65,738

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.,

Respondent,

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

PETITIONER'S JURISDICTIONAL BRIEF

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QUESTIONS PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND 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

Petitioner, ARGONAUT INSURANCE COMPANY, was the Plaintiff in a subrogation action in the trial Court. Respondent, MAY PLUMBING COMPANY, was the Defendant below. The parties will be referred to by name in this brief.

On February 7, 1975, a building in a condominium complex being constructed by ARGONAUT'S insured caught fire and was severely damaged. ARGONAUT payed its insured $249,360.51 as a reusult of that fire damage to its insureds property and covered under its insurance policy. The amount paid was solely attributable to the cost of repairing the damage to the building which was under construction and damaged by the fire. ARGONAUT brought its action against MAY PLUMBING COMPANY, a plumbing sub-contractor hired by ARGONAUT'S insured, JACK PARKER CONSTRUCTION COMPANY, for negligently causing the fire to occur while completing its contractual duties.

The jury returned a verdict in favor of ARGONAUT and awarded ARGONAUT 75% of its damages based upon a finding of 25% contributory negligence on the part of ARGONAUT. Damages, in the gross amount, were assessed in the exact amount paid by ARGONAUT of $249,360.51.

The parties had stipulated that the trial Court would determine the issue as to whether prejudgment interest was recoverable and, if so, the amount of interest. The trial Court, by way of post trial motion, awarded prejudgment interest in the amount of $97,980.00

A timely appeal was filed by MAY PLUMBING COMPANY, contesting, among other things, the award of prejudgment interest. The Fourth District Court Of Appeal affirmed the principal judgment without opinion but reversed the award of prejudgment interest. (A-2) In so doing, the Distirct Court cited for authority the case of McCoy v. Rudd,

367 So.2d 1080 (Fla. 1st DCA 1979), and quoted there from. ARGONAUT filed a Motion For Rehearing which was denied by Order dated July 17, 1984. It is the District Court's opinion reversing the award of prejudgment interest which is the subject of this Petition For Discretionary Review.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH NOT ONLY A DECISION OF THIS COURT AND ANOTHER DISTRICT COURT OF APPEAL BUT ALSO EXPRESSLY AND DIRECTLY CONFLICTS WITH ITS OWN PRIOR DECISIONS.

The Fourth District found that the fact that the jury charged ARGONAUT with 25% comparative negligence made damages uncertain and unliquidated and that the trial Court's award of prejudgment interest was therefore improper. The Court quoted the following language from McCoy v. Rudd, 367 So.2d 1080 (Fla. 1st DCA 1979), at 1082, as follows:

> Where the judgment is for damages, interest may not be added to the principal award unless there can be a conclusive determination of an exact amount due a date from which interest can be computed. See Bryan and Sons Corp. v. Klefstad, 265 So.2d 382, 385 (Fla. 4th DCA 1972). There was a dispute between the parties hereto not only as to fault but also as to the amount of appellees' loss. This dispute was settled only by the jury. 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.

The Court also cited the case of Parker's Mechanical Contractors v. East Point Water and Sewer District, 367 So.2d 665 (Fla. 1st DCA 1979).

The McCoy decision cited above as authority for the opinion in this case no longer represented the law in the First District as of the date of the decision in our case. The McCoy decision had been receded from by the First District in the case of Bergen Brunswick Corp. v. State Department of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982) where the trial Court stated, at page 767, as follows:

> Accordingly, in Florida there has evolved a principle that prejudgment interest may be awarded when damages are a fixed sum or an amount readily acertainable by simple calculation and not dependent on the resolution of conflicting evidence, inferences, and interpretations (citations excluded). Indeed, this court has recited such, in dicta, as the applicable rule. See McCoy v. Rudd, 367 So.2d 1080 (Fla. 1st DCA 1979). However, we now determine that the better view is expressed in the case of Tech Corp. v. Permutit Co., 321 So.2d 562 (Fla. 4th DCA 1975), where the court held that, for the purpose of assessing prejudgment interest, a claim becomes liquidated and susceptible of prejudgment interest when a verdict has the effect of fixing damages as of a prior date. Such a rule eliminated the unwarranted disparate treatment of those litigants who contest liability only, and those who contest the measure of damages.
>
> In the present case the jury verdict established the amount of damages, and the record evidence indicates that, due to appellee's dissatisfaction with appellants' performance, the parties' contractual relationship was terminated by formal notice prior to the commencement of the proceeding below. The jury verdict in this case thus had the effect of fixing damages as of a prior date, and therefore prejudgment interest should have been awarded.

As such, the decision in our case expressly conflicted with the decision of the First District Court Of Appeal on the same issue of law, prejudgment interest.

The Court in Bergen, Supra, cited as its authority the Fourth District case of Tech Corp. v. Permutit Company, 321 So.2d 562 (Fla. 4th DCA 1975). That earlier Fourth District case held that where the verdict of the jury fixes damages as of a prior date, prejudgment interest is properly recoverable. As the Court stated in Bergen, Supra, at page 767, the application of the Rule as announced in that case eliminates any advantage a party would receive by contesting the damages and liability over one who contest only

liability.

In reviewing the above decisions, it can be seen that both the First District and the Fourth District, in the Tech Corp., Supra, decision, have expressly held that in situations analogous to ours, prejudgment interest should be recovered. These decisions are consistent with the long standing Florida Law as discussed by this Court in Parker v. Brinson Construction Company, 78 So.2d 873 (Fla. 1955), which establishes that the General Rule is in favor of the recovery of prejudgment interest. The exception to the general case is applicable in cases such as personal injury cases where the elements of damage such as mental anguish and future pain and suffering are speculative in nature. There obviously were no speculative damages involved in our case.

The above decision of this Court, the First District and the Fourth District in Tech Corp., expressly conflicts with the decision in our case. The Fourth Districts view that a finding of 25% comparative negligence disallows the recovery of prejudgment interest in a case such as this where the damages arise solely from repair costs for fire damage simply cannot be squared with the other discussed decision. This Court therefore, has jurisdiction of this cause pursuant to Rule 9.030 (A)(2)(A)(IV).

This Court should exercise its discretion and accept jurisdiction in this cause. The loss of the use of money is a very real element of damages. There simply is no way to make a party whole if the damaged party is not compensated for the loss of use of its money. At the same time, to allow the award of such justifiable damages does not harm the adverse party to any degree. The paying party has had the use of that same money for its use and benefit for the exact same amount of

time as the prevailing party has lost the use of it. To not award prejudgment interest therefore allows unjust enrichment of the losing party to the detriment of the prevailing party.

The law of this State has been in a state of confusion for a number of years. The Courts of our State seem to have gone out on tangents in discussing issues like liquidation and unliquidation while losing cite of the general and well founded Rule which mandates the recovery of prejudgment interest as part of a parties damages in cases such as this. For all of the above reasons, it is respectfully requested that this Court exercise its decretion in favor of accepting this cause for argument on the merits.

CONCLUSION

In conclusion, it is respectfully suggested that the decision of the Fourth District Court of Appeal in this case directly and expressly conflicts with prior Supreme Court decisions, prior First District decision and prior Fourth District decisions. Based upon the importance of an award of prejudgment interest in order to do equity and allow a party to be made whole by their action and based upon the confusion that apparently exist in Florida Law with regard to prejudgment interest, it is respectfully requested that this Court take jurisdiction of this case for briefing on the merits so that, based on this Court's decision, the law of Florida will be uniformly applied.

Respectfully submitted,

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BY: 
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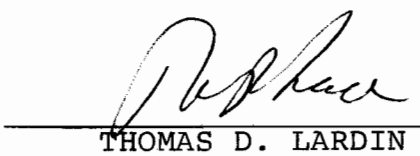
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing bried and Appendix thereto was served by mail this the 17th day of August, 1984 to: Christopher Fertig, Esq., 3104 South Andrews Avenue, Ft. Lauderdale, Florida 33316, and Robert M. Klein, Esq., One Biscayne Tower, Suite 2400, Miami, Florida 33131, Respondents.


THOMAS D. LARDIN