OIA 4-12-85

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 65,738

4TH DCA CASE NO: 82-502, 82-693 and 82-755

ARGONAUT INSURANCE COMPANY, et al.,

Petitioners,

vs.

MAY PLUMBING COMPANY, NORTHERN ASSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY AND CHICAGO INSURANCE COMPANY,

Respondents.

BRIEF OF RESPONDENTS MAY PLUMBING COMPANY, NORTHERN ASSURANCE COMPANY and COMMERCIAL UNION INSURANCE COMPANY ON THE MERITS

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SUMMARY OF ARGUMENT

Respondents MAY PLUBMING COMPANY, NORTHERN ASSURANCE COMPANY and COMMERCIAL UNION INSURANCE COMPANY, do not believe that the law of Florida with regard to prejudgment interest is in turmoil. To the contrary, Respondents believe that a review of the cases will readily reflect that prejudgment interest has traditionally been allowed in matters ex contractu, and that it has been disallowed in either pure tort actions, or tort actions which bear only a coincidental relationship to some form of contract.

If there is any confusion whatsoever within the law of Florida, it extends solely to the sometimes casual use of the phrase "liquidated damages" as a benchmark for determining when prejudgment interest will be allowed. Liquidated damages have classically been an element of damage in contract actions alone, and that phrase is inappropriate for use in the context of a tort action. To the extent that several courts have improperly allowed awards of prejudgment interest merely because elements of damage are fixed in a particular case (and thus inappropriately labeled liquidated) some clarification may be justified. Prejudgment interest should never be appropriate in a pure tort action, and clarification of the liquidated damage issue should only be rendered in the context of ex contractu matters.

Nevertheless, whether one uses the precise damage standard, the ex contractu standard or the liquidated damage standard, prejudgment interest was inappropriate in this matter,

and the Fourth District properly rejected the award of prejudgment interest by the trial court.

STATEMENT OF THE CASE AND STATEMENT OF FACT

Respondents will adopt the statment of the case and statement of fact contained in the brief which was submitted by Respondent CHICAGO INSURANCE COMPANY.

ARGUMENT

THE DISTRICT COURT OF APPEAL DID NOT ERR IN REVERSING THE AWARD OF PREJUDGMENT INTEREST IN FAVOR OF PETITIONER, WHERE: (1) THE CLAIM DID NOT TRULY SOUND IN CONTRACT; (2) THERE WAS NO TRUE "DEBT" OWING BETWEEN THE RESPONDENTS AND PETITIONER'S INSURED: (3) DAMAGES WERE UNLIQUIDATED; AND (4) LIABILITY AND DAMAGE ISSUES WERE CONTESTED.

Initially, Respondents would note that they will adopt and incorporate by reference all of those arguments that have been presented by Co-Respondent CHICAGO INSURANCE COMPANY. Respondents MAY PLUMBING, et al., will attempt to avoid belaboring many of those points which were addressed in CHICAGO'S brief. However, Respondents do wish to elaborate somewhat upon several of the points raised by the Co-Respondent, in addition to supplementing those argument to a certain extent.

Initially, Respondents would note that Petitioner's "return to the roots" of the prejudgment interest issue would lead this Court to believe that prejudgment interest has invariably been allowed in most instances in a civil action, absent certain limited exceptions. To the contrary, as this Court noted long ago, the "ancient rule is adverse to the assessment of interest upon unliquidated demands." SULLIVAN v. McMILLAN, 19 So. 340, 342 (Fla. 1896). While the SULLIVAN court went on to discuss the fact that the distinctions between liquidated and unliquidated damages have often become blurred in more recent jurisprudence, the court nevertheless accepted the general proposition that prejudgment interest may be allowed where the "exact pecuniary amount was either ascertained or ascertainable by simply computa-

tion, or by reference to generally recognized standards, such as market price...." Based upon this recited principle of law, the SULLIVAN court allowed an award of prejudgment interest where the defendant contracted to purchase the plaintiff's entire output of lumber, but refused to accept the balance of the timber after a portion had been delivered.

In this regard, Respondents will concur with that portion of the Petitioner's assessment of the law on prejudgment interest in this state, to the extent that Petitioner suggests that prejudgment interest should be assessed in order to prevent a defendant from wrongfully making use of a plaintiff's money. In other words, where a defendant has failed to carry through with a contract, which would have brought in a certain sum of money by a certain date, and where that sum is readily ascertainable through simple calculations, then the defendant should indeed be required to pay prejudgment interest for depriving the plaintiff of money that was rightfully his, or of property which would have brought in a certain sum of money had it been delivered--or accepted--within the time allowed by the contract. In such circumstances, "'[a]s soon as it is the legal duty of the defendant to pay, he is liable for interest....'" SULLIVAN, supra at 343, citing Sedgwick on the Measure of Damage, §315.

Based upon this rationale, Respondents would submit that the Fifth Circuit's opinion in E.S.I. MEATS, INC. v. GULF FLORIDA TERMINAL COMPANY, 629 F.2d 3148 (5th Cir. 1981), is completely harmonious with Florida law, to the extent that the Fifth Circuit allowed an assessment of prejudgment interest in a negli-

gent bailment action. In that instance, the defendants breached their bailment contract by failing to return the bailed goods upon demand, and in the condition which they were in when the contract of bailment commenced. Using the SULLIVAN standard, the plaintiff's demand in E.S.I. was "of such a nature that its exact pecuniary amount was either ascertained or ascertainable by simply computation, or by reference to generally recognized standards, such as market price...." Further, the legal duty to pay, i.e., to completely fulfill the contract of bailment, was readily ascertainable, to the extent that this date was solely dependent upon the fixed date of demand for performance under the contract of bailment. Thus, when the defendant could not fulfill its contract, the plaintiff was deprived of the use of its property from that day forward, and its damages began to accrue.

At the same time, Respondents do not feel that the Fifth Circuit's decision necessarily cleared up any discord in Florida law on the subject of prejudgment interest, or that any real confusion exists on the subject. To the contrary, Respondents would submit that Florida opinions have been extraordinarily consistent with regard to those types of cases in which an award of prejudgment interest has been allowed, or disallowed, notwithstanding some occasionally contradictory language concerning the standards to be used for gauging the entitlement to an award of prejudgment interest.

For example, the courts have routinely allowed awards of prejudgment interest in cases sounding in contract, or in

cases ex contractu. See, e.g., SNEAD CONSTRUCTION CORPORATION v. LANGERMAN, 369 So.2d 591 (Fla. 1st DCA 1978); PLANTATION KEY DEVELOPERS, INC. v. COLONIAL MORTGAGE COMPANY OF INDIANA, 589 F.2d 164, 170-71 (5th Cir. 1979), and cases cited therein. It is therefore emminently appropriate for a court to award prejudgment interest in a bailment action, which is necessarily predicated upon a bailment contract or agreement. Yet an award of prejudgment interest in a bailment action should not give rise to the suggestion that prejudgment interest should therefore necessarily be awarded in any negligence action, since bailment is a hybrid form of action which is necessarily based upon a bailment agreement, and which cannot be appropriately characterized as a true tort action. In fact, the Fifth Circuit recognized the hybrid nature of a bailment action in the E.S.I decision. "Bailment actions lie somewhere between tort and contract, and, in fact, on what might be called the dividing line between them." E.S.I., supra at 1356. Thus, while the E.S.I. decision implied that there was no case law which <u>expressly prohibited</u> application of prejudgment interest in a tort action, it allowed for that possibility and for appropriate distinctions based upon its own recognition of the hybrid nature of a bailment action.

While the Florida courts have been uniform in their allowance of prejudgment interest in ex contractu matters, they have been similarly consistent in their refusal to allow an assessment of prejudgment interest in classic tort actions, based primarily upon principles of law which date all the way back to the SULLIVAN case. Thus, despite varying phraseology, the courts

of this state have uniformly refused to allow an assessment of prejudgment interest in all but a very few types of tort actions. And where prejudgment interest has been allowed in a claim that technically sounds in tort, the claim has invariably been based upon a contract, i.e., the claim was for misrepresentation with regard to a written contract, or for conversion of funds received as part of a contractual agreement. See, e.g., BERGEN BRUNSWIG CORP. vs. STATE, 415 So.2d 765 (Fla. 1st DCA 1982); SRYBNIK v. ICE TOWER, INC., 183 So.2d 224 (Fla. 3rd DCA 1966).

The reasons for this distinction are obvious. In a tort action, there is no real "debt" owed by the defendant. Nor are the damages ascertainable by "simple computation," or by reference to such "generally recognized standards" as market price. Thus, while an award of prejudgment interest may be appropriate in a contract action, where it is "proper to allow interest at the legal rate from the date the debt was due," BROWARD COUNTY v. SATTLER, 400 So.2d 1031, 1033 (Fla. 4th DCA 1981), a similar award is inappropriate in a tort action were there is no debt, no date when the debt accrues, and no clear measure of damages.

In this particular case, there is no suggestion that MAY PLUMBING or its insurers owed a "debt" to ARGONAUT INSURANCE COMPANY. To the contrary, this was a standard tort suit, seeking to establish that property damage had been occasioned in this matter by the neglect of an employee of MAY PLUMBING. In addition, the case included questions of comparative negligence on the part of MAY PLUMBING. For this reason, it cannot be reasonably suggested--as Petitioner attempts to suggest--that there was no

dispute as to the amount of compensation sought in the trial court.

In McCOY v. RUDD, 367 So.2d 1080 (Fla. 1st DCA 1979), relied upon by the Fourth District in its opinion, the owner of some buildings which had been destroyed by fire sued the parents of a child who had allegedly caused the fire. A jury ultimately awarded a verdict in favor of the property owner in the amount of $75,000. In addition, the jury awarded interest on the principle amount of the verdict from the date of the fire to the date of the verdict. The First District affirmed the primary judgment, but reversed the award of interest.

In its opinion in McCOY, the First District noted that the parties to that case were disputing the liability issues and the amount of damages. Thus, there is no way that the defendants could have determined precisely what they owed to the plaintiff property owner, even had they admitted liability. Nor could they have fixed a precise date upon which payment became due. These issues were resolved by the jury.

That is precisely what occurred at the trial of this cause. There was considerable testimony at trial which indicated that the property owners in this matter had submitted a damage estimate which was considerably higher than the amounts which were ultimately paid by ARGONAUT. Respondents also argued that ARGONAUT paid more than it should have. In addition, however, the liability issues in the case were vigorously debated, and in fact the jury ultimately determined that Petitioner's insured was 25% at fault for the damages which were ultimately sustained.

Under the circumstances, Respondents would submit that this case presented a "classic" case of damages which were not readily ascertainable, and which could not otherwise be ascertained by simple computation, or by reference to generally recognized standards.

The only case which Petitioner points to which might arguably--or at least superficially--seem to resemble a tort action is this Court's decision in PARKER v. BRINSON CONSTRUCTION COMPANY, 78 So.2d 873 (Fla. 1955). PARKER was a workmen's compensation matter, which simply held that a workmen's compensation claimant was entitled to interest on all amounts secured pursuant to a proceeding brought under the workmen's compensation act, from the date that the claimant had been receiving compensation. A review of that decision clearly indicates that the Court's opinion was predicated solely upon the overall philosophy of the prevailing workmen's compensation statute:

> The basic philosophy of the act is to ensure and secure prompt payment of compensation or other awards to the man who works for wages or his beneficiaries...It is common knowledge that those who work for small wages are dependent upon such wages for their immediate livelihood. Inherent in the act itself is the intention that if such an award is wronfully withheld (and under the law it is wrongfully withheld if it be eventually determined that it should have been paid), the person or the party which should have paid it should be compelled to pay, as damages for its detention, lawful interest thereon from the date it should have been paid.... PARKER, supra at 875.

This case clearly has no application in this instance, and lends no support to Petitioner's suggestion that it is entitled to prejudgment interest simply because MAY PLUMBING was performing

its responsibilities at the sight of the Colony Park Apartments pursuant to a contract between MAY PLUMBING and ARGONAUT'S insured.

In other words, Respondents would submit that the contract in this matter is only incidental--or coincidental. Had there been no contractual relationship whatsoever between MAY PLUMBING and ARGONAUT'S insured, the same lawsuit could still have been filed to recover damages as a result of MAY PLUMBING'S negligence. In order to accept Petitioner's theory, this Court would have to effectively extend application of prejudgment interest to virtually all forms of tort claims. Yet there is no suggestion in any of the cases cited by Petitioner that this Court or any of the courts of this state have ever intended such a result.

This suggestion is not far fetched. If ARGONAUT is entitled to prejudgment interest in this instance, then any plaintiff in a bodily injury suit would be entitled to an award of prejudgment interest on lost wages or medical bills incurred as a result of an automobile accident. In both instances, the plaintiff has been deprived of the use of his money--utilizing Petitioner's rationale--and the defendant has theoretically (however technically) profited by its use of the plaintiff's money until such time as the jury determines that the defendant owes that money to the plaintiff. Such an award would be unprecedented in Florida jurisprudence in a matter that is not ex contractu.

Respondents would finally comment on the "confusion" which has been generated by occasionally careless language in opinions discussing the "liquidated damage" standard for assessing prejudgment interest. By and large, Respondents believe that

Florida courts have generally been true to the SULLIVAN standard, to the extent that they have refused to allow an assessment of prejudgment interest in cases where damages are not subject to "simple computation." Unfortunately, however, the rationale behind this standard has occasionally become blurred, allowing some courts to award prejudgment interest where it probably should not have been allowed at all, merely because the damages were "liquidated." In that sense, Respondents would refer again to the auto accident lawsuit analogy.

In a negligence case for bodily injury where there has been an automobile accident, many of a plaintiff's damages may be fixed, e.g., medical bills and lost wages. Yet these damages cannot truly be characterized as "liquidated damages," however casually the courts may use that phrase. To the contrary, liquidated damages are a classic element of a contract claim, where the amount of the damages can be readily fixed pursuant to an agreement between the parties, or the terms of the contract itself. Thus, casual language notwithstanding, it is perhaps appropriate to avoid use of this terminology altogether in any discussion pertaining to prejudgment interest.

In that regard, Respondents would simply suggest a reaffirmation by this Court of those principles of law which hold that prejudgment interest is only assessable in contract matters, or tort actions which are truly ex contractu, such as conversion, bailment or misrepresentation upon a written contract. And in those cases, prejudgment interest could only be assessed where--as was stated in SULLIVAN--the exact pecuniary amount

is "ascertainable by simple computation, or by reference to generally recognized standards, such as market price...."

To the extent that the Court believes that the distinction between liquidated and unliquidated damages should be retained, Respondents would adopt the arguments which have been advanced by CHICAGO INSURANCE COMPANY. Clearly, in this instance, the damages were not liquidated in any sense of the word. Rather, the damages which were assessed by the jury were every bit as uncertain as those which are awarded in a traditional bodily injury action. The jury's ultimate award was based upon its evaluation of expert testimony concerning the value of the property that was damaged, the cost of repairs, the need for repairs, etc. This was not a simple matter of deciding a claim based upon the prevailing market value of damaged goods. Under the circumstances, prejudgment interest should not have been awarded in any event.

Respondents will also adopt that portion of CHICAGO'S brief which deals with the rate of interest. For the reasons which are advanced by CHICAGO, Respondents would submit that the trial court's use of varying rates of interest was inappropriate. Nor could the trial court establish when the "debt was due," both because <u>there was no debt</u>, and because ARGONAUT in fact made no payments itself until some seventy days after the date of loss. And it must be recalled that prior to that time there was of course no real demand upon Respondents to pay this as of yet unestablished debt. Thus, as Respondent CHICAGO INSURANCE COMPANY suggests, such problems may explain why it is that

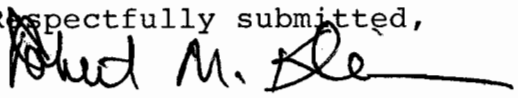
the courts have traditionally allowed prejudgment interest claims only in contract actions, where a date certain may be readily ascertained for compliance with the contract.

In summation, Respondents would suggest to the Court that the law of Florida with regard to prejudgment interest is not truly as chaotic as Petitioner would suggest. Several notable distinctions have regularly been maintained by the courts of this state, most notably those distinctions between matters ex contractu and classic tort actions. If there has been some blurring of the standards for assessment of prejudgment interest, it has been with regard to the question of liquidated versus unliquidated damages. As was noted above, Respondents do not feel that the liquidated or unliquidated nature of the damages in a particular case should be the basis for determining whether prejudgment interest will be allowed. Yet to the extent that that standard may have some application, as an oversimplification of the rule which this Court announced in SULLIVAN, it is clear that prejudgment interest would not have been appropriate in this case. For these reasons, the district court's decision to reverse the award of prejudgment interest should be affirmed in all respects.

CONCLUSION

For all of the above-captioned reasons, Respondents MAY PLUMBING COMPANY, NORTHERN ASSURANCE COMPANY and COMMERCIAL UNION INSURANCE COMPANY respectfully request this Court to enter an order affirming the district court's decision denying an award of prejudgment interest in this matter.

Respectfully submitted,



ROBERT M. KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 7th day of March, 1985, to Thomas Lardin, Esq., P.O. Box 14663, Ft. Lauderdale, Florida 33302-4663 and Frank Gramling, Esq., 750 S.E. 3rd Avenue, Suite 200, Ft. Lauderdale, Fl 33316.

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