65,738

FILED
SID J. WHITE
SEP 13 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 82-502, 82-693
and 82-751

ARGONAUT INSURANCE COMPANY,
et al.,

Petitioner,

vs.

MAY PLUMBING COMPANY, et al.,

Respndent,

_____/

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

RESPONDENT, CHICAGO INSURANCE COMPANY'S REPLY TO JURISDICTIONAL BRIEF

FERTIG AND CURTIS
Attorneys for Respondent
3104 South Andrews Avenue
Fort Lauderdale, FL 33316
Telephone: 525-6652 BROW
945-6250 DADE

TABLE OF CONTENTS

TABLE OF CITATIONS

QUESTIONS PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH ANOTHER DISTRICT COURT ON THE ISSUE OF PREJUDGMENT INTEREST AS WELL AS CONFLICTS WITH DECISIONS OF THE SAME DISTRICT COURT ON THE SAME ISSUE?

STATEMENT OF THE CASE AND FACTS:

The respondent, Chicago Insurance Company, adopts the statement of the case and facts as recited by the petitioner, ARGONAUT INSURANCE COMPANY, in its jurisdictional brief.

ARGUMENT:

THE DECISION OF THE 4TH DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT, ANY OTHER DISTRICT COURTS OF APPEAL, OR ITS OWN PRIOR DECISIONS.

The petitioner, ARGONAUT INSURANCE COMPANY brought this action in the trial court alleging that the negligence of MAY PLUMBING COMPANY caused the loss which resulted in ARGONAUT paying to its insured the sum of $249,360.51. ARGONAUT sought subrogation from MAY PLUMBING COMPANY for the amount of its payment, plus prejudgment interest. The action was one in tort and not in contract. ARGONAUT was required to show negligence on the part of MAY PLUMBING COMPANY in order to recover. No evidence was presented at trial establishing a contractual relationship with MAY PLUMBING COMPANY. This distinction is important in analyzing whether there is any conflict of decisions.

The Fourth District Court of Appeal in reversing the Trial Court's award of Prejudgment interest, cited as authority; McCoy v. Rudd 367 So,2d 1080 (Fla. 1st DCA 1979). In McCoy, the Court was similarly considering a tort action involving the destruction of buildings, and held that prejudgment interest was not proper because,

> Assuming that the appellant, McCoy, was negligent from the outset of the dispute there was no way that he could have reasonably known with any degree of certainty or definiteness how much he

> owed the Rudds until the jury settled the issue by their verdict Id at 1082.

In the instant case, there was no method by which MAY PLUMBING COMPANY could have determined the amount it owed to ARGONAUT. ARGONAUTS suit was based upon negligence and MAY PLUMBING COMPANY alleged an affirmative defense of comparative negligence which was accepted by the jury when it rendered a 25% finding of fault on behalf of ARGONAUT. Therefore, it was not determined prior to the jury's verdict as to what amount MAY PLUMBING COMPANY would have to pay, if any thing at all. The issue of comparative negligence was a jury question.

The petitioner argues that the McCoy decision expressly and directly conflicts with Bergen Brunswick Corp. v. State Department of Health and Rehabilitative Services, 415 So.2d 765 (Fla 1st DCA 1982) and a case cited in Bergen, Tech Corp. vs. Permutit Company 321 So.2d 562 (Fla. 4th DCA 1975). However, the Court in Bergen was not dealing with a tort action but rather a contract action. The beginning of the paragraph in Bergen cited by the petitioner reads as follows:

> On Cross appeal appellee contends at the lower Court erred in denying claim for prejudgment interest. Such interest may be awarded in conversion and et contractu actions. Id at 767

There is no conflict between McCoy vs. Rudd, Supra and the Bergen decision. While the damages in a contract

action may be fixed and certain at the time the contract is entered into, the damages in a tort action are never certain until the jury reaches its verdict. Even if the damages have been determined prior to trial, when the issue of comparative negligence is raised, the amount that will ultimately be owing to the successful plaintiff cannot be determined prior to the verdict. By necessity there must be a different standard for allowing prejudgment interest in a tort action with comparative issues since the Defendant cannot, prior to the verdict, calculate the degree of comparative negligence. Such was the situation in the instant case werein the jury found MAY PLUMBING COMPANY responsible for only 75% of the damages sought by ARGONAUT.

The case cited by Bergen as its authority, Tech Corp. vs. Permutit Company, 321 So.2d 562 (Fla. 4th DCA 1975) was also a contract action, and is thus distinguishable from both the instant case and the case relied upon by the 4th District Court of Appeal, McCoy v. Rudd, 367 So.2d 1080 (Fla 1st DCA 1979).

Petitioner also alleges conflict with the Florida Supreme Courts decision of Parker v. Brinson Construction Co., 78 So.2d 873 (Fla 1955). Petitioner argues that the mere denial of prejudgment interest creates an express conflict with Parker, which petitioner cites as

establishing a general rule in favor of the recovery of prejudgment interest. There is no conflict for several reasons. First, the Parker case did not establish a general rule in favor of the recovery of prejudgment interest. The court was reviewing a workers compensation case and found it analagous to a contract action. The rule cited by the court reads as follows:

> In actions growing out of contract and in some actions in tort we have approved the recovery of interest from the time of the accrual of the cause of action, but in personal injury case we have consistently declined to approve interest before entry of judgment. Zorn vs. Britten 120 Fla 304,162 So. 879.

If there is any general rule in favor of the recovery of the prejudgment interest, the Court was only applying it to contract actions, and again the instant case is one sounding in tort. Thus there is no conflict with the general rule of Parker. Petitioner agrues in its brief at page 5 that Parker "establishes that the general rule is in favor of the recovery of prejudgment interest". A general rule is not necessarily applicible to every situation. Specifically the Court in Parker in the excerpt quoted above held merely that prejudgment interest may be proper in some actions in tort. Thus there is not direct conflict under Parker in a tort case which does not award prejudgment interest when there are comparative negligence

issues.

This court should exercise its discretion and decline to accept jurisdiction in this case. There is no conflict of decisions as all the cases cited by the petitioner as being in conflict are distinuishable factually and legally from the instant case. Petitioners arguments about the appropriateness of awarding prejudgment interest is not an issue in determining whether or not this court should exercise jurisdiction. The sole issue for determination by this court is whether or not there has been...

> the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mingini v. State of Florida 312 So.2d 733 (Fla 1975) at page 733."

Therefore, the Respondant, CHICAGO INSURANCE COMPANY, respectfully requests that this court decline exercise conflict jurisdiction in this matter as the decision of the Fourth Disctrict Court of Appeal does not directly conflict with any prior decision of any appellate court in Florida.

CONCLUSION

The decision of the District Court of Appeal for the Fourth District does not conflict with any of its own prior decisions nor with any decisions of any of the other District Courts of Appeal of Florida or of the Supreme Court of Florida. The cases cited by the Petitioner to be in conflict with the decision of the District Court in the instant case are distinguishable in that the instant case is one sounding in tort wereas the allegedly conflicting decisions sound in contract. This Court itself has recognized that a different standard may be applied in awarding prejudgment interest in tort case as compared to a contract case. Based upon the foregoing it is respectfully requested that this Court exercise its discretion and refuse to take jurisdiciton of this case for briefing on the merits.

Respectfully submitted,
FERTIG AND CURTIS
3104 South Andrews Avenue
Fort Lauderdale, FL 33316
Phone: 525-6652/945-6250
Coonsel for Chicago Ins. Co.

BY: _____
CHRISTOPHER R. FERTIG

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the

foregoing was sent by mail to: THOMAS LARDIN, ESQ., Post Office Box 14663, Fort Lauderdale, FL 33302; and ROBERT M. KLEIN, ESQ., One Biscayne Tower, Suite 2400, Miami, Florida 33131 this 11th day of September, 1984.

CHRISTOPHER R. FERTIG