IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 84,045

LUMBERMENS MUTUAL CASUALTY
CO., a foreign corporation,

Petitioner,

-vs-

KAY C. PERCEFULL, as Guardian
of the person and property of
RIP VON PERCEFULL, an incompetent,

Respondent.
_____/

BRIEF OF AMICUS CURIAE, ACADEMY OF FLORIDA TRIAL LAWYERS, ON BEHALF OF RESPONDENT

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PREFACE

This case is before the Court on certification of conflict by the Fourth District Court of Appeal with a decision of the Third District Court of Appeal: CIGNA PROPERTY & CASUALTY CO. v. RUDEN, 621 So.2d 714 (Fla. 3d DCA 1993). The parties will be referred to by their proper names or as they appeared in the trial court. The following designation will be used:

(R) - Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

A few points of clarification regarding the facts of this case may be helpful. The insurance policy provides with respect to the payment of claims (R983):

> All benefits under this policy will be payable to you. Any accrued benefits unpaid at your death will be paid to your estate.

It should also be noted that apparently one of the health care providers, New Medico, charged interest on the unpaid balance of the bill sent to the Plaintiff (R1518). In the initial decision of the Fourth District, the court stated (19 FLW D523 at 524, fn.3):

> Percefull also claims that the New Medico bill included an interest charge which should be included in any final judgment. Percefull can recover prejudgment interest from the date of her proof of loss, or other interest charges assessed by the hospital. To allow both would amount to a double recovery.

For some reason, that footnote was deleted from the superseding decision of the Fourth District.

SUMMARY OF ARGUMENT

The Fourth District properly determined that the insured was entitled to prejudgment interest from the date the insurance benefits were due to be paid. The insurance contract provided that those benefits would be paid to the insured, and that they would be paid immediately upon filing of written proof of loss. Thus, the insured had a vested property interest, for which premium had been paid and, thus, under the "loss theory" of prejudgment interest was entitled to that element of damages. To hold otherwise would be inconsistent with established case law, and would provide an unwarranted benefit to the insurance company by virtue of giving it free use of the money that it has wrongfully withheld. There is no justification for creating such an exception to the established principles governing prejudgment interest and, therefore, the Fourth District's decision should be approved.

ARGUMENT

In ARGONAUT INSURANCE CO. v. MAY PLUMBING CO., 474 So.2d 212 (Fla. 1985), this Court determined that, based on century-old precedent, Florida has adopted the position that prejudgment interest is an element of pecuniary damages and that the "loss theory" as opposed to the "penalty theory" was to be applied in this State. An historical analysis of the development of the law in Florida relating to prejudgment interest compels the conclusion that the Fourth District's decision is consistent with prior pronouncements of this Court and its decision in this case should be approved.

In SULLIVAN v. McMILLAN, 19 So. 340 (Fla. 1896), a breach of contract case, the Court stated (19 So. at 343) quoting 1 SEDGEWICK, DAMAGES §300 (8th Edition 1891):

> On general principles, once admit that interest is the natural fruit of money, it would seem that, wherever a verdict liquidates a claim and fixes it as of a prior date, interest should follow from that date.

That statement was quoted with approval in ARGONAUT INSURANCE v. MAY PLUMBING, supra, 474 So.2d at 214. Additionally, the Court in SULLIVAN stated (Ibid):

> Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for a failure to keep a contract, interest attaches as an incident.

In the case sub judice, under the contract of insurance, the benefits were due to be paid to the insured and, thus, constituted money which "ought to have been paid" immediately following the

written proof of loss. Thus, under SULLIVAN, prejudgment interest should be an incident of the damages in this case.

In JACKSON GRAIN CO. v. HOSKINS, 75 So.2d 306 (Fla. 1954), this Court reaffirmed the principles stated in SULLIVAN, and also noted previous decisions holding that prejudgment interest was not available in personal injury actions. This Court stated (75 So.2d at 310):

> In actions growing out of contract and in some actions in tort we have approved the recovery of interest from the time of accrual of the cause of action, but in personal injury cases we have consistently declined to approve interest before entry of judgment. ZORN v. BRITTON, 120 Fla. 304, 162 So. 879. * * *
>
> Apparently an exception to the allowance of interest has been made in personal injury cases because of the speculative nature of some items of damage, such as mental anguish, and the indefiniteness of items such as future pain and suffering. FARRELLY v. HEUACKER, 118 Fla. 340, 159 So. 24. See also PENNY v. ATLANTIC COAST LINE R. CO., 161 N.C. 523, 77 S.E. 774, Ann.Cas. 1914D, 992. [Emphasis supplied.]

In PARKER v. BRINSON CONSTRUCTION CO., 78 So.2d 873 (Fla. 1955), this Court addressed the issue of when interest began to run on compensation benefits due under the Workmen's Compensation Act. After discussing SULLIVAN v. McMILLAN, supra and JACKSON GRAIN v. HOSKINS, supra, this Court noted that workmen's compensation benefits were not strictly a matter of contract, nor did they bear the characteristics of an award in tort. Pursuant to the policies underlying the Workmen's Compensation Act, this Court determined that claimant should be entitled to interest from the date the

compensation should have been paid. This Court stated (78 So.2d at 875-76):

> If the carrier should be compelled to sue the employer for premiums on a workmen's compensation policy, the carrier would be entitled to receive, as a part of its damages, lawful interest on the premium which was wrongfully withheld from the date the premium became due. We see no reason why the same principle should not be made to apply, so far as interest is concerned, where the carrier fails to pay an award when it should have paid it.

This Court then determined that it would apply the statutory rate of interest from the date the compensation benefits should have been paid, reasoning (78 So.2d at 876):

> Such rule places no hardship upon the carrier or employer and compensates the beneficiary for the loss of the use of the withheld funds. During the period such compensation is withheld, the carrier or employer should pay for the use of the money which it is using and has wrongfully withheld. During the same period, the beneficiary should be compensated for the same amount of money which at least theoretically, and most times actually, he is forced to hire to sustain himself. Any other rule affords the carrier or employer an advantage wholly disproportionate to the harm that befalls the beneficiary. Moreover such would result in a situation never contemplated nor intended by the workmen's compensation law and which would be repugnant to its basic purposes.

While the PARKER decision was based on the statutory policies underlying the Workmen's Compensation Act, the same rationale should apply here in support of the Fourth District's decision. The general rule in Florida is that prejudgment interest is collectible when the damages sought are a liquidated amount arising from a contract. The insurance company in this case wishes to make an

exception because the medical bills which the Plaintiff would be paying out of the benefits payable to the Plaintiff, have not yet been paid. However, as the contract language indicates, the benefits are payable to her, and there is no doctrinal significance to the fact that she may be obligated to pay those amounts to a third party, i.e., the health care providers. Moreover, consistent with PARKER, if the insurance company had sued for the recovery of premiums, it would be entitled to prejudgment interest and, therefore, there is no equitable justification for not applying the same principle when the carrier has refused to pay benefits as required by the contract. As in PARKER, such a rule would afford the insurance company an unfair advantage.

In SOUTHEAST TITLE & INSURANCE CO. v. AUSTIN, 202 So.2d 179 (Fla. 1967), this Court held that interest on an arbitration award on an uninsured motorist claim was properly computed from the date of the award, rather than the date of the accident, stating with respect to the claim that (202 So.2d at 181), "although based on [a] contract of insurance, [it] is essentially one for the recovery of tort damages." The insurance company in this case does not cite SOUTHEAST TITLE v. AUSTIN, but cites other uninsured motorist cases in which prejudgment interest was not permitted. However, consistent with the rationale of SOUTHEAST TITLE v. AUSTIN, those cases are distinguishable because they involve the recovery of tort damages, whereas in this case the damages clearly arise from the breach of contract, i.e., the insurance company's failure to pay the benefits due pursuant to the policy which arose out of

liquidated medical bills. Put another way, these damages do not include intangible losses and, thus, are not of a "speculative nature," as noted by this Court in JACKSON GRAIN v. HOSKINS, supra.

In ARGONAUT INSURANCE v. MAY PLUMBING, supra, this Court summarized the prior century of decisions on prejudgment interest and concluded that the "loss theory" of prejudgment interest had been adopted in Florida, and that in this State prejudgment interest was not intended to be awarded as a penalty for the defendant's wrongful act of disputing a valid claim. This Court stated (474 So.2d at 215):

> Under the "loss theory," however, neither the merit of the defense nor the certainty of the amount of loss affects the award of prejudgment interest. Rather, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability therefor.
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> * * * *
>
> In short, when a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss. [Emphasis supplied.]

In the case sub judice, the insured had a contractual right to the payment of the benefits under the insurance contract, and that wrongful deprivation of property is the loss for which the Plaintiff is entitled to be compensated, including interest from the date those benefits were due. The insurance company relies on this Court's use of the phrase "out-of-pocket" in support of its argument that because the Plaintiff has not paid the outstanding

medical bills, no property right has been lost. However, the policy specifically states that the benefits are payable to the insured, and consistent with the "loss theory" prejudgment should be available from the date those payments were due. This conclusion is further supported by this Court's decision in FLORIDA STEEL CORP. v. ADAPTABLE DEVELOPMENTS, INC., 503 So.2d 1232, 1236 (Fla. 1986):

> Again, our decision in ARGONAUT is controlling, wherein we reaffirmed that the loss theory of prejudgment interest is the law in Florida. Under the loss theory, the plaintiff's loss of the use of funds due him is itself a wrongful deprivation by the defendant of the plaintiff's property. As interest is merely another element of pecuniary damages, once it has been determined that a defendant is liable for a plaintiff's damages, interest should follow as a matter of law. 474 So.2d at 215. [Emphasis supplied.]

See also, PEAVY v. DYER, 605 So.2d 1330, 1332 (Fla. 5th DCA 1992). In this case, the loss of the use of the benefits due the Plaintiff is the wrongful deprivation of property, and the insurance company should be responsible for interest from the time it is determined that those payments were due. The fact that the insured has not paid bills of third parties, i.e., the health care providers, is not a basis to deny prejudgment interest on either legal or equitable grounds.

In ALVARADO v. RICE, 614 So.2d 498 (Fla. 1993), this Court ruled that a plaintiff in a personal injury action was not entitled to prejudgment interest on past medical expenses despite the fact that those amounts were liquidated. This Court noted that (614 So.2d at 499):

> To date, cases recognizing a right to prejudgment interest have all involved the loss of a vested property right.

[Citing, inter alia, ARGONAUT INSURANCE CO. v. MAY PLUMBING, supra.] This Court noted that the Plaintiff in ALVARADO had not lost a vested property right because she had not actually paid her medical bills prior to the date of the judgment. Additionally, this Court noted that Alvarado admitted that she had not been charged interest by the health care providers (614 So.2d at 499).

ALVARADO is distinguishable because in the case sub judice, the Plaintiff lost a vested property right, i.e., the contractual right to have the benefits paid pursuant to the provisions of the insurance contract for which premiums had been paid. That contractual right is of equal stature as the other vested property rights involved in the cases cited with approval by this Court in ALVARADO, see e.g., BARNES SURGICAL SPECIALTIES, INC. v. BRADSHAW, 549 So.2d 1189 (Fla. 2d DCA 1989) (salesman's right to prejudgment interest on commissions which were improperly withheld); INTERNATIONAL COMMUNITY CORP. v. OVERSTREET PAVING CO., 493 So.2d 25 (Fla. 2d DCA 1986) (subcontractor's right to prejudgment interest on mechanic's lien). Therefore, the fact that the Plaintiff in this case has not paid the medial bills is not significant, since she had a contractual right to have the benefits of the policy paid to her following the written proof of loss. The loss of that vested right is sufficient, in itself, to trigger the entitlement to prejudgment interest.

The Fourth District's decision in this case is consistent with the case law summarized above, in that it recognizes that the insured had a vested property right in the payment of the benefits, and that that vested right was lost by virtue of the insurance company's failure to pay pursuant to the contract. The Third District's decision in CIGNA PROPERTY & CASUALTY CO. v. RUDEN, 621 So.2d 714 (Fla. 3d DCA 1993), is inconsistent with this Court's prior decisions, since it fails to acknowledge the recognized distinction between contract and tort claims and it ignores the vested rights analysis underlying that distinction. Therefore, this Court should approve the Fourth District's decision, and disapprove of CIGNA PROPERTY v. RUDEN, supra.

Policy Considerations:

The insurance company contends that the Fourth District's decision results in a windfall to the insured, and even makes the ludicrous contention that the decision will stimulate insureds to prolong litigation in order to increase the amount of prejudgment interest. Those contentions are without merit. As a practical matter, an insured who is being deluged with past due notices for unpaid medical bills and whose credit is being destroyed has no incentive to prolong litigation. In fact, if the insurance company is not liable for prejudgment interest, it is the party that is likely to prolong litigation.

The "windfall" argument also is meritless. If, as the insurance company argues, the Plaintiff is not compensated for the

lost value of the benefits which were not paid timely, then the insurance company is obtaining the benefit of the use of the money that it wrongfully retains. This consideration was noted by this Court in PARKER v. BRINSON CONSTRUCTION, supra, in which it determined that interest should accrue on workmen's compensation benefits from the date they are due. Additionally, as noted by the Fourth District in the initial opinion, one of the health care providers charged interest on the outstanding balance and, thus, there would be no windfall to the extent of the Plaintiff's obligation to pay that interest.

It is respectfully submitted that this Court should not rely on considerations such as whether the medical providers charge interest, whether the Plaintiff has utilized personal funds to pay the outstanding bills, or whether the medical care provider has pursued collection, such as obtaining a judgment against the insured, as being crucial to a determination of the right to prejudgment interest. Not only will those considerations complicate the litigation by increasing the number of issues to be litigated and resolved at trial, but it would also result in consequences that are not beneficial to society as a whole. If this Court were to hold that prejudgment interest is recoverable if the medical care provider charged interest on past due balances, the obvious result would be that medical care providers will charge such interest, thus increasing health care costs. If it is deemed significant that a health care provider has pursued collection and obtained a judgment against the Plaintiff (with resulting interest

accruing), the obvious result would be more aggressive collection tactics on the part of health care providers, despite the insured's efforts to obtain insurance benefits to pay those medical bills. Whether the insured has expended personal funds to pay the medical bills should not be significant. Unlike in a tort case such as ALVARADO v. RICE, supra, an insured pays a premium for the contractual right to have benefits paid to defray medical expenses. That creates a vested right which has value not only as an asset, but also as the convenience of having the money paid quickly, when it is needed "immediately upon receipt of due written proof of such loss" (R983). To deny prejudgment interest unless personal funds are expended to pay medical bills ignores the latter aspect of the benefit contracted for by the insured and would create an unwarranted exception to the vested rights analysis which is implicit in the "loss theory" of prejudgment interest under Florida law.

CONCLUSION

For the reasons stated above, the decision of the Fourth District should be approved, and the decision of the Third District Court of Appeal in CIGNA PROPERTY v. RUDEN, supra, should be disapproved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to ARNOLD R. GINSBERG, ESQ., 410 Concord Blvd., Miami, FL 33130; BARD D. ROCKENBACH, ESQ., P.O. Box 3767, West Palm Beach, FL 33402; and JEFFREY LIGGIO, ESQ., 213 Southern Blvd., West Palm Beach, FL 33405, by mail, this 2nd day of November, 1994.

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