IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 65,738

FOURTH DISTRICT COURT OF
APPEAL CASE NO. 82-502, 82-693
and 82-751

ARGONAUT INSURANCE COMPANY, et al.,

Petitioner,

vs.

MAY PLUMBING COMPANY, et al.,

Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

THOMAS D. LARDIN, ESQUIRE
WEAVER, WEAVER, LARDIN & LIROFF, P.A.
Attorneys for Petitioner
Suite 200 500 S.E. 6th Street
Post Office Box 14663
Ft. Lauderdale, FL 33302-4663
Telephone: (305) 763-2511

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QUESTION PRESENTED

WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ERRED IN REVERSING THE RECOVERY OF PREJUDGMENT INTEREST IN FAVOR OF PETITIONER WHERE THE CAUSE OF ACTION WAS ONE ARISING OUT OF A CONTRACTUAL RELATIONSHIP AND WHERE THERE WERE NO SPECULATIVE ELEMENTS OF DAMAGES TO JUSTIFY THE APPLICATION OF THE EXCEPTION TO THE RECOVERY OF PREJUDGMENT INTEREST?

SUMMARY OF ARGUMENT

As the Fifth Circuit stated in E. S. I. Meats, Inc. v. Gulf Florida Terminal Company, 639 F.2d 1348 (5th Cir. 1981), "The Florida law of prejudgment interest is marbled with sometimes conflicting theories." At 1355. It is respectfully submitted that the courts of Florida must return to the roots of the issue, as the Fifth Circuit did, to re-establish a uniform and workable rule to be applied in the trial courts of our state.

The earliest cases of our courts discussing prejudgment interest established that fundamental fairness necessitates the inclusion of prejudgment interest as part of a plaintiff's damage claim. Otherwise, the plaintiff has lost the use of his money, and the defendant has had the use of plaintiff's money, and the plaintiff goes uncompensated for that loss. Such a rule prevents the plaintiff from ever being made whole and encourages defendants to continue to use money which does not belong to them. Not only is that not fair, but it represents a windfall to the defendant to the extent of the interest not paid.

The earliest cases of our courts also criticized the liquidated versus unliquidated damage rule on prejudgment interest as an unworkable and unfair rule. Despite that criticism by this Court in Sullivan v. McMillan, 19 So. 340 (Fla. 1896), some of the District Courts of our state have receded to the application of this rule while others have not. This, of

course, creates uncertainty as to what the law of Florida is, which is exactly the problem written about by the Court in E. S. I., supra.

It is time for the courts of Florida to return to the uniform application of the general rule as stated in Jackson Grain Company v. Hoskins, 75 So.2d 306 (Fla. 1954), that prejudgment interest is recoverable and a part of a plaintiff's damage claim except in personal injury cases where some of the elements of damages are speculative. This will allow a plaintiff to receive just compensation without harming the defendant in any way because the defendant has had the use of funds which were not his at all times since the debt or right of recovery accrued.

The facts of this case are limited to damages which all accrued on a date certain and none of which were future damages. The better reasoned rule for application in all cases would be for prejudgment interest to be applicable to all claims, including personal injury claims, where any part of the debt accrued as of a date certain. Obviously, pain and suffering, mental anguish and future damages would not be a part of this rule. A formula could be established for past pecuniary damages which do not accrue on a date certain. This is, in essence, what the courts do in reverse in reducing awards or instructing the jury on reducing the awards for future damages to present money value in personal injury cases. Florida Standard Jury Instruction 6.10.

STATEMENT OF THE FACTS

Petitioner, ARGONAUT INSURANCE COMPANY, was the Plaintiff in a subrogation action in the trial court. Respondent, MAY PLUMBING COMPANY, was the Defendant below. Additionally, MAY PLUMBING COMPANY's insurance companies, NORTHERN ASSURANCE COMPANY OF AMERICA, COMMERCIAL UNION INSURANCE COMPANY and CHICAGO INSURANCE COMPANY, were parties Defendant. 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 paid its insured $249,360.51 as a result of that fire damage to its insured's property and covered under its insurance policy. The amount paid was solely attributable to the cost of repairing damage to the building which was under construction and damaged by the fire.

ARGONAUT brought its action against MAY PLUMBING COMPANY for negligently causing the fire to occur while completing its contractual duties to ARGONAUT's insured. MAY PLUMBING COMPANY was a subcontractor under contract with ARGONAUT's insured at the time of the fire and was completing its contractual duties under that contract when the negligence occurred. (Trial Transcript - 573, 574)

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's insured. Damages, in the gross amount, were assessed in the exact amount paid by ARGONAUT to its insured of $249,360.51. There were no witnesses whatsoever called at the trial of this matter by the Defendants on the damage issues.

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. After a timely appeal filed by MAY PLUMBING COMPANY, the Fourth District Court of Appeal affirmed the principal judgment without opinion, but reversed the award of prejudgment interest. The Fourth District, in its opinion, held that the comparative negligence factor made any award of damages uncertain, and therefore unliquidated and, based upon the authority of McCoy v. Rudd, 367 So.2d 1080 (Fla. 1st DCA 1979), reversed the interest award.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE AWARD OF PREJUDGMENT INTEREST IN FAVOR OF PETITIONER IN THIS TORT ACTION ARISING OUT OF A CONTRACTUAL RELATIONSHIP WHERE THERE WERE NO SPECULATIVE ELEMENTS OF DAMAGES TO JUSTIFY THE APPLICATION OF THE EXCEPTION TO THE RECOVERY OF PREJUDGMENT INTEREST APPLICABLE IN PERSONAL INJURY CASES.

What has happened with regard to the issue of prejudgment interest in the courts of the State of Florida was analyzed very effectively by the Federal Appellate Court in E. S. I. Meats, Inc. v. Gulf Florida Terminal Company, 639 F.2d 1348 (5th Cir. 1981). The Court in that case indicated that the "Florida law of prejudgment interest is marbled with sometimes conflicting themes." The Court then went on to analyze the history of prejudgment interest in Florida, starting with some of the earliest Florida cases as announced by this Court.

The Court in E. S. I. began its analysis with the case of Sullivan v. McMillan, 19 So. 340 (Fla. 1896). There was, however, an earlier case discussing the issue of prejudgment interest, cited in the Sullivan case, which was Jacksonville T. and K. W. Railway Company v. Peninsular Land Transportation and Manufacturing Company, 9 So. 661 (Fla. 1891). In the Jacksonville case this Court formulated basic rules that prejudgment interest is simply compensation for the use of money and is part and parcel of the damage claim. The Court held, however,

that this concept did not seem properly applied to uncertain and contingent damages. The Court also set forth the basic proposition that it really doesn't matter whether the theory of the case sounds in contract or tort.

From that, the law of Florida went to the principles as announced in the Sullivan decision. In that case, this Court criticized the distinction between liquidated and unliquidated claims and reiterated the concept that prejudgment interest is a part of a plaintiff's claim for damages and as such constitutes a part of the concept of fair and adequate compensation for the damages suffered. The rule to be applied at that time was that where a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date.

The next case of significance dealing with the concept of prejudgment interest was Jackson Grain Company v. Hoskins, 75 So.2d 306 (Fla. 1954). In that case, this Court again set forth the general rule that prejudgment interest is recoverable as part of the plaintiff's damage claim. The Court also specifically discussed the exception which would be applicable to personal injury cases because of the speculative nature of some of the damages involved in that particular type of case. As such, as of that date, there was a firmly established rule with regard to the recovery of prejudgment interest to be applied uniformly throughout the courts of the State of Florida. That concept was carried forward by this Court in the case of Parker v. Brinson Construction Company, 78 So.2d 873 (Fla. 1955).

It is at this point where the prejudgment interest law of Florida becomes "marbled with sometimes conflicting themes." The end result of this vacillation of theories and themes is that different rules are applicable not only in the different District Courts, but even in the same District Court, which leads to confusion in the application of the rules in the trial courts and inequity in the application of the law as different plaintiffs are subject to different rules. In the next portion of this Argument, Petitioner will attempt to document what has happened to Florida law in the various Districts.

In the Second District Court of Appeal, the rule seems to be at least consistent. In The Town of Longboat Key v. Karl E. Widell and Son, 362 So.2d 719 (Fla. 2nd DCA 1978), that Court indicated that prejudgment interest is recoverable in ex contractu cases where damages are unliquidated, whether the theory of the case is tort or contract. Unliquidated, the Court held, means "when the amount of the damages cannot be computed except on conflicting evidence, inferences and interpretations." At 723. In two later cases, the Second DCA has applied the same rule regarding liquidated and unliquidated damages to prejudgment interest cases. Hughes v. Irons, 370 So.2d 76 (Fla. 2nd DCA 1979), and Kenworth of Tampa, Inc. v. Turnkey Development Corporation, 407 So.2d 1063 (Fla. 2nd DCA 1981). As such, the rule which is currently being applied in the Second DCA is the liquidated versus unliquidated damages rule which this Court criticized in 1896 in the Sullivan decision.

In the Third District, a similar rule has been applied. In the case of Alarm Systems of Florida, Inc. v. Singer, 380 So.2d 1162 (Fla. 3rd DCA 1980), the Court was faced with a case which was part subrogation action and part an action for uninsured damages arising from the same set of circumstances. The Court held that since the subrogation portion of the claim was a claim for scheduled items and was therefore liquidated, prejudgment interest should be awarded. With regard to the unscheduled items, since damages were not fixed until a determination was made by the trier of the facts, the claim was unliquidated and prejudgment interest was disallowed. In a later case, that same Court indicated that in actions ex contractu, prejudgment interest is appropriately added to unliquidated damages where the trier of fact chooses to assess it. Possner v. Flink, 393 So.2d 1140 (Fla. 3rd DCA 1981). As such, there appears to be an inconsistency with regard to the application of the prejudgment interest rule in the Third District.

There is likewise inconsistency in the application of the rule in the Fourth District. In our case, the Court obviously based its decision on the liquidated versus unliquidated damages rule. Although the Court based its decision that the claim was unliquidated on the jury's assessment of contributory negligence, there is no question that the rule applied was the liquidated versus unliquidated damages rule as recited in the case of McCoy v. Rudd, 367 So.2d 1080 (Fla. 1st DCA 1979). In a

decision just prior to the decision in this case, the same Court held that in actions ex contractu, prejudgment interest is appropriately added to unliquidated damages where the trier of fact chooses to assess it and cited the Possner case discussed above. Diversified Commercial Developers, Inc. v. Ramblewood Plaza, 450 So.2d 533 (Fla. 4th DCA 1984). If that isn't enough of an inconsistency, in an even earlier case, the Court applied the following rule:

> If it is finally determined that the debt was due, the person to whom it was due is entitled not only to the payment of the principal of the debt, but also to the interest at the lawful rate from the due date thereof. Parker v. Brinson Construction Company, Fla. 1955, 78 So.2d 873. Whenever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date.

Tech Corporation v. Permutit Company, 321 So.2d 562 (Fla. 4th DCA 1975). While that was a contract claim and not a tort arising out of a contractual relationship, there is no doubt from the rule above stated that the Fourth District, at that time, had receded from the liquidated versus unliquidated damage rule.

Lastly, we turn to the First District. An analysis of the current posture of that District must start with the case of McCoy v. Rudd, 367 So.2d 1080 (Fla. 1st DCA 1979), cited by the Court in the opinion below. In that case, the Court stated its rule, in a negligence action, that interest may only be added to the principal award where the damage claim is liquidated. The Court held that since the dispute concerning the exact amount due

was only settled by the jury, the claim was unliquidated and that therefore prejudgment interest could not be recovered. That same theory regarding liquidation versus unliquidation of the damage claim was carried forward by the Court in Parker's Mechanical Contractors, Inc. v. Eastpoint Water and Sewer District, 367 So.2d 665 (Fla. 1st DCA 1979).

In 1982, the First District re-evaluated its position on the subject of prejudgment interest. Bergen Brunswick Corporation v. State Department of Health and Rehabilitative Services, 415 So.2d 765 (Fla. 1st DCA 1982). The Court cited for its authority in its reassessment the Fourth District case of Tech Corporation v. Permutit Company, 321 So.2d 562 (Fla. 4th DCA 1975). The Court stated 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 ascertainable by simple calculation and not dependent on the resolution of conflicting evidence, inferences, and interpretations. (Citations omitted) 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 Company, 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 eliminates the unwarranted disparate treatment of those litigants who contest liability only, and those who contest the measure of damages. At 767.

The First District, therefore, not only receded from the liquidated versus unliquidated rule, but expressly receded from the McCoy opinion which was relied upon by the Fourth District in its decision on our case. The case that the First District cited for authority, as indicated above, was the Fourth District opinion in Tech Corp.

Where all this leads is to the exact type of critical examination as was conducted by the Court in E. S. I. Meats, Inc. v. Gulf Florida Terminal Company, 639 F.2d 1348 (Fla. 5th Cir. 1981). After painstakingly scrutinizing the various rules and theories on the prejudgment interest issue in the State of Florida, the Court fell back to the rationale of the Florida cases as commenced with the Sullivan case that a defendant must compensate a plaintiff for depriving him of his property. Because of the history of the prejudgment interest issue in Florida and because of the obvious reason for the rule to begin with, to fairly and adequately compensate a plaintiff, prejudgment interest was allowed in the E. S. I. case. It is respectfully submitted that the same rule should be readopted and reasserted by this Court, not only for the sake of clarity and uniformity in the courts of Florida, but also because the rule as formulated in the Sullivan case is a fundamentally fair rule.

In applying this law to our facts, there is no reason to decline to award Petitioner, ARGONAUT INSURANCE COMPANY, prejudgment interest. The Defendant, MAY PLUMBING COMPANY, had a

contractual relationship with ARGONAUT's insured which created the reason for MAY PLUMBING COMPANY's employee to be doing the work which was negligently done and caused the fire in question on February 7, 1975. The damages which arose from the negligence of the MAY PLUMBING COMPANY employee were fixed as of that date. Likewise, the damages as a result of that negligence were not speculative in nature as are claims for mental anguish or pain and suffering in a personal injury case. There is, therefore, no reason to apply the exception to the general rule and no reason to disallow ARGONAUT's claim for prejudgment interest.

If, through this maze of decisions on the issue, there is one concept upon which there appeared to be no disagreement, it is that a bona fide dispute concerning whether the debt is due or not never affects the recovery of prejudgment interest. A bona fide dispute as to whether or not the debt is due is exactly the reason prejudgment interest was disallowed in this case. Although calling it unliquidation, what the Fourth District did was to disallow prejudgment interest because there was a dispute over whether or not the debt was due. The jury determined that 75% of the debt was due and that therefore MAY PLUMBING COMPANY owed ARGONAUT INSURANCE COMPANY $187,020.38 since February 7, 1975. As such, there is no reason for the disallowance of prejudgment interest on this basis.

By analogy, Petitioner would like to compare prejudgment interest rules with the rule uniformly applied in personal injury

cases. At the request of a defendant, part of the Florida Standard Jury Instructions include an instruction with regard to reducing future pecuniary damages to present money value. Instruction No. 6.10. That is simply interest in reverse. The jury is asked to discount the amount of money awarded to the plaintiff presently because with regard to future pecuniary damages, plaintiff is technically not entitled to that money yet. What this is and what it represents is theories of pre-judgment interest only in reverse. The defendant in such a case is effectively able to reduce the amount of money he has to pay now because the defendant is losing that amount of money now, when technically he shouldn't lose that amount of money until sometime in the future. It is respectfully submitted that there is no justification for treating a plaintiff any differently, especially since, if there is to be an award or recovery, the wrongful act of the defendant has caused the damages to begin with. Consequently, a rule which denies a plaintiff prejudgment interest for money that plaintiff has been deprived of by virtue of the wrongful act of the defendant is unjust and unfair and does not fit within the rationale of the concept of damages in Florida of just compensation for the damages suffered.

At the trial of this cause, ARGONAUT put into evidence, without objection, that the average cost of borrowing money during the applicable period of time was 10.5%. As such, it is respectfully submitted that this Honorable Court reverse the

decision of the District Court of Florida, Fourth District, and reinstate the trial court's decision on the issue of prejudgment interest and establish the amount of that interest at 10.5% per annum.

CONCLUSION

In conclusion, it is respectfully submitted that the District Court applied an erroneous rule with regard to the recovery of prejudgment interest. The rule which this Court announced as applicable in Florida favors the recovery of prejudgment interest in all cases other than personal injury cases or cases like that where future damages or speculative elements are involved. The uncontroverted evidence at the trial established that the loss or damage to ARGONAUT as a result of the deprivation of its funds was 10.5% per annum. It is respectfully requested that this Honorable Court reverse the decision of the District Court and reinstate the decision of the trial court with regard to prejudgment interest and order that the assessment be calculated on the basis of 10.5% per annum.

Respectfully submitted,

WEAVER, WEAVER, LARDIN & LIROFF, P.A.
Post Office Box 14663
Ft. Lauderdale, FL 33302-4663
Telephone: (305) 763-2511
Counsel for Petitioner

By: _____
THOMAS D. LARDIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was served by mail this 31st day of January, 1985, 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, Attorneys for Respondents.

WEAVER, WEAVER, LARDIN & LIROFF, P.A.
Attorneys for Petitioner
Post Office Box 14663
Ft. Lauderdale, FL 33302-4663
Telephone: (305) 763-2511

By: _____
THOMAS D. LARDIN