# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

# THE SUPREME COURT
# OF THE
# UNITED STATES

**CAPTION:** MYLES OSTERNECK AND GUY KENNETH OSTERNECK, ETC., Petitioners V. ERNST & WHINNEY

**CASE NO:** 87-1201

**PLACE:** WASHINGTON, D.C.

**DATE:** November 29, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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MYLES OSTERNECK AND GUY KENNETH OSTERNECK, ETC.,

Petitioners

v. No. 87-1201

ERNST & WHINNEY

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Washington, D.C.

Tuesday, November 29, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

LAURIE WEBB DANIEL, ESQ., Atlanta, Georgia; on behalf of the Petitioners.

GORDON LEE GARRETT, JR., ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1201, Myles Osterneck v. Ernst & Whinney.

Very well. You may proceed whenever you're ready, Ms. Daniel.

ORAL ARGUMENT OF LAURIE WEBB DANIEL

ON BEHALF OF THE PETITIONERS

MS. DANIEL: Thank you, Mr. Chief Justice, and may it please the Court:

This case is before the Court on writ of certiorari to the Eleventh Circuit. The principal issue to be decided by this Court is whether the Osternecks' request for prejudgment interest, which was made immediately after a trial of the Osternecks' claims, is a motion falling under Rule 59(e) of the Federal Rules of Civil Procedure.

This question is crucial to this case because if the Osterrecks' request for prejudgment interest is considered a Rule 59(e) motion, then under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, the motion would have the effect of suspending the finality of the judgment and of nullifying the Osternecks' notice of appeal which was filed within 30 days of the judgment.

The Eleventh Circuit found that the

Osternecks' request for prejudgment interest is a Rule 59(e) motion which prevented it from having jurisdiction to hear the Osternecks' appeal from the judgment entered in favor of Ernst & Whinney.

The Osternecks are asking this Court to reverse and remand for three basic reasons. First, the Osternecks' request simply does not fit the definition of a Rule 59(e) motion as explained by the legislative history and the decisions of this Court.

Second, the Osternecks' request cannot be distinguished from a request for attorney's fees, which this Court has found does not fall within the scope of Rule 59(e).

Third, to hold in the Osternecks' favor would be consistent with traditional principles of finality and appellate procedure.

There are few background facts which may be helpful to this Court in deciding this issue. The background facts are brief and, and undisputed. This case was litigated for almost 10 years before a jury trial was finally reached. The jury trial lasted three-and-a-half months. Every issue was completely litigated during that time.

After three-and-a-half months of trial, the jury returned a verdict on all of the Osternecks'

claims. The jury found that certain of the defendants were liable for damages. However, the jury found that Ernst & Whinney was not liable.

Immediately after the jury determined the liability and damages on the Osternecks' claims, the Osternecks asked the trial judge to add prejudgment interest to the amount awarded by the jury. The trial judge at that point determined that the prejudgment interest issue should be handled separately, and the trial judge instructed the Osternecks to submit briefs on this issue. At the same time, the trial judge instructed the clerk of the court to enter final judgment pursuant to the jury verdict determining liability and damages on all of the Osternecks' claims.

QUESTION: The jury had exonerated Ernst & Whinney. Is that right?

MS. DANIEL: That's correct. Ernst & Whinney -- as far as Ernst & Whinney was concerned, the case was over. They had won the case at trial.

The Osternecks' request for prejudgment interest didn't affect anything that the jury decided with regard to any of the defendants as a matter of fact. The request, in fact, accepted the jury's determination of liability and damages. The request was based on the jury's determination of liability and

damages. In fact, in the -- in the written motion and in the briefs, the Osternecks told the trial court this is what the jury found and we want prejudgment interest based on that to be calculated.

QUESTION: But now the Eleventh Circuit said that under Georgia law, prejudgment interest is discretionary with the trial judge?

MS. DANIEL: It's -- under the -- this was a feceral securities law case. So, it's under the rule that -- in a 10(b)(5) case where -- that prejudgment interest is not a matter of right; it is a discretionary matter for the trial judge to decide.

QUESTION: Bring me up to date. Is the -- is Ernst & Whinney an outgrowth of the olc Ernst & Ernst firm?

MS. DANIEL: That's correct, Your Honor.

QUESTION: One, one of the -- one of the Big Eight?

MS. DANIEL: That's correct, Your Honor. Criginally when this case was filed in 1975, I believe that Ernst & Ernst was the named defendant. Subsequently it became Ernst & Whinney.

All parties considered the judgment entered on the jury verdict to be a final judgment and an appealable judgment. All parties, in fact, did file

notices of appeal from that judgment.

When the prejudgment interest was added several months later, the trial court was careful in his order to make it clear that he was not changing any of the decisions embodied in the judgment that was entered on the jury verdict. He specified that other than the addition of the prejudgment interest, the judgment entered on the jury verdict was to remain the same in all respects.

QUESTION: What difference does that make? Part of your argument is that it has to change the -- the prior judgment in some way? What if he had added punitive damages? That wouldn't change anything in the prior judgment either, but you wouldn't assert that that somehow is not a new judgment, does not extend the judgment.

MS. DANIEL: The punitive damage question -- I don't think that the trial judge would be able to award punitive damages. That's something that --

QUESTION: No, I understand that. But assume he did. Assume he did. Assume he did erroneously. The question would be whether the judgment is appealable or when the judgment is appealable.

MS. DANIEL: If the trial judge added punitive damages --

QUESTION: He added punitive damages.

MS. DANIEL: -- on his, on his -- on request?

QUESTION: Uh-hum.

MS. DANIEL: If the, if the Esternecks had asked the trial judge after judgment to award punitive damages.

QUESTION: And he had said you asked for it, you got it. Incorrectly, but nonetheless would that, that wouldn't change the --

MS. DANIEL: Well, that would not affect the finality of the, the judgment that was entered on the jury verdict. If it was an incorrect award of punitive damages, ther the defendants would be able to appeal.

QUESTION: It wouldn't affect the finality of it?

MS. DANIEL: Not of the decisions embodied in the, the judgment entered on the jury verdict. Those -- that decision and determination of liability and damages would remain intact.

QUESTION: What about a federal statute that specifically authorizes the judge to impose punitive damages? The judge, as opposed to the jury. You get a jury verdict, and the judge says I'm going to take under advisement the punitive damages issue. And then a month later he awards punitive damages. When is that matter

appealable?

MS. DANIEL: Well, if -- I believe that if that were, in fact, possible that -- that under traditional principles of finality and appealability would not affect the finality of the judgment. What --

QUESTION: So, we'd have two appeals up here: one from the jury verdict, and one from the punitive damages?

MS. DANIEL: Well, it's possible. As a practical matter, however, in this sort of situation where you've had a trial and, and you have a jury verdict and a case has been litigated to this extent, the substantive issues and the merits issues really have, have been exhausted.

This Court in a fairly recent decision in Stringfellow v. Concerned Neighbors -- I believe that was decided in 1977 -- elaborated on the purpose of --

QUESTION: Nineteen eighty-seven.

MS. DANIEL: Nineteen eighty-seven I believe it was. Yes. Elaborated on the purposes of the finality rule of Section 1291. And the Court said in that case: "As we have noted in the past, the finality rule of Section 1291 protects a variety of interests that contribute to the efficiency of the legal system. Pretrial appeals may cause disruption, delay and expense

for the litigants. They also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interests in allowing trial judges to supervise pretrial and trial procedures without undue interference."

I think that the -- this summary shows the primary concern with piecemeal appeals is directed at appeals that, that would disrupt the trial process or the pretrial process. But as a practical matter, where you've had a trial on all claims and you have a determination of liability and damages on all claims as to all parties, that the risk of piecemeal appeals, as a practical matter, is not great.

QUESTION: Isn't it going to be quite difficult for, say, the, the Court of Appeals to decide in a separate appeal from an award of prejudgment interest -- to decide that question without getting back to the merits of, of the litigation which was concluded in the judgment of the jury?

MS. DANIEL: No, Your Honor. Basically the question of prejudgment interest is -- prejudgment interest is meant to compensate the plaintiff for the loss of use of his money between the time of the wrongdoing until the time of the judgment.

QUESTION: Well, it's -- it remedies the injury giving rise to the cause of action, doesn't it?

MS. DANIEL: Well, Your Honor, that -- that is what the Eleventh Circuit found. However, I believe that the Ninth Circuit aptly pointed out it's not really the underlying wrongdoing, it's the delay in really the litigation process itself. And in fact, in this case that is what the trial judge did look to in assessing whether prejudgment interest should be allowed.

QUESTION: Well, I think the general rule is that prejudgment interest does arise from the operative facts that created the right to recover the principal. In other words, if you didn't have that right, you wouldn't have prejudgment interest; and they're linked, as compensation. Isn't that right?

MS. DANIEL: Well, of course, if there had never been any wrongdoing, you wouldn't have any request for prejudgment interest.

But in the Blau v. Lehman case, which is the case where this Court made it clear that interest is not entitled as a matter of right in a securities fraud claim, this Court described interest as follows. It says: "This Court has said in a kindred situation that interest is not recovered according to a rigid theory of compensation from money withheld, but is given in

response to considerations of fairness."

It's not strictly for -- it's not really compensation of the underlying injury. Like attorney's fees, it does compensate. Attorney's fees compensate also. They're necessary to make the prevailing party whole.

QUESTION: But what does -- what does the trial judge take into consideration then in deciding whether or not to award prejudgment interest in a Securities Act case like this?

MS. DANIEL: Well, as the trial judge in this court took into consideration, whether there was some responsibility for the delay on -- you know, doing -- due as a result of the Plaintiff's actions or other circumstances, such as in this case where we had I think five or six district court judges and the turnover in, in judicial personnel during the course of litigation contributed to the delay of this litigation. These are factors that are collateral matters. They're not related to the wrongdoing itself, but they are factors that the judge could consider in his, his -- under his equitable powers.

In fact, the prejudgment interest question, like attorney's fees, is, is uniquely separable from the underlying cause of action. Here the jury did not have

the power to determine prejudgment interest. It could not even be decided at the -- determined at the same time as the jury decided the merits of the underlying cause of action. Of necessity, it had to be decided in a separate proceeding by the trial judge. A separate decision had to be made as far as that.

The merits decision -- the -- what the case was all about had already been determined by the jury, and all issues had been, been determined on the merits. There was liability and damages determined as to all parties.

The case was, was essentially over, and of necessity, we had to have a decision on the merits before we could even ask for prejudgment interest. Prejudgment interest is like attorney's --

QUESTION: Ms. Daniel, in your brief in the trial court, I think you argued that one of the factors that should be taken into account in deciding whether to grant prejudgment interest was the degree of personal wrongdoing on the part of the defendants. Isn't that related to the merits?

MS. DANIEL: Your Honor, that is related to the merits. However, the trial judge does not actually reconsider -- make a separate determination of that.

QUESTION: No, but you can't tell by looking

at the jury verdict what that degree was. You have to know something about the facts of the case, don't you?

MS. DANIEL: That's right. And in that respect it really is no different from a trial judge determining whether to award attorney's fees in a civil rights case. I believe under the Johnson test, the trial judge has to look to, or can look to, such things as the underlying wrongdoing, the nature of the wrongdoing, how egregious it was, how unpopular the case might have been, how difficult it might have been to obtain counsel in that type of case, whether the party actually prevailed on the civil rights cause of action as opposed to a different cause of action that might be alleged in the -- in the complaint. All of these things would involve a consideration of the merits of that action.

QUESTION: But, Ms. Daniel, I think we said in Budinich or we conceded in Budinich that there is some elements of the attorney's fees point that seem maybe not, not part of -- not part of the merits. Some do and some don't. And we said we were just going to cut the Gordian knot and treat all attorney's fees awards the same for purposes of consistency. So, the mere fact that there are some elements of attorney's fees that may -- that may support your case doesn't, doesn't prove

anything. We acknowledged that in Budinich.

MS. DANIEL: Well, I think in the Bucinich case, certainly you did make that acknowledgement. But the reason why you, you made that decision, as far as all attorneys' fees goes, is to look at, at the reason why attorney's fees and costs should be treated as a separable issue.

And this goes back I think -- what we need to keep in mind when we're talking about whether the Osternecks' motion was a Rule 59(e) motion, that is the definition of what a Rule 59(e) motion is.

In the White v. New Hampshire case, this Court explained Rule 59(e) was adopted to allow a trial court to correct an error in a decision embodied in the judgment, but it was not meant to apply to motions which did not challenge any of the decisions embodied in the judgment. It does not apply to a motion which merely seeks what is due because of the judgment.

And the costs and attorney's fees fit that, that category of cases that don't fall within the scope of Rule 59(e) because they don't challenge any of the decisions embodied in the judgment. They merely seek what is due because of the judgment.

QUESTION: Ms. Daniel, if you should not prevail here, are you completely out of court so far as

Ernst & Whinrey are concerned?

MS. DANIEL: Well, Your Honor, if, if we don't -- if we don't prevail at all, yes, that's correct.

QUESTION: Well, somewhere -- I think it was in the Eleventh Circuit's opinion -- I saw a reference to a pending motion in the district court for an extension of time in which to file a new appeal. What has happened to that?

MS. DANIEL: Your Honor, after the Eleventh Circuit dismissed appeal, the trial judge at that point determined that the Osternecks would not have additional time to file another notice of appeal.

QUESTION: Would you say that again?

MS. DANIEL: The trial judge did rule on that, on the Osterrecks' request for additional time to file ancther notice of appeal, and denied the Osternecks' request. So, the Osternecks would not have the opportunity in the trial court to file a new notice of appeal.

QUESTION: But you could lose on your -- on your major argument and perhaps still win based on unique circumstances?

MS. DANIEL: That's right, Your Honor. There are unique circumstances in this case. The trial judge characterized the prejudgment interest request as a

separate issue. He did direct the clerk to enter final judgment on the jury verdict at the same time. He ordered the clerk to do that as soon as possible. All parties considered the final judgment -- or the judgment on the jury verdict to be final for purposes of appeal. There were parties who stipulated that the Osternecks' notice of appeal was timely filed --

QUESTION: Ms. Daniel, supposing that we conclude that you're wrong on the major issue -- I'm not saying we will -- and then this same sequence of events happened in the future, notwithstanding our ruling to the contrary, would that make any difference? I mean, could special circumstances overrule a general holding that this is or is not a Rule 59(e) motion if we made it clear in this --

MS. DANIEL: There is a very, very narrow doctrine that was announced in the Thompson case that will allow a circuit court of appeals -- in fact, commands them -- to take jurisdiction over a case where a party has filed its notice of appeal in reliance of action -- on actions of the district court and other parties and other unique circumstances. We believe that the facts surrounding this case does put this case within that very, very narrow exception.

There's an additional fact that I didn't

mention, and that is that a second notice of appeal was, in fact, filed in this case on the prejudgment interest award.

QUESTION: But, counsel, if you go back to the Thompson case, in that case the judge had already ruled on the point.

MS. DANIEL: That's correct, Your Honor. And --

QUESTION: Doesn't that -- that doesn't help you at all, does it?

MS. DANIEL: Well, in the Thompson case, the judge had characterized the -- a post-judgment motion as being timely which then affected the time when the parties determined when to file their notices of appeal. The --

QUESTION: The new trial motion had been made in ample time.

MS. DANIEL: That was the characterization made by the trial court. In fact, the motion was tardy.

QUESTION: And that limits the opinion, doesn't it?

MS. DANIEL: Excuse me?

QUESTION: Doesn't that limit the opinion to a case like that?

MS. DANIEL: Well, the court did note that

the --

QUESTION: Do you have any court of appeals other than the Ninth Circuit on your side?

MS. DANIEL: Not directly on this issue. The other cases cited by Ernst & Whinney are distinguishable, and most of them involve situations where prejudgment interest was included in the judgment and the party in their post-judgment motion was seeking to delete or change the rate of interest which was included in the judgment. In that situation you would have exactly what Rule 59(e) was meant to apply to. You would have a motion seeking to change something that was embodied in the judgment.

The Osternecks' motion does not fall in that type of category since it did not challenge the underlying judgment in any way.

QUESTION: Well, on your unique circumstances argument, you recited for us the factors in your favor. I suppose on the other side of the scale is the fact that the district judge said that he would have to amend the judgment if your motion was granted. That, I take it, weighs against you in this calculus.

MS. DANIEL: That, that would be something to consider. However, the trial judge also characterized the, the earlier judgment as the final judgment even in

awarding the prejudgment interest and there are these additional facts. None of the parties ever questioned it. The trial judge didn't ever question it.

I think that there is an additional unique circumstance in this case and that is that the Osternecks did file a second notice of appeal from the prejudgment interest award. And it was captioned as against the defendants who were liable for damages. However, it summed up saying that the Osternecks were appealing from all prior judgments.

The Eleventh Circuit found that it was not sufficient to preserve an appeal against Ernst & Whinney. However, Ernst & Whinney knew that the Osternecks were appealing against them. We had had discussions about designating the record continuously during all this time, and the second notice of appeal did, did say that it was appealing from all prior judgments. And that --

QUESTION: Did it denominate Ernst & Whinney by name?

MS. DANIEL: It did not denominate Ernst & Whinney by name. However, Ernst & Whinney did know there was another notice of appeal outstanding which it had also considered to be final, a final -- a valid appeal from a final judgment. So, Ernst & Whinney knew

it was being -- facing an appeal. There was a second notice of appeal which referred to the -- all prior judgments, and Ernst & Whinney wouldn't have been prejudiced if the second notice of appeal could be deemed to preserve a -- an appeal against it.

I, I think that the important thing in this case is to keep in mind the definition of a Rule 59(e) motion. The Congress intended a Rule 59(e) motion to cover only those motions seeking to correct an error in the judgment or to change a decision embodied in the judgment and not to apply to what -- something that seeks something new.

QUESTION: Actually 59(e) is just very bare of any meaning in, in the way it's set out. It doesn't really say what it's for, does it?

MS. DANIEL: The rule itself does not, but this Court has looked to the legislative history in the White decision and explained that that is what it is, is meant to deal with.

And as a -- as a practical matter, the Budinich case reiterated a well-established principle that where you have a litigation that has effectively terminated on the merits, the reservation of an issue that will not moot or alter any decisions in that judgment will not suspend the finality.

As a practical matter, that's what we had here. This case had gone on for over 10 years. We had had a jury trial. The jury had returned a verdict on the merits. The judgment embodied that. The Osternecks' request for prejudgment interest could not change any of those decisions.

QUESTION: Ms. Daniel, I don't, I don't -- I keep coming back to that. I really can't believe it's -- I can't believe it's true.

Suppose you have a bench trial, the trial is to the judge. And let's assume there are -- there are 11 injuries that the plaintiff received, and the -- and the judge issues a judgment dealing with 10 of them. He says nothing at all about the eleventh. He deals with 10 and he awards a certain amount of money damages for each of the 10.

Then there's a motion. Your Honor, you forgot about the eleventh. Will you amend the judgment to include the eleventh injury and to give us monetary damages for that eleventh injury?

Now, the previous judgment said nothing at all about that eleventh. It just -- just left it out. Now, you would say that would not be covered by 59(e)?

MS. DANIEL: That -- that would not be covered by either the traditional principle I just mentioned or

Rule 59(e) because in that event, the litigation would not have been over. One of the main claims would have been left unresolved.

And we don't -- in our situation there was nothing left for the finder of fact to do. The trier of fact could not determine the prejudgment interest.

QUESTION: Justice Scalia's motion that he just described on behalf of the plaintiffs in that case -- would that be a Rule 59(e) motion?

MS. DANIEL: That would not be a Rule 59(e) motion because the -- there would be no final judgment. The litigation would not be over. There would be an underlying claim that, that would not have been resolved.

In our case we had a, a verdict on all claims on -- as to all to all parties. The litigation was over in that respect. It's, it's not -- it's not something that, that the trier of fact could determine at the same time. It was something that, that had to be determined separately.

I'd like to reserve any remaining time for rebuttal.

QUESTION: Thank you, Ms. Daniel.

Mr. Garrett, we'll hear now from you.

ORAL ARGUMENT OF GORDON LEE GARRETT, JR.

ON BEHALF OF THE RESPONDENT

MR. GARRETT: Mr. Chief Justice, and may it please the Court:

Although couched in Rule 59(e) terms, the real question presented here is whether a judgment of determining plaintiffs' compensatory damages can be appealed while there is a pending request for additional compensation on the very same claim in the form of prejudgment interest.

Specifically, the issue is whether a post-judgment motion seeking to change the original judgment by adding discretionary prejudgment interest to plaintiffs' recovery is properly denominated as a motion to alter or amend the judgment pursuant to Rule 59(e). Petitioners' post-judgment motion filed within 10 days after the entry of judgment sought, based on the literal language of Rule 59(e), to alter or amend the judgment by increasing the compensatory damages awarded.

In addition to Rule 59(e)'s literal language, we believe that important principles of finality require treatment of Petitioners' motion to increase their compensatory damage award within Rule 59(e) except in rare circumstances --

QUESTION: You, you describe it, Mr. Garrett, as a motion to increase compensatory damages. Yet, it's, it's styled a motion for prejudgment interest.

MR. GARRETT: That's correct. And it seems to me that it makes no difference how one styles a motion. The effect of that motion was to increase by nearly a million dollars the damages awarded to the plaintiffs for the injury they claimed they received.

QUESTION: Well, but supposing a judgment awards me of a, a particular amount in damages but fails to specify interest from the date of judgment. Is that automatic, or do I have to move under Rule 59(e) to incorporate a provision for interest from the date of judgment?

MR. GARRETT: It depends on whether or not, it seems to me, Your Honor, that you're entitled prejudgment interest under either case law or statutory law.

QUESTION: Well now, I'm talking about interest, post-judgment interest.

MR. GARRETT: Oh, post-judgment? I'm sorry, Your Honor.

QUESTION: Yes.

MR. GARRETT: Post-judgment interest can be handled simply as a clerical mistake. You're entitled to --

QUESTION: Under Rule --

MR. GARRETT: Under Rule 60. Post-judgment

interest, of course, is automatic under most State and federal laws, and that could be handled as a ministerial or clerical mistake as I believe the decisions of the courts have so held.

QUESTION: What if the State rule on prejudgment interest made it mandatory and automatic?

MR. GARRETT: It --

QUESTION: Then would its omission be treated as a clerical error under Rule 60(a)?

MR. GARRETT: It seems to me, Your Honor, that most State statutes which do mandate prejudgment interest are very specific. They describe an interest rate and state that one is automatically entitled.

QUESTION: All right, and if --

MR. GARRETT: They would not --

QUESTION: And if that were omitted, would it fall within a clerical error under Rule 60(a)?

MR. GARRETT: That is correct, Your Honor, because to me it is no different than the post-judgment interest, which is also mandatory.

As I was saying --

QUESTION: Mr. Garrett, can I ask you a question about the facts that puzzle me? Did the -- I understand the defendants against whom the judgment and the prejudgment interest was awarded -- they also

appealed, did they not?

MR. GARRETT: Messrs. Talley and Kellar appealed. Barwick Industries and Barwick appealed, although their appeals were later abandoned because of failure to comply with Eleventh Circuit rules.

QUESTION: But as to the first two that did appeal, they appealed from the original judgment, not the one after the -- the prejudgment interest.

MR. GARRETT: No, Your Honor. They appealed on July 29, my recollection is, from not only the original judgment on January 30th --

QUESTION: And also the prejudgment interest award?

MR. GARRETT: The prejudgment interest award and the amended judgment which came out on July, July the 9th, which was a result of the increase.

QUESTION: So they, in effect, filed two notices of appeal.

MR. GARRETT: That is correct, Your Honor.

QUESTION: And if the -- if the plaintiff had filed a second notice of appeal at the same time, we wouldn't have all this fussing.

MR. GARRETT: We wouldn't have all this fussing and we wouldn't be here.

QUESTION: Okay.

QUESTION: Rule 59(e) and Rule 4(a)(4) of the Federal Rules of Appellate Procedure help implement the requirement of finality by precluding premature appeals by any party until the district court has had an opportunity to resolve post-judgment issues. Once resolved in the district court, the issues raised in the post-judgment motion seeking to alter or amend the judgment can be reviewed, along with all other issues before the district court in a single appeal to the circuit court.

The longstanding policy precluding piecemeal appeals is particularly appropriate in cases such as the one here involving multiple parties and issues. Here the Eleventh Circuit correctly determined that a post-judgment motion filed within the 10 days prescribed by Rule 59(e) seeking to add prejudgment interest is a Rule 59(e) motion. Accordingly, the Eleventh Circuit correctly held that under Rule 4 of the Rules of Appellate Procedure, Petitioners' notices of appeal filed before the resolution of their post-judgment motion had no effect and properly dismissed the appeal against Ernst & Whinney for lack of jurisdiction.

We believe that this case presents a clear opportunity for the Court to ersure that Rule 59(e) and Appellate Rule 4(a)(4) are applied consistently to

achieve prompt resolution and unified appeal of issues which should be decided together.

The Court has established that attorney's fees and costs, divorced from the merits by tradition in Rule 58, are outside Rule 59(e). Here the Court can confirm that post-judgment motions for relief traditionally encompassed within the merits relating to a plaintiff's compensatory damage award remain within Rule 59(e).

Section 1291 of the Judicial Code --

QUESTION: Counsel, do you have any case that says that a punitive damage is compensatory?

MR. GARRETT: No, Your Honor. I do not believe it's compensatory.

QUESTION: Well, why do you have to keep using that? You want us to use that word?

MR. GARRETT: No, I don't think it's necessary, but in this particular case --

QUESTION: Well, in this --

MR. GARRETT: -- it is compensatory in nature. Prejudgment interest is compensatory in this particular case.

I think the decision dealing with 59(e) can be certainly much broader.

Section 1291 of the Judicial Code confers appellate jurisdiction upon the courts of appeal only

from final decisions. The Court has consistently recognized that the final judgment rule is the dominant rule in federal appellate practice. The purpose of the rule is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.

Rule 59(e) and 4(a)(4) help implement this policy by securing complete decisions for unified relief. Fifty-nine(e) requires that motions to alter or amend a judgment be filed within 10 days. That's the same time limitation found in Rule 50(b), a motion for judgment notwithstanding the verdict; Rule 52(b), a motion to amend findings; and Rule 59(b), a motion for new trial. These rules, together with Rule 4(a)(4), ensure that requests to the trial court for further decisions affecting a judgment are made promptly after entry of Judgment.

And, of course, under Rule 4(a)(4), which was amended in 1979, where any party files any of those motions, the time for appeal by all parties runs from entry of the order resolving the motion. A new notice of appeal must be filed from the entry of the order. As this Court recognized in Griggs, that is mandatory and jurisdictional.

By precluding appellate jurisdiction until the

district court completely resolves all issues affecting the judgment, Rule 4(a)(4) and Civil Rule 59(e) implement the final judgment rule. Here until Petitioners' motion for prejudgment interest was decided, the litigation on the merits was not over and the judgment was not yet right for execution. The district court had not yet resolved all of the elements of their damage claim recoverable by Petitioners, nor did it finally establish the amount of that recovery.

To allow an appeal of a judgment before a plaintiff's entitlement to discretionary prejudgment interest is resolved by the district court, we believe would contravene the requirements of Section 1291 to effect simultaneous appeals. Thus, the traditional treatment of post-judgment requests for discretionary prejudgment interest as within 59(e) and not independently appealable is consistent with the unitary appeal rule set forth in Section 1291.

Treating Petitioners' request for prejudgment interest as an independent proceeding and permitting a separate appeal from the judgment establishing other elements of compensation on the very same claim ignores important considerations of finality. And most importantly, Petitioners advance no cogent reason why an award of discretionary prejudgment interest should be an

exception to 1291 requirement of a unified appeal.

Narrow exceptions to the requirement of a single appeal exist only pursuant to statutory authorization or where certain decisions of the district court are completely separate from the merits and necessity or long tradition mandate separate appellate review.

QUESTION: Well, Mr. Garrett, before the decision in White against New Hampshire, certainly people would have said that attorney's fees were not an exception to the rule you're talking about I think.

MR. GARRETT: Well, it seems to me that if one had examined attorney's fees, they have traditionally been associated with costs. They are taxed as costs. And costs by statute are -- excuse me -- the judgment is not delayed for entry because of costs. Now, some courts split on that, but it's clear if you follow the traditional analysis of attorney's fees and costs, you would come to the conclusion that the White -- Court did in White.

As I said, narrow exceptions do exist to the final judgment rule. Most of the exceptions are statutory in nature relating to review of pre-verdict and prejudgment orders where, for example, under Rule 54(b) in an action involving multiple claims of parties,

the district court makes an express determination, or under 28 U.S.C. 1292(b) where the district court specifically finds that the order involves a controlling question of law, the court of appeals in its discretion may take the appeal.

We are aware of no statutory provision which authorizes a separate appeal of a district court's discretionary award of prejudgment interest. Prejudgment interest is not a collateral order, and it does not fit within the narrow category of cases supporting appellate review.

QUESTION: Mr. Garrett, can I ask you a, a question? I mentioned -- supposing one looked at the judgment of this case and said it really is three separate judgments rather than three paragraphs of one judgment, and the third judgment is the one in favor of your client as against the Plaintiff, and there was no motion to alter or amend that judgment?

QUESTION: Well, it seems to me, Your Honor, that Rule 54(b) directly addresses that issue. Where there are multiple claims or a party, no judgment is entered until all claims against all parties are resolved until -- unless specific steps are followed by the district court. It seems to me 54(b) answers that question, Your Honor.

QUESTION: Do you think the judge could have entered three separate judgments rather than one in three paragraphs?

MR. GARRETT: I've long since --

QUESTION: In which event your case would collapse.

MR. GARRETT: I've long since learned that judges can do most anything.

(Laughter.)

MR. GARRETT: But it seems to me that that would be improper under Rule 54, that you can't enter three separate judgments based on a single trial against multiple parties, that that would be improper under the rule.

QUESTION: Well, there are times when a judge will enter a judgment as to one party. Say, at the end of the plaintiff's case, he might enter a judgment totally and a 54(b) order to go with it and dispose of that portion of the litigation.

MR. GARRETT: That's correct, but that's not appealable by the very terms of the rule.

QUESTION: Well, it would be if he made the right order under 54(b).

MR. GARRETT: That's correct. And, of course, the issue before this Court does not relate to 54(b).

There was no --

QUESTION: No.

MR. GARRETT: -- express finding.

QUESTION: But you're really fortunate that he put it all in one, one judgment, I guess, in your position.

MR. GARRETT: I, I think --

QUESTION: You think he had to do it?

MR. GARRETT: I think he had to do it. I think that's exactly what the rules require.

QUESTION: Yes.

QUESTION: Well, 54(b) really only speaks of, of when not, not how. It says may direct entry as to one or more, but fewer than all, only upon an express determination, that there is no just reason for delay and upon express direction for the entry of judgment. I mean, it seems to me what it's talking about is you can't do it sooner as to some than, than as to others. But I don't think it really speaks to whether you can enter a separate judgment for each of them simultaneously, which is what Justice Stevens is asking about.

MR. GARRETT: Well, I think that's true. But, of course, Rule 54(b) really relates to prejudgment and pre-verdict matters. There is really no reason at all

to have separate judgments once you've had a trial and you have a pending motion to change the compensatory damages.

QUESTION: Except for the, the judge might think, well, the case is over as to Ernst & Whinney, and I don't want to be fussing around with prejudgment interest. That was no reason to delay the appeal relating to them because they're not involved in the prejudgment interest fight.

MR. GARRETT: That's correct. And he may have done that if he had done it properly and, of course, he did not do that here. And that brings us directly, we believe, within Rule 59 and in the mandatory provisions of Rule 4(a)(4).

This case, as I said, does not comply with the very limited collateral order doctrine. The order is not -- or excuse me -- the issue as to prejudgment interest is not completely separate and independent from the merits, and there are no strong affirmative reasons -- and Petitioners point to none -- mandating a separate appellate review.

Indeed, the most recent cases from this Court seem to have narrowed the collateral order doctrine even further. The order must conclusively determine the disputed question, resolve an important issue completely

separate from the merits of the action, and be so that it is effectively unreviewable on appeal. Of course, that definition does not fit this case.

As discussed earlier, the Federal Rules of Civil and Appellate Procedure mandate except in narrow circumstances that the district court consider post-trial motions that may affect the verdict or judgment before a unified appeal on the merits. Separate review of post-verdict and post-judgment motions are even more limited than pre-verdict and judgment review.

By statute, Rule 58, of course entry of judgment shall not be delayed for the taxing of cost. Therefore, you can have a final judgment even though tax are not -- excuse me -- costs are not taxed.

And this Court we believe effectively importing the narrow exceptions in Cohen into the construction of Rule 59(e) held that a prevailing party's request for attorney's fees raised legal issues basically collateral to the main cause of action, put forward a bright line test that their award was separable, and that the judgment not including attorney's fees was final.

We do not believe that the Court's decisions in White or Budinich are support for prejudgment

interest. As Justice Scalia mentioned, we believe that this is no different than punitive damages. For example, the Fair Credit Reporting Act specifically states that punitive damages shall be decided by the court. If that were the case and the jury returned a verdict for the defendant, it is clear that you could not appeal from the judgment entered on that verdict until the punitive damage issue was decided. We do not believe --

QUESTION: Unless you wish to waive the punitive --

MR. GARRETT: Unless you wish to waive it. That is absolutely correct, because once you file your notice of appeal, and you have not properly moved the court, then the district court loses its jurisdiction and the case goes to the court of appeals. That's correct, Your Honor.

Of course, as the Court said in Budinich, a claim for attorney's fees is not a part of the merits to which the fees pertain. It does not remedy the injury giving rise to the action. At common law, attorney's fees were regarded as an element of costs awarded to the prevailing party.

The Court in White and Budinich also identified positive, affirmative reasons for separating

attorney's fees. To hold otherwise would have encouraged piecemeal litigation. A counsel would have been filing fee requests after what appeared to be final orders in lengthy civil rights litigation. Litigations whc -- excuse me. The problem also occurred because counsel would not have an opportunity to negotiate private settlements of their fee.

Now here, unlike the affirmative policy reading supporting appeals of collateral orders, there are no affirmative reasons why an award of prejudgment interest is independent of any other aspects of a plaintiff's damage case. Here an award of prejudgment interest is not separable from the merits. It is awarded to the plaintiff based on the conduct of the defendant. Unlike attorney's fees and costs, it is not awarded to a prevailing party. A defendant is not entitled to prejudgment interest.

The Court considers in determining whether prejudgment interest should be awarded the very conduct of the defendant. Evidence concerning the factors can be presented at the trial court during the trial with all of the aspects -- all other aspects of the plaintiff's claim.

Petitioners failed to advance any affirmative reasons why prejudgment interest should be --

QUESTION: Mr. -- Mr. Garrett, have you had experience in responding or making these motions for prejudgment interest in cases like this? What I'm curious about, does the trial court actually hold a hearing and hear witnesses, or -- as you suggest? Or does he simply base his ruling on what he heard at the trial?

MR. GARRETT: Well, it seems to me there are several ways to do it. Obviously, he hears the underlying evidence of the conduct of the defendants.

QUESTION: At trial.

MR. GARRETT: At trial.

If the court is concerned that the jury should not hear interest rates and the lost use of money, then he can hold a separate hearing outside the presence of the jury during one day of the trial, and you can have all the evidence relating to the prejudgment interest issue before the trial judge so he can make a decision on that depending on what the jury does.

Alternatively, if the issue is protracted, he may wait until the jury returns a verdict. If the jury returns a verdict for the defendants, all of them, the issue is not right for his review obviously.

Otherwise, he could do what he did here and hold a very short post-judgment hearing dealing with the

merits and then amend the judgment to reflect that. So, I think there are several ways to do it.

We also believe that the test suggested by the Petitioners is one which this Court has rejected and we believe that they fail. Basically, as we understand it, Petitioners state that any motion which will then not affect a previous judgment or ruling of the court is not a Rule 59(e) motion. Of course, that clashes with the Court's interpretation of 1291 and would render such things a partial summary judgment on liability appealable because then compensatory damages would not affect that particular issue. And, of course, it would permit summary judgment for one defendant in a multiparty action to be appealed. Of course, the drafters of Rule 54(b) preclude this result as well as decisions of this Court.

Finally, we believe that the unique circumstances in Thompson do not merit reversal of this case. That decision we believe should be strictly limited to its facts where a judge affirmatively misled a party believing that a post-trial motion was timely filed, therefore, indicating to the party that it did not file a notice of appeal within 30 days but rather file it within the time period after the pretrial motion was disposed of.

In that case, four judges dissented, we believe quite correctly, pointing out that to -- the more exceptions we have to the rules, the more mischief we'll have in our system. The rules are technical and they need to be to ensure accuracy in appeals.

Thank you.

QUESTION: Thank you, Mr. Garrett.

Ms. Daniel, you have two minutes remaining.

REBUTTAL ARGUMENT OF LAURIE WEBB DANIEL

MS. DANIEL: Thank you, Your Honor.

First of all, I'd like to point out we are not seeking this Court to reverse under the doctrine -- the collateral order doctrine espoused by the Cohen case. That deals with pretrial collateral issues. We're in this case dealing with a post-trial motion when all other issues had been decided. And as a practical matter, the concern for piecemeal appeals is not great where you have -- you have resolved the main issues.

We're not advocating separate appeals. In this situation where you've had a trial, all the other issues have been decided, a post-judgment motion like this could easily be consolidated with the prior appeal as it was done in this case. The Eleventh Circuit heard oral argument on the merits of the Osternecks' appeal against Ernst & Whinney along with the prejudgment

interest questions. It was consolidated. Where you have had a trial, that is often the case.

QUESTION: Well, that's -- that's a solution for all piecemeal appeals. I mean, you could shrug your shoulder about ary piecemeal appeal by saying, well, you can -- you know, if it's any problem, you can consolidate it.

MS. DANIEL: Your Honor, I would respectfully disagree that when you do have a trial and have had the litigation and a judgment entered on the merits of the case, that that is not a practical concern. As this Court found in the Budinich case with the attorney's fees issue where you, you resolved the case on the merits, the threat of piecemeal appeals is, is not as a practical matter great.

I think that the Blau case and then the old case of Stewart v. Barnes that we cited in our brief show that prejudgment interest is a collateral issue. It's not -- it does not form the substance or the basis of the cause of action, but is awarded only in respect -- with respect to the detention of the principal amount and is -- is to compensate for the delay.

The trial judge in, in our case did only look to the delay in the litigation process itself. He did not conduct any kind of lengthy hearing on the merits of

the case, in fact, did not focus on the merits of the case at all.

With regard to the 54(b) issue, this case does not fall within the classic 54(b) situation because it was over. It was not a pretrial situation. Prejudgment interest is not a claim. It's what is due because of, of prevailing on a claim.

However, if it was considered a 54(b) situation, the trial judge did specifically state on the record that --

QUESTION: Ms. Daniel, your time has expired.

MS. DANIEL: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:54 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NO. 87-1201 - MYLES OSTERNECK AND GUY KENNETH OSTERNECK, ETC., Petitioners

V. ERNST & WHINNEY

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)