-judgment interest for the time from March 23, 2007, when the principal judgment was paid and the interest amount was first calculable, to whenever the court decided the fixed vs. variable issue.

The trial court issued its ruling on the motions on December 12, 2007, in an order captioned "Order Denying Motion for Summary Judgment on Post-Judgment Interest." (JA 65-67.) The court agreed with plaintiff's argument that, pursuant to section 28-3302(c), a variable rate generally applies to determine post-judgment interest. (JA 65.) Nevertheless, the court applied a fixed rate of interest from the date of the original judgment. (JA 66.) The court decided that the "good cause" exception to the general rule applied in this case, stating that "delay caused by post trial and appellate relief amounts to good cause." (*Id.*) The court did not address the plaintiff's remaining request for interest for the time period between the payment of the principal judgment and the court's order on plaintiff's motion for summary judgment. (*See* JA 74.) The court directed that "post judgment interest be entered for Defendant in the amount of $305,277.84." (JA 66-67.) The parties understood this to mean "entered for Plaintiff," since this was the amount that

defendants agreed they owed.[2] The plaintiff then timely noticed this appeal on December 20, 2007. (JA 1).

STATEMENT OF FACTS[3]

On March 19, 2004, the trial court entered judgment for Sharon K. Burke against Drs. Groover, Christie and Merritt P.C., and other defendants for the sum of $5,774,156.07 "with interest thereon from March 19, 2004, at the statutory rate." (*See* JA 6.) The defendants Groover Christie and Higgins filed a timely appeal, and on March 8, 2007, received a partial reversal, on the issue of the applicability of the Maryland damages cap, which had the effect of reducing the judgment by $1,410,000.

After credits for the damages cap and a partial payment on the judgment made by a co-defendant, the balance due on the judgment was $3,364,156.07. On March 23, 2007, the defendants paid this amount. However, the parties could not agree on the amount of interest owed on the $3,364,156.07 from March 19, 2004 until the date that the principal was paid three years later.

The interest rates in effect for judgments in the Superior Court of the District of Columbia, pursuant to D.C. Code 28-3302(c), are set out in the following table:

[2] Despite the order's title "denying" plaintiff's motion for summary judgment, the parties agree that this was a final, appealable order since the court in fact resolved the entire issue of the amount of post-judgment interest by directing entry of judgment for an amount of interest requested by the defendants in their cross-motion.

[3] The following facts were set forth in Plaintiff's Corrected Statement of Material Facts as to Which There Is No Genuine Issue, and attachment, which originally accompanied Plaintiff's Motion for Summary Judgment on Post-Judgment Interest as filed in the trial court. (*See* JA 51-53 & 54-64.) The defendants did not dispute any of the plaintiff's calculations and did not file any pleading suggesting that any material facts were in dispute.

Time Period	IRS Annual Rate	70% of IRS Rate rounded to nearest full percent
Jan. 1, 2007 -- Mar. 31, 2007	8.00%	6.00%
Oct. 1, 2006 -- Dec. 31, 2006	8.00%	6.00%
Jul. 1, 2006 -- Sep. 30, 2006	8.00%	6.00%
Apr. 1, 2006 -- Jun. 30, 2006	7.00%	5.00%
Jan. 1, 2006 -- Mar. 31, 2006	7.00%	5.00%
Oct. 1, 2005 -- Dec. 31, 2005	7.00%	5.00%
Jul. 1, 2005 -- Sep. 30, 2005	6.00%	4.00%
Apr. 1, 2005 -- Jun. 30, 2005	6.00%	4.00%
Jan. 1, 2005 -- Mar. 31, 2005	5.00%	4.00%
Oct. 1, 2004 -- Dec. 31, 2004	5.00%	4.00%
Jul. 1, 2004 -- Sep. 30, 2004	4.00%	3.00%
Apr. 1, 2004 -- Jun. 30, 2004	5.00%	4.00%
March 19, 2004 -- March 31, 2004	4.00%	3.00%

As provided by D.C. Code § 28-3302(c), the rates shown in the right-hand column above are 70 percent of the rate charged by the Internal Revenue Service for underpayment of tax, rounded to the nearest full percent, or if one-half of one percent, to the next highest full percent. The rates shown in the middle column, for the IRS interest rate on underpayment of taxes, are calculated by 26 U.S. Code § 6621 as the sum of the federal short-term rate plus three percentage points. The IRS interest rates are published quarterly, and at the time of the summary judgment filings, they could be found in IRS Revenue Ruling 2006-63 (JA 54, 59-60), which was provided to the trial court.[4]

The parties agreed on the mathematical calculations of the interest due. Assuming, as the plaintiff argued, that the judgment interest rate varied with the change in interest rate published each quarter, the post-judgment interest owed to plaintiff as of the date the principal was paid in March 2007 amounted to $472,900.80. Likewise, if

[4] An updated version of the same IRS interest table can be found in IRS Revenue Ruling 2008-10, http://www.irs.gov/pub/irs-drop/rr-08-10.pdf.

one assumed that the defendant was correct and the interest rate should be fixed retrospectively as of the date of the judgment in 2004, which was then a three percent annual rate, the total interest owed to Ms. Burke as of March 2007 would be $305,277.84. The only dispute was whether the interest rate on plaintiff's judgment would be variable or fixed. The amount ultimately awarded the plaintiff pursuant to the fixed rate of interest was $305,277.84, or *$167,622.92 less* than if a variable rate had been applied, a savings of some 35 percent for the defendants in the total interest owed. The court awarded the plaintiff nothing extra for the lapse of time from March 2007, when the parties calculated how much would be due under either the variable rate or the fixed rate, until the date in December 2007 when the interest was ordered to be paid at the fixed rate.

SUMMARY OF ARGUMENT

I. The trial court erred by applying a fixed rate of interest to determine post-judgment interest owed by the defendants. The court correctly interpreted the applicable statutory provision, D.C. Code § 28-3302(c), as generally requiring a fluctuating or variable rate of interest, but the court erred in concluding that good cause had been shown to deviate from the general rule. The trial court held that the three-year lapse of time from the judgment to the decision of the appeal constituted "good cause," an exception that would swallow the rule, inasmuch as there was nothing unusual about the length of time it took to decide the appeal, and no other "good cause" reasons were presented to the trial court for making an exception to the usual rule. Accordingly, this Court should reverse the trial court's denial of the statutory variable rate of interest and remand to the trial court

to enter an order requiring defendants to pay the variable rate of interest, for a total of $472,900.80.

II. The trial court erred by failing to address plaintiff's request for prejudgment interest for the amount of interest owed between the time the parties calculated how much was due and the court's entry of the order on the motion for summary judgment nine months later. Whether the amount owed was correctly decided at $305,277.84, or should have been $472,900.80, the trial court's decision let the defendants hold the amount they owed for nine months interest-free, to the detriment of the plaintiff. This Court should remand to the trial court and require that the court enter an order granting prejudgment interest as a matter of law pursuant to D.C. Code § 15-108, which mandates such an award where liquidated debts are at issue.

ARGUMENT

This appeal presents a straightforward question of statutory interpretation regarding the calculation of post-judgment interest in the context of a medical malpractice action in which a jury found the defendants liable for negligently causing plaintiff's severe and permanent brain damage. The trial court erroneously applied a fixed interest rate to determine post-judgment interest owed to plaintiff on a $3.36 million judgment that the defendants failed to pay for three years. This decision ran counter to the statutory and case law in the District of Columbia, which generally requires that courts apply a variable rate of interest to post-judgment interest awards. Moreover, the decision had the practical effect of leading to an incongruous result in which the losing

party to a lawsuit was relieved of its obligation to pay over $165,000 in post-judgment interest.

There was no basis in the law or the undisputed facts of this case for the court to reach this unfair result.

The trial court failed even to address plaintiff's request for prejudgment interest for the period between the defendant's payment on the judgment and the court's order on the motion for summary judgment for post-judgment interest. Such an award is mandated pursuant to District of Columbia law when liquidated sums are at issue. This Court should remand to the trial court and direct the court to order defendants to pay prejudgment interest beginning on March 23, 2007 when the amount of interest due on the judgment was determinable.

I. THE TRIAL COURT ERRED IN FINDING "GOOD CAUSE" TO REDUCE THE AMOUNT OF POST-JUDGMENT INTEREST THE DEFENDANTS OWED.

The general rule is that, pursuant to District of Columbia statute, the rate of interest on a judgment fluctuates in accordance with the rate set by the Secretary of the Treasury under Section 6621 of the Internal Revenue Code for underpayment of tax to the Internal Revenue Service. The court erred when it found "good cause" to deviate from that general rule merely due to the passage of three years for post-trial and appellate review.

A. Standard of Review

This Court reviews denials of motions for summary judgment *de novo*, applying the same standard as the trial court when reviewing and assessing the record: whether there is a genuine issue of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. *Borger Mgmt., Inc. v. Sindram*, 886 A.2d 52, 58-59 (D.C. 2005).

Questions of statutory interpretation are also reviewed *de novo*. *Carlson Const. Co. v. Dupont West Condo., Inc.*, 932 A.2d 1132, 1134 (D.C. 2007). As this Court has stated more than once: "We first look at the language of a statute to interpret a statute. We are required to give effect to a statute's plain meaning if the words are clear and unambiguous. The literal words of a statute, however, are not the sole index to legislative intent, but rather are to be read in the light of the statute taken as a whole, and are to be given a sensible construction and one that would not work an obvious injustice." *Id.* (citing *D.C. v. Bender*, 906 A.2d 277, 281-82 (D.C. 2006)).

If this Court determines that the trial court correctly interpreted the term "good cause," then the trial court's finding that the "good cause" exception applied in this case would be reviewed for abuse of discretion. *See Hotel Tabard Inn v. D.C. Dept. of Consumer & Regulatory Affairs*, 747 A.2d 1168, 1178 (D.C. 2000).

B. The Trial Court Correctly Determined that the Plain Language of D.C. Code § 28-3302(c) Sets Forth a General Rule of Fluctuating Interest Rates for Judgments, but then Erred in Applying the Statute.

The interest rate on judgments in the District of Columbia is set by D.C. Code § 28-3302(c), which provides in relevant part:

> *The rate of interest on judgments* and decrees, where the judgment or decree is not against the District of Columbia, or its officers, or its employees acting within the scope of their employment or where the rate of interest is not fixed by contract, *shall be 70% of the rate of interest set by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2744; 26 U.S.C. § 6621), for underpayments of tax to the Internal Revenue Service, rounded to the nearest full percent, or if exactly 1/2 of 1%, increased to the next highest full percent*; provided, that a court of competent jurisdiction may lower the rate of interest under this subsection for good cause shown or upon a showing that the judgment debtor in good faith is unable to pay the judgment.

Id. (emphasis added).

In *Jerome Management, Inc. v. District of Columbia Rental Housing Commission*, 682 A.2d 178 (D.C. 1996), this Court interpreted Section 28-3302(c), holding that "the interest rate *fluctuates* unless good cause is shown." *Id.* at 186 (emphasis added). This interpretation was correct, and there is no reason to revisit it.

The general rules of statutory construction in the District of Columbia were set out in *People's Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751 (D.C. 1983) (en banc), in which the Court stated, "We must first look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning." 470 A.2d at 753 (quoting *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979)). The Court listed four exceptions to the plain meaning rule: "1. when the legislative history reveals ambiguities that the Court must resolve; 2. when the literal meaning of the statute would produce absurd results; 3. when a statute needs to be construed to avoid 'obvious injustice'; and 4. when it is necessary 'to effectuate the legislative purpose' by refusing to adhere to a strict plain wording of a statute." 470 A.2d at 754. None of those exceptions applies here.

In addition, this Court has noted: "The burden on a litigant who seeks to disregard the plain meaning of the statute is a heavy one, and 'this court will look beyond the ordinary meaning of the words of the statute only where there are persuasive reasons for doing so.'" *National Geographic Soc'y v. District of Columbia Dept. of Employment Serv*s., 721 A.2d 618, 620 (D.C. 1998) (quoting *James Parreco & Son v. District of Columbia Rental Hous. Comm'n*, 567 A.2d 43, 46 (D.C. 1989)).

By contrast, the federal statute for interest on civil judgments recovered in the federal courts is fixed at a rate equal to "the weekly average one-year constant maturity treasury yield … for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961(a). Thus, with 28 U.S.C. § 1961(a), Congress showed that it knew how to write an interest rate statute to make plain that the rate was fixed and not variable. The statute governing judgment interest rates in the Superior Court of the District of Columbia, by comparison, does not refer to the interest rate at a set point in time such as the week preceding the date of judgment. By referring to a rate that is known to fluctuate each quarter, D.C. Code § 28-3302(c) is clearly a variable rate statute, except for "good cause" exceptions.

Likewise, the Court's construction in *Jerome Management* was in line with the legislative purpose underlying post-judgment interest statutes. For example, the Maryland Court of Appeals has observed that the purpose of post-judgment interest is "obviously to compensate the successful suitor for the same loss of the use of monies represented by the judgment in its favor, *and the loss of income thereon*, between the time of the entry of judgment . . . – when there is a judicial determination of the monies owed it - and the satisfaction of the judgment by payment." *Carpenter Realty Corp. v.*

Imbesi, 801 A.2d 1018, 1024 (Md. 2002) (quoting *I.W. Berman Prop. v. Porter Bros., Inc.*, 344 A.2d 65, 79 (Md. 1975)) (emphasis added). The purpose of post-judgment interest, in the words of the United States Supreme Court, "is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990) (quoting *Poleto v. Consolidated Rail Corp*., 826 F.2d 1270, 1280 (3d Cir. 1987)). And another nearby appellate court has observed that "post-judgment interest . . . is a statutory award for delay in the payment of money actually due." : ; *Upper Occoquan Sewage Auth'y v. Blake Constr. Co./Poole & Kent*, 655 S.E.2d 10, 22-23 (Va. 2008) (quoting *Dairyland Ins. Co. v. Douthat*, 449 S.E.2d 799, 801 (Va. 1994)).

The District of Columbia's post-judgment interest statute appropriately takes into account the real world of market interest rates. The best estimate of a prevailing plaintiff's "loss of income" on her judgment is the amount of interest that money would have earned if she (or the defendants) had deposited the judgment in an interest-bearing account and let it accumulate interest over that period of time. The table of interest rates on District of Columbia judgments shows a range of 3 to 6 percent from early 2004 to 2007, which is close to what the same judgment would have earned in an interest-bearing account.[5]

[5]The IRS annual rate, which varies quarterly, is calculated as the sum of the federal short-term rate plus three percentage points. (*See* JA 54.) The federal short-term rate, which had been in steady decline over the past six months in response to the slowing economy, was most recently calculated by the IRS at 3%. - *continued*

That the rate fluctuates is fair to the losing party as well, who had the opportunity to benefit from interest accumulating on the money it owed to the prevailing party, akin to a loan, and is only required to pay back that interest that accrued during the course of the appeal. *See Lucius v. City of Memphis*, 925 S.W.2d 522, 526 (Tenn. 1996) ("Post-judgment interest compensates the party who was entitled to money but deprived of its use by requiring an additional payment by one who benefited from retaining the money"). Indeed, if the rate did *not* fluctuate, and was instead fixed as of the date of judgment, one of the parties could experience an unfair windfall. For example, if the rate was fixed at six percent based on the then-prevailing rate, but then the market rate declined to three percent over the pendency of the appeal, the plaintiff would earn a windfall of twice as much interest on the judgment as the same money would earn in the market. Or, as happened here, if the judgment interest rate was fixed at three percent (as the trial court did after the fact), but then market rates went up to six percent, a windfall would go to the judgment debtor, which in effect profits from withholding the plaintiff's money during the appeal and earning a higher rate in the market than it ultimately has to pay the prevailing party. *See Lovewell v. Physicians Ins. Co.*, 679 N.E.2d 1119, 1123 (Ohio 1997) ("The purpose of postjudgment interest awards is to guarantee a successful plaintiff that the judgment will be paid promptly, and to prevent a judgment debtor from profiting by withholding money belonging to the plaintiff").

See http://www.irs.gov/newsroom/article/0,,id=179676,00.html The federal short-term rate is close to the current returns available on certificates of deposit. A recent release from the Federal Reserve Board showed interest rates on six-month certificate of deposit (CDs) ranging from 2.86% to 2.94 %. *See* May 29, 2008 Selected Interest Rates http://www.federalreserve.gov/releases/h15/update/.

That unfair windfall happened here. What is worse, it happened retrospectively, when the trial court had full knowledge of the benefit it was conferring on the losing defendants. It would have been one thing if the trial court had fixed the rate of interest prospectively -- in March 2004, at the then-applicable rate of three percent. No one knew then what would happen to interest rates over the next few years. But the defendants waited to make their request for a fixed rate of interest until after the fact, when their windfall could be readily calculated. By deciding after three years that the rate of interest on plaintiff's judgment would be held to the same rate as when it was entered, the trial court penalized the plaintiff for the doubling of the interest rate that occurred over that three-year span, and rewarded the losing defendants by the same amount: $167,622.92. It makes no sense to penalize the prevailing injured party, and to reward the tortfeasor, for the vagaries of market interest rates. In effect, the trial court decided that the defendants were entitled to keep a substantial part of the interest they earned while they withheld plaintiff's money judgment from her for three years.

Not only is it the law in the District of Columbia that a fluctuating rate "shall" apply to post-judgment interest awards, but also it is the fair and equitable result—both generally and under the facts of this case.

C. The Trial Court Erred In Interpreting the "Good Cause" Exception

Although correctly deciding that judgments generally bear interest at a fluctuating rate tied to the IRS rate of interest, the trial court nevertheless ruled that a fixed rate would apply on this judgment.[6] Citing one decision, *Jerome Management, Inc. v.*

[6] The trial court's order is internally inconsistent. Although the court stated that the case was "not ripe for summary judgment" and that "[a]s to Plaintiff's claim regarding post judgment interest, the record contains genuine factual disputes regarding – *continued*

District of Columbia Rental Housing Commission, the court determined without further analysis or elaboration that "delay caused by post trial and appellate relief amounts to good cause." (JA 66.) This conclusion rests apparently on a misinterpretation of the ultimate holding in *Jerome Management*, and the court's decision constituted an abuse of discretion.

1. The Trial Court Misinterpreted the Statutory Term "Good Cause" Within the Context of the Entire Statutory Provision, the Purpose of Post-Judgment Interest, and the Facts of this Case.

This Court reviews interpretations of statutory provisions *de novo*. *Carlson Constr. Co. v. Dupont W. Condo., Inc.*, 932 A.2d 1132, 1134 (D.C. 2007). Accordingly, if the trial court's finding that there was "good cause" to apply the fixed rate was premised on a faulty interpretation of that term, then as a matter of law that determination should be reversed and plaintiff's motion for summary judgment should have been granted.

The operative language is set forth in D.C. Code § 28-3302(c) which, after stating the general rule of fluctuating rates, goes on to provide for two narrow exceptions to the rule: " . . . a court of competent jurisdiction may lower the rate of interest under this subsection *for good cause shown* or upon a showing that the judgment debtor in good faith is unable to pay the judgment." *See* D.C. Code § 28-3302(c) (emphasis added).

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the circumstances under which fixed and variable rate of interest are applied," the court still reached a determination that the rate of interest should be fixed. (*See* JA 65-66.) However, both parties agreed in their cross-motions that there were no genuine factual disputes in this record and that the case was ripe for summary judgment. The defendants filed no statement of material facts disputing the plaintiff's statement of undisputed facts. (JA 51-53.) As to the inconsistent language in the court's order, the parties agree that when the order is reviewed in its entirety, it constitutes a final, appealable order.

No District of Columbia cases explicitly interpret the meaning of the term "good cause" in the context of § 28-3302(c).[7] Nevertheless, this Court's recent decision in *Carlson Construction Co. v. Dupont West Condominium, Inc.,* 932 A.2d 1132 (D.C. 2007) reiterates basic concepts of statutory interpretation that are instructive in this case. As this Court stated, "We first look at the language of a statute to interpret a statute. We are required to give effect to a statute's plain meaning if the words are clear and unambiguous. The literal words of a statute, however, are not the sole index to legislative intent, but rather are to be *read in the light of the statute taken as a whole*, and are to be given a *sensible* construction and one that would not work an *obvious injustice*." *Id.* (citing *District of Columbia v. Bender*, 906 A.2d 277, 281-82 (D.C. 2006)) (emphasis added).

Thus, a term such as "good cause" must be read "in light of the statute taken as a whole" to give it a "sensible" construction which would not result in an "obvious injustice." The trial court's apparent interpretation of "good cause" in the context of D.C. Code § 28-3302(c) cannot be reconciled with the teachings of *Carlson*.

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[7] In *Jerome Management*, this Court upheld an administrative agency's apparent interpretation of the term "good cause." However, a different and more limited standard of review applies to an administrative agency's interpretation of the statute it is responsible for administering. *See Jerome Mgmt. , Inc.,* 682 A.2d at 181. Rather than applying the *de novo* standard that is applicable to review a trial court's interpretation of a statutory provision, this Court affords additional deference to such interpretations by an administrative agency. *Id.* at 181-82 ("With respect to questions of law, 'we will uphold the agency's interpretation of the stature it is responsible for administering unless it is unreasonable in light of prevailing law, or conflicts with the statute's plain meaning or legislative history.' Where the agency's interpretation of a statute comports with that standard, we will sustain it even where a party advances another reasonable interpretation of the statute which this court might have accepted if construing the statute in the first instance") (quoting *Oubre v. District of Columbia Dept. of Employment Servs.*, 630 A.2d 699, 702 (D.C. 1993)).

First, when read in light of § 28-3302(c), the statute that governs post-judgment interest awards, the "good cause" exception must be construed to further, or at least not be at odds with, the purpose of post-judgment interest—to reimburse prevailing parties for their loss of income caused by the delay in payment of the judgment. As explained in the previous section of this brief, the general rule of variable rates set forth in 28-3302(c) advances that purpose, as does section 6621 of the Internal Revenue Code, and its consequent link to market interest rates. Thus, it would be inconsistent with the rest of the 28-3302(c) and its apparent legislative goals to allow an exception to undo the remedial impact of the general rule. Yet, a broad construction of the "good cause" exception would have precisely that effect, as the facts of this case show.

Second, an exception is just that—an exception. Thus, the "sensible" construction of the "good cause" exception (or, for that matter, any statutory exception) should not result in the exception in effect swallowing the rule. "*Good* cause" cannot mean the same thing as "*any* cause." This Court recognized that obvious fact in reaching its decision in *Jerome Management* when it upheld the agency's "good cause" determination because in that case there was *nine years* of "protracted" delay in the administrative process. By contrast, the trial court here apparently considered the simple passage of time for post-trial motions and an appeal to amount to "good cause."[8] When one applies the *Carlson* standard, it makes no sense to apply the fixed rate in any and all situations involving the simple and normal passage of time pending an appeal.

[8] Indeed, the trial court made no express finding and cited no evidence, nor did she take judicial notice, that the three years between the judgment and the decision of the appeal somehow constituted a "protracted" or excessive delay.

Finally, an "obvious injustice" follows when the "good cause" exception is construed broadly enough to allow wrongdoers (such as the losing party to a malpractice lawsuit) to escape liability for well over $150,000 worth of interest – a discount of some 35 percent of the total interest owed – to the detriment of the prevailing injured party who did not receive any payment from the defendants on her judgment against them for three years.

Thus, as a matter of law, the trial court did not correctly interpret the meaning of "good cause," and its decision to use the fixed rate must be reversed.

2. The Trial Court's Use of the "Good Cause" Exception to Apply a Fixed Rate of Post-Judgment Interest Was an Abuse of Discretion.

Even if the trial court did not misinterpret the meaning of "good cause" as a matter of law, its decision should still be reversed because the court's application of the "good cause" exception constituted an abuse of discretion.

In *Jerome Management*, this Court upheld an administrative agency's decision to apply the good cause exception and affirmed the application of a fixed rate of interest. The agency in *Jerome Management* based its decision on two facts that are not present here: (1) there was "*nine years* of *protracted* administrative delay" and (2) "there was no evidence that either party was at fault." *See Jerome Mgmt., Inc.*, 682 A.2d at 186. With respect to the first fact, the agency obviously and understandably found *nine years* to constitute an excessive "delay," since that length of time is hardly the normal circumstance in the context of an administrative proceeding.

In Ms. Burke's case, the amount of time that elapsed between the judgment and

the payment on the judgment was three years, the first year of which was entirely due to the trial court's delay of a year in deciding the post-trial motion (JA 3), and the rest of which was due to the normal length of time that appeals require in this court. The defendants filed their appeal on May 24, 2005, and decision was entered on March 8, 2007, less than two years later (or approximately 650 days). According to this Court's most recent annual report on case activity, taken from the court's web site,[9] the average time on appeal for cases decided in 2007 was a median of 505 days and an average of 645 days. (JA 69). Thus, there is nothing to distinguish the amount of time in this appeal from the average. By the trial court's standard of "good cause," then, every case on appeal would qualify for a reduction of the interest rate. This defeats the purpose of post-judgment interest, in that the interest rate may fluctuate significantly on appeal, and, consequently, the prevailing plaintiff's loss of income during the intervening time may not be adequately recouped. *See, e.g., Carpenter Realty Corp. v. Imbesi*, 801 A.2d 1018, 1024 (Md. 2002). And of course, it makes no sense to apply an exception to non-exceptional circumstances. Indeed, post-judgment interest is designed to be a "statutory award for *delay* in the payment of money actually due." *Upper Occoquan Sewage Auth'y v. Blake Constr. Co./Poole & Kent*, 655 S.E.2d 10, 22-23 (Va. 2008) (emphasis added).

The administrative agency in *Jerome Management* based its "good cause" finding on one additional fact – there was "*no evidence that either party was at fault*" -- which also does not apply here. The defendants knew that the relevant interest statute, which has been on the books for many years, provides for a fluctuating interest rate. *Jerome*

[9] *See* http://www.dcappeals.gov/dccourts/docs/statistics/2007CourtOfAppeals.pdf

Management, the decision that referred to the statute's general rule of a fluctuating interest rate, has been on the books since 1996. Nevertheless, when the defendants made the decision in the spring of 2004 to seek post-judgment relief, they did not ask the trial court to amend the judgment to fix the interest rate then and there. Instead, they waited three years, when they could see that applying a fixed rate in hindsight could convey a substantial dollar benefit on the defendants. This Court should not reward such a calculating approach to post-judgment interest.

Any harm to the defendants from the year that the trial court took to decide defendants' post-judgment motion or the twenty-two months that the case pended on appeal was the defendants' own fault, due to their own calculation about when they would seek to have a fixed rate applied to the post-judgment interest.

Accordingly, the trial court's decision to order a fixed rate of post-judgment interest should be reversed, and the case should be remanded to enter an order requiring defendants to pay post-judgment interest according to the statutory variable rate, for a total of $472,900.80. This sum represents nothing more or less than what the plaintiff could have earned on the principal if it had been held in an interest-bearing account for her benefit during the three years of post-trial and appellate proceedings.

II. THE TRIAL COURT ERRED BY FAILING EVEN TO ADDRESS MS. BURKE'S REQUEST FOR PREJUDGMENT INTEREST. PLAINTIFF IS ENTITLED TO SUCH PREJUDGMENT INTEREST AS A MATTER OF LAW.

In Ms. Burke's motion for summary judgment, she requested prejudgment interest to begin on March 23, 2007, which is when the principal was paid and thus the total amount of post-judgment interest could be calculated. (JA 70.) In her memorandum of points and authorities, she cited the statute on prejudgment interest for liquidated debts,

D.C. Code § 15-108, and the case law interpreting that statute. Notwithstanding this clear request, the court failed even to address the issue. Even if the court's decision to award $305,277.84 in post-judgment interest was correct, Ms. Burke would still be entitled to interest on that amount from March 23, 2007 until December 12, 2007, the date of the court's decision on the motion for summary judgment. Of course, if the court's decision was in error, then Plaintiff would be entitled to interest on the higher amount: $472,900.80. In any event, whether the interest rate should have been variable or fixed, it certainly could not have been zero percent, which was the effect of the trial court's silence on this point.

The issue is governed by D.C. Code § 15-108, which provides: "In an action in the United States District Court for the District of Columbia or the Superior Court of the District of Columbia to recover a liquidated debt on which interest is payable by contract *or by law* or usage the judgment for the plaintiff *shall* include interest on the principal debt from the time when it was due and payable, at the rate fixed by the contract, if any, until paid." (Emphasis added.)

Since the interest sum of $472,900.80 was "payable . . . by law" as of March 23, 2007, the order on the trial court's motion and the judgment should have stated that that sum was due and owing to Ms. Burke as of that date. Not only did the court's order and judgment fail to include this element of interest, but the issue was not even addressed in the court's decision on the motion.

In *District Cablevision Ltd. Partnership v. Bassin,* 828 A.2d 714, 731 (D.C. 2003), this Court held that where the statutory conditions are met, prejudgment interest is mandatory on a liquidated debt. The Court said, "Prejudgment interest is 'an element of

complete compensation' to a creditor for the loss of use of money that a debtor wrongfully withholds. Statutes providing for prejudgment interest are thus 'remedial and should be generously construed so that the wronged party can be made whole.'" *Id.* at 732 (quoting *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1253, 1255 (D.C. 1990)).

The Court's language in *Bassin* applies even more broadly to Ms. Burke's overall claim in her motion for summary judgment. The money that she was owed as of March 19, 2004 was withheld for three years without justification, and to make her whole now requires that D.C. Code § 28-3302(c) be interpreted to give her all the interest she is due on her judgment, from the date that the amount was set by payment of the principal.

CONCLUSION

The judgment of the trial court setting the total of post-judgment interest at $305,277.84 should be reversed, and this Court should direct entry of judgment for the plaintiff Sharon Burke in the amount of $472,900.80 in post-judgment interest, plus prejudgment interest to be calculated beginning on March 23, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 10, 2008, a copy of the foregoing Appellant's Brief was mailed first-class, postage prepaid to:

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