orig.

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 REPLY BRIEF ON THE MERITS

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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 UNCERTAIN OR CONTINGENT ELEMENTS OF DAMAGES TO JUSTIFY THE APPLICATION OF THE EXCEPTION TO THE RECOVERY OF PREJUDGMENT INTEREST.

STATEMENT OF THE FACTS

Petitioner will only briefly comment on the facts where deemed necessary. Otherwise, Petitioner relies upon the Statement of Facts as previously submitted.

Respondent, CHICAGO INSURANCE COMPANY, states that there was no contractual relationship between Petitioner's insured and MAY PLUMBING COMPANY. That simply is not so. Petitioner's insured was the general contractor on the job site where this fire occurred. MAY PLUMBING COMPANY was the plumbing subcontractor on that job and was under contract with Petitioner's insured. The work being performed by MAY PLUMBING COMPANY was being performed under that contract. The fact that MAY PLUMBING COMPANY negligently performed those duties does not change the relationship of the parties.

Respondent, CHICAGO INSURANCE COMPANY, also states that Petitioner listed eleven (11) witnesses on the issue of damages. While that fact, if true, appears to have no relevance to this appeal, the fact is that Petitioner called one live witness on damages, John Updegraff. Respondent called no witnesses and, except for cross-examination of Mr. Updegraff, presented no evidence material to the issue of damages.

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 UNCERTAIN OR CONTINGENT ELEMENTS OF DAMAGES TO JUSTIFY THE APPLICATION OF THE EXCEPTION TO THE RECOVERY OF PREJUDGMENT INTEREST APPLICABLE IN PERSONAL INJURY CASES

Respondents, through much of their argument, appear to be saying that since applying a rule in favor of prejudgment interest in some tort cases may be difficult, there should be no such rule. The ease or difficulty in proof or application of an otherwise just theory of law has never been, and should never be, an impediment to the very existence of the rule. The court, or a properly instructed jury, can certainly and fairly apply a uniform rule with regard to the recovery of prejudgment interest. Questions concerning when the debt accrued or when the interest accrues are factual matters which either the court or the jury can decide.

Respondents, in both Briefs, refuse to concede that the law of Florida on prejudgment interest is unsettled. It is not only Petitioner that stated such, but also the Fifth Circuit in E.S.I. Meats, Inc. v. Gulf Florida Terminal Company, 639 F.2d 1348 (5th Cir. 1981). Where not only do the opinions of the District Courts in the different districts disagree on the law, but also the decisions of the same districts conflict with one

another, there is undoubtedly conflict which only this Court can resolve. The question is how to fairly and consistently resolve that conflict. Petitioner respectfully suggests that the fairest and most equitable rule is one in favor of the recovery of prejudgment interest which will allow a damaged Plaintiff full and adequate compensation to the extent available under the law.

It would appear to make little or no difference with regard to this issue whether or not the relationship arose out of contract or the duty created arose out of tort law. The question should more appropriately be whether or not there are contingent or uncertain elements of damages involved as this Court long ago stated in the case of Jacksonville T. and K. W. Railway Company v. Penninsular Land Transportation and Manufacturing Company, 9 So. 661 (Fla. 1891). Based upon the direction the law in this area has taken since 1891 when the Jacksonville case was decided, a return to the roots of the issue is indeed necessary.

In the event that any rule regarding prejudgment interest announced by this Court were to necessitate a foundation in contract, that foundation exists in this case. The very relationship that gave rise to MAY PLUMBING COMPANY's performing the plumbing services it negligently performed was founded upon the contract existing between Petitioner's insured and MAY PLUMBING COMPANY. The negligent performance of those contractual duties caused the fire in question. As such, whether the theory of the case was breach of contract or tort, the relationship and the cause of action arose out of that contractual relationship.

Respondents use the analogy of bailment, which is a good analogy. Bailment formed the basis of the relationship in the E.S.I. Meats case. In that case, while the relationship, bailment, arose out of a contract, the theory of the case was that the obligations were negligently performed. In a bailment case, the only significance that bailment has to the case is to shift the burden of going forward with the evidence. Once a prima facie case of delivery in good condition of bailed property and the failure to return it in the same condition has been established, the burden of going forward with the evidence shifts to the defendant. The ultimate burden remains on the plaintiff, however, and the burden is to prove negligence on the part of the bailee, a tort. MOAC Corp. v. Aquadynamics, Inc., 295 So.2d 370 (Fla. 3rd DCA 1974).

The allegation of the commission of the tort of negligence arising out of a contractual relationship as stated above, and as in E.S.I. Meats, is exactly what occurred in our case. The contractual relationship existed first, and out of that relationship the tort of negligence was committed. As such, if a contractual relationship is to be a requirement for the recovery of prejudgment interest, that relationship is undoubtedly present here.

Respondents also resist the imposition of prejudgment interest on the basis that there was a finding of comparative fault. A dispute over fault, however bona fide, has never

created an impediment to the recovery of prejudgment interest. Not a single case could be cited which denied prejudgment interest on that basis. The fact that Respondent was determined to only be 75% responsible for the damages caused means that only 75% of the total damage award was withheld from Petitioner by Respondents. An analogy would be where a defense amounting to a set-off would be asserted in a purely contractual claim. The fact that the total damages which the plaintiff would be entitled to would be reduced to the extent of the set-off as decided by the trier of fact would not affect the plaintiff's right to prejudgment interest. The set-off simply reduces the amount of plaintiff's damages, and thereby reduces the figure to which prejudgment interest applies. That is exactly what occurred here. It is up to the trier of fact to determine the amount of comparative negligence, just as it would be up to the trier of fact to determine the amount of any set-off.

Respondents' position concerning the damages being uncertain is also not supportable. In almost any case except a suit on a promissory note for a sum certain, a defense could, by cross-examination, "contest" the amount of damages. The question, as stated by this Court in the Jacksonville case and Sullivan v. McMillan, 19 So. 340 (Fla. 1896), is not whether or not the defendant "contests" the amount of damages, but rather whether or not the elements of damages involved, or some of them, involve uncertain or contingent claims. There is nothing uncer-

tain or contingent about damages where the measure is how much money it will cost to repair the damage caused to a building by a fire. The fact that people could differ as to a bid price for that repair does not thereby render the damages uncertain or contingent. Otherwise, there could never be an interest award. Even something as relatively simple as repairing damage to a dented fender on a car could, and many times does, yield different opinions as to the repair costs. It is the trier of facts' function to resolve those differences based upon the evidence. In our case the only evidence as to the cost of repairing the fire damage was brought forward by Petitioner.

Respondents continue to take the position that to award prejudgment interest is to punish the defendant. That simply does not make sense. In this case, Petitioner paid out, in April of 1975, $187,020.38 which Respondent was responsible for. That is to say, the Respondent insurance companies had the use of $187,020.38 which they used to earn interest, or a return on that money, which they should not have had the use of. To return not only the principal but the interest earned on that principal to the party to whom the principal belongs is not punishment, but rather fundamental fairness. On the other hand, the defendant paying that same prejudgment interest is paying out money that the defendant earned from money which was not legally the defendant's to begin with. The end result is the plaintiff is made whole at no expense to the defendant.

Without a rule in favor of prejudgment interest in situations such as ours, a defendant who has been adjudicated to be the cause of the damage to a plaintiff will be permitted to profit from that act by keeping the interest earned on the money withheld. It certainly does not appear equitable or fair that a negligent defendant should profit at the expense of a wronged plaintiff who cannot be made whole if not permitted to recover for the loss of use of his money. The fact that the wronged plaintiff is the insurance company who paid the damages to its insured and that the profiting defendant is the insurance company who earned interest on the money it retained does not change the equities and inequities of the situation.

Respondents attempt to distinguish the damage issues on the basis that in contract you are dealing with debt, whereas in tort you are not. That is nothing more than a play on words. In either case, the obligation to pay, in the absence of voluntary payment, and the amount of payment due, must be reduced to a final judgment in order to authorize forced collection procedures. The fact that the obligation to pay arose out of a purely contractual claim is of no importance. Suppose that the theory of Petitioner's case at the trial level had been breach of contract, since there was a contract between the parties which obviously was not complied with. The damages would have been exactly the same, as the measure would be the repair costs for the fire damage. It is illogical to suggest that so long as the

theory was contract, the claim was a "debt" and prejudgment interest recoverable, but if a tort, the same damage claim cannot support a claim for prejudgment interest.

Neither Respondent commented on the analogy in Petitioner's argument with regard to the reduction of future economic damages in personal injury cases to present money value as being interest in reverse. That is, however, what it is. By way of conclusion, that analogy sharply focuses in on the inequities which exist where a rule of law to be applied fails to fully compensate a damaged plaintiff by disallowing the recovery of prejudgment interest. If such concepts, such as reduction to present money value, are considered to be fundamentally fair in reducing what a defendant has to pay, certainly the wronged plaintiff should be entitled to the full measure of his damages by the recovery for the loss of use of his money; prejudgment interest.

CONCLUSION

In conclusion, it is respectfully requested that this Honorable Court enter its opinion reversing the opinion of the Fourth District Court of Appeal and allow the recovery of prejudgment interest by Petitioner at the rate of 10.5% per year.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief on the Merits was served by mail this 14th day of March, 1985, to: CHRISTOPHER FERTIG, ESQ., Fertig and Gramling, Attorneys for Respondent, CHICAGO INSURANCE COMPANY, 750 Southeast 3rd Avenue, Suite 200, Ft. Lauderdale, Florida 33316, and ROBERT M. KLEIN, ESQ., Stephens, Lynn, Chernay & Klein, Attorneys for Respondents, MAY PLUMBING COMPANY, NORTHERN ASSURANCE COMPANY and COMMERCIAL UNION INSURANCE COMPANY, One Biscayne Tower, Suite 2400, Miami, Florida 33131.

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