O/a 4-12-85

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO: 65,738

FOURTH DISTRICT
COURT OF APPEAL
CASE NOS: 82-502, 82-693
& 82-751

ARGONAUT INSURANCE COMPANY,

Petitioner,

v.

MAY PLUMBING COMPANY, NORTHERN ASSURANCE COMPANY OF AMERICA, COMMERCIAL UNION INSURANCE COMPANY, and CHICAGO INSURANCE COMPANY

Respondents.



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DISCRETIONARY PROCEEDING TO REVIEW A
DECISION OF THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

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# ANSWER BRIEF OF RESPONDENT, CHICAGO INSURANCE COMPANY

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## STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, ARGONAUT INSURANCE COMPANY'S, statement of the facts omits a statement of the case, and while respondent does not disagree with the specific statements made, except as they conflict herein, feels compelled to amplify Petitioner's statement, in order to point out omissions, discrepancies, and distinctions which should aid in forming the basis of this Court's decision. The parties will be referred to by name in this brief, and Respondent will set forth specific pertinent dates and specific dollar amounts.

References to the record on appeal will be indicated by the letter "R" in parenthesis followed by the appropriate page number.

On May 11, 1977, ARGONAUT INSURANCE COMPANY, filed a complaint and demand for jury trial in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida. The complaint, which sounded in negligence, breach of warranty, and strict liability, sought damages in the amount of $250,360.51, in Count 1, and in the amount of $249,360.51, in both Count 2 and Count 3, the Counts sounding in breach of warranty, and strict liability. ARGONAUT INSURANCE COMPANY paid fire loss claims to its insureds, COLONIE BUILDING CORPORATION and COLONIE BUILDING CORPORATION II, on April 21, 1975. The fire loss claim was a result of two fires which

occurred on February 7, 1975, at Building 20, of an apartment complex owned by the insureds.

The complaint made no allegation of a contractual relationship between ARGONAUT INSURANCE COMPANY or COLONIE BUILDING CORPORATION, or COLONIE BUILDING CORPORATION II, and MAY PLUMBING COMPANY, the insured of COMMERCIAL UNION INSURANCE COMPANY, and CHICAGO INSURANCE COMPANY, and, in fact, was silent as to any contractual relationship which might have been breached (R-1087-1091).

Defendants, MAY, COMMERCIAL, and CHICAGO, answered the complaint and affirmatively asserted that the negligence of Plaintiffs had comparatively reduced Plaintiffs' right to recover (R-1211 and R-1215).

In the pretrial stipulation (R-1491), the issues of law and fact to be tried were set forth and they included questions of the negligence, if any, of MAY PLUMBING, the comparative negligence, if any, of Plaintiffs, legal causation, and the amount of damages sustained. The pretrial stipulation further set forth the names and addresses of eleven (11) trial witnesses that Petitioner, ARGONAUT INSURANCE COMPANY, asserted would testify as to damages (R-1493-1495).

On December 10, 1981, a jury of six determined the total amount of damages sustained by ARGONAUT INSURANCE COMPANY caused by the incident in question, and determined that there was negligence on the part of ARGONAUT INSURANCE COMPANY or its insureds, COLONIE BUILDING CORPORATION I, or COLONIE BUILDING CORPORATION II, and MAY PLUMBING COMPANY. The negligence the jury found was the legal cause of the total amount of damages sustained by ARGONAUT INSURANCE COMPANY (R-2241 and 2242).

Six (6) days later, on December 16, 1981, the Trial Court entered its final judgment, directing that ARGONAUT recover from MAY, the sum of $187,020.38 (R-1960), and, almost ninety (90) days later, on March 16, 1982, entered its final cost and interest judgment directing that ARGONAUT recover from MAY the additional sum of $97,980.00 as prejudgment interest. The additional amount was calculated from the date of the fire itself, and was calculated at changing interest rates of six (6), eight (8), ten (10), and twelve (12) percent (R-2255).

## ARGUMENT

### THE DISTRICT COURT OF APPEAL DID NOT ERR IN REVERSING THE AWARD OF PREJUDGMENT INTEREST IN FAVOR OF PETITIONER, IN THIS TORT ACTION.

For prejudgment interest to be awarded, there must be a contract or quasi contractual relationship, a specific time when the debt is due, and liquidated damages. If, and only if, all these elements were present, would a court be justified in awarding prejudgment interest and then, that interest could only be awarded at the legal interest rate. The Fourth District Court of Appeal was infinitely correct in reversing the trial Court's award of prejudgment interest, because of the uncertainties involved in this case, and the uncertainties inherently involved in tort actions.

By beginning inversely, this Court can readily observe the complications involved in attempting to apply prejudgment interest in a tort action.

Initially, Section 687.01 Fla. Stat. mandates the rate of interest in the absence of a contract. The Statute, in its legislative wisdom, is quick to set forth a percent, per annum, but allows the parties to contract for a lesser or greater rate by a contract in writing. In the case at bar, if prejudgment interest were to be

awarded, that rate should have been six (6) percent, per annum. That amount was established by the legislature, and was the effective rate of interest at the time the fire occured (February 7, 1975), at the time the loss was paid (April 21, 1975), at the time the suit was filed (May 11, 1977), at the time the verdict was rendered (December 10, 1981), at the time the final judgment was entered (December 16, 1981), and at the time the final cost and interest judgment was entered (March 16, 1982).

Petitioner's solution to the interest rate question of applying a straight 10.5 percent, is without foundation. It, however, is not as complex, confusing, and uncertain, as the Trial Court's proposal of applying six (6) percent for 965 days, eight (8) percent for 1,095 days, ten (10) percent for 365 days, and twelve (12) percent for 77 days (R-2255).

The Petitioner, ARGONAUT INSURANCE COMPANY, urges this Court to award the prejudgment interest, not at the amount mandated by the legislature in Section 687.01 Fla. Stat., but, in an amount which Petitioner has magically made appear. If this Court does find that it is proper to allow prejudgment interest in tort actions, such as the case at bar, surely it would do so by

applying the legal interest rate.

In both, POSNER V. FLINK, 393 So. 2d 1140 (Fla. 3rd DCA 1981) and CHELSEA TITLE AND GUARANTEE CO. V. TURNER, 389 So. 2d 691 (Fla. 4th DCA, 1980) the Trial Court was pursuaded that interest of approximately ten (10) percent was appropriate. In both, the Third and Fourth District Courts of Appeal, respectively, elected to follow the legislative mandate of six (6) percent, Section 687.01 Fla. Stat., rather than the talismanic ten percent. So too, if this Court should find prejudgment interest proper, it too should continue to follow the legislative mandate now, as in the past, PARKER V. BRINSON CONSTRUCTION COMPANY, 78 So 2d 873 (Fla 1955), and do so at the then legal interest rate of six (6) percent.

The test for liquidated damages, a requirement for prejudgment interest, will also not be stood by the Trial Court's award herein.

In the case of TAMPA ELECTRIC COMPANY V. NASHVILLE COAL COMPANY, 214 F. Supp. 647 (M.D. Tenn. 1963), the Federal Court concluded that:

> "Florida follows the traditional rule of allowing prejudgment interest where

> a claim is liquidated, but not where a claim is unliquidated... The test in Florida, as noted in the Tampa Electric case, seems to be that a claim is unliquidated, when the amount of the damages can not be computed, except on conflicting evidence, inferences, and interpretations." TOWN OF LONG BOAT KEY V. CARL E. WIDELL & SON, 362 So. 2d 719 (Fla. 2nd DCA, 1978) at Page 723.

The case at bar is riddled with conflicting evidence, conflicting inferences, and conflicting interpretations. The suggestion that Petitioner needs eleven (11) witnesses as to damages, coupled with testimony as to damages, coupled with Petitioner's demand for an amount higher in the negligence count than the total amount of damages sustained by ARGONAUT, as determined by the jury, and the jury's reduction of that amount by $62,340.13, do nothing but confirmed the unliquidated nature of the claim herein. The Appelate court would not accept that the total amount paid by an insuror to its insureds would establish, per se, damages and the validity of the insurance company's estimate of those damages based on the insurance company's evaluation of the claim, made to the exclusion of the defendants' evidence. In FRANK V. ENGEL VAN LINES, INC., 429 so. 2d 333 (Fla 3rd DCA 1983), the Appelate Court also reviewed a claim which was hotly disputed as to both liability and extent, in the lower Court. The Third District was quick to deny prejudgment interest on unliquidated damages, citing ALARM SYSTEMS OF FLORIDA, INC. V. SINGER, 380 So

2d, 1162 (Fla 3 DCA, 1980) and TOWN OF LONG BOAT KEY V. CARL E. WIDELL & SON, supra. The Court further assisted in drawing the distinction between unliquidated and uncertain damages, and those which could become liquidated by a jury verdict, based on a contract or quasi contractual action, where the claim was easily capable of assertainment, by mere computation, or by reference to well established standards of value. The same Court that denied prejudgment interest because the damages were uncertain, due to conflicting evidence, inference, and interpretations in FRANK V. ENGEL VAN LINES, INC., supra, was not adverse to awarding prejudgment interest in a case where the record contained ample and competent testimony as to the reasonable value of services rendered in a disputed, express or implied contractual claim, based on quantum meruit, JOCKEY CLUB, INC. V. BLEEMER, LEVINE & ASSOC., 413 So 2d 433 (Fla 3rd DCA 1982).

Besides requiring liquidated damages to remove the inherent uncertainty and confusion arising from the award of prejudgment interest in tort claims, based on negligence, a prejudgment interest award would, by necessity, require that the interest be paid from the

date the debt was due, rather than from the date of judgment. BRYAN & SONS CORP. V. KLEFSTAD, 265 So 2d 382 (Fla 4th DCA, 1972); PARKER'S MECHANICAL CON. V. EASTPOINT WATER, 367 So 2d 665 (Fla 1st DCA, 1979).

In the case at bar, the Trial Court asserted that the debt was due while the fire was still smoldering. This date, February 7, 1975, from which the Trial Court began prejudgment interest, is even more questionable when considered in light of the loss payment date by ARGONAUT to its insureds, some 70 days after the fire (April 21, 1975). Surely, this Court would not advocate that ARGONAUT INSURANCE COMPANY should benefit by interest accruing to ARGONAUT between the date of the fire and the date of the payment of the alleged total damages. To do so, would encourage dilatory tactics in the payment to insureds, to the benefit of insurors, such as Petitioner herein.

Perhaps the date of debt was thirty (30) days after the claim was made; perhaps the date of debt was thirty (30) days after the fire; perhaps the date of debt was the date of demand for payment; KENWORTH OF TAMPA, INC. V. TURNKEY DEVELOPMENT CORPORATION, 407 So 2d 1063 (Fla 2nd DCA 1981); perhaps the date of debt was the date

of default; DIVERSIFIED COMMERCIAL DEVELOPERS V. FORMRITE, 450 So. 2d 533 (Fla 4th DCA, 1984), or perhaps, the uncertainty of the date of the debt in a tort action renders a valid and significant distinction between the case at bar and a contractual action with a date certain, thereby supporting the Appelate Court's reversal of the prejudgment interest, because of the uncertainty, inherent in tort actions.

The Florida Court's have pointed out the uncertainties in awarding prejudgment interest in personal injury tort actions, and we are now asked whether the Fourth District Court of Appeal appropriately applied the criteria for not making an award, and in fact, reversing the lower Court's award of prejudgment interest, feeling that the presence of comparative negligence precluded such an award and placed the case at bar in the latter personal injury tort category, rather than the contract or quasi contractual grouping applied by the trial judge. The claim at bar stems from a contract between ARGONAUT INSURANCE COMPANY and its insureds, but is essentially one for recovery of tort damage and as such, the damage claim herein is more similar to a personal injury claim, than to a contract

claim, and therefore, the award of interest prior to the entry of judgment is not applicable. SOUTHEAST TITLE AND INSURANCE COMPANY V. AUSTIN (Fla 1967).

Petitioner, ARGONAUT INSURANCE COMPANY, asserts that the award of prejudgment interest allows ARGONAUT to be made whole, by being given the payment or money necessary to hire money, and that the award further precludes MAY PLUMBING COMPANY from being unjustly enriched, by having the value of the use of the total damages claimed by ARGONAUT for the period of time between the fire and the entry of judgment.

To the contrary, this argument will not withstand the test of logic. The imposition of prejudgment interest actually precludes or hinders access to the Courts, and because of its punitive nature, thwarts justice.

In the case at bar, MAY PLUMBING COMPANY, with creedance and validity, disputed the amount of damages claimed by ARGONAUT INSURANCE COMPANY. The jury agreed and reduced the claim asserted by ARGONAUT by $62,340.13. It would seem ludicrous to then allow the Trial Court to effectively increase the jury's finding of fact (damage) by $97,980.00. By affirming the Trial Court's action,

this Court would place a Defendant who prevailed in a negligence trial, in the unenviable position of winning the trial and then being penalized by $35,640.13 for prevailing.

Finally, if we assume that a defendant in a negligence action, has neither the benefit of his bargain, goods or services, nor the benefit of payment therefor, then the imposition of prejudgment interest on an unknown and uncertain principal amount which Defendant does not have, is punitive. Unlike a contract or quasai contractual action, Defendant in a tort action does not have the use of dollars, services, or goods, to the exclusion of the Plaintiff, and therefore, cannot be unjustly enriched. See JOCKEY CLUB V. BEEMER, supra.

WHEREFORE, based on logic, the lack of a contract or quasai contractual relationship, and the uncertainties of time and damages, this Court should uphold the Fourth District Court of Appeal's ruling, reversing the Trial Court's award of prejudgment interest, based on McCOY V. RUDD, 367 So 2d 1080 (Fla 1st DCA 1979), and the cases sited herein.

## CONCLUSION

In conclusion, it is respectfully submitted that the District Court of Appeal applied the proper law, precluding the recovery of prejudgment interest in tort or negligent claims, where there is no reasonable way to know, with any degree of certainty or definiteness, the speculative and uncertain damages, until the jury settles the issue by their verdict. Further, it is respectfully submitted, that the District Court of Appeal, having found that prejudgment interest should not be awarded, did not go further to establish the impropriety of the interest rate awarded and the interest rate sought by Petitioner. It is therefore, respectfully requested that this honorable Court affirm the decision of the District Court, and deny prejudgment interest, or reduce such interest in both rate and time.

Respectfully submitted.

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served by mail this 25th day of February, 1985 to: Robert M. Klein, Stephens, Lynn, Chernay & Klein, PA, Attorneys for Respondent, One Biscayne Tower, Suite 2400, Miami, Florida 33131; and Thomas D. Lardin, Weaver, Weaver, Lardin & Liroff, PA, Attorneys for Petitioner, POB 14663, Fort Lauderdale, Florida 33302-4663.

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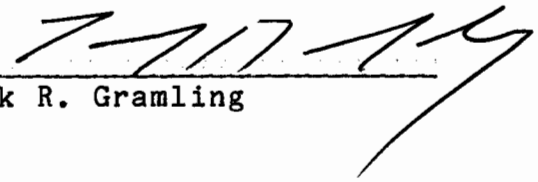
By: 
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