IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Supreme Court No.

4TH DCA CONSOLIDATED CASE NOS.:
92-00637 and 92-02492

LUMBERMANS MUTUAL CASUALTY COMPANY, a foreign corporation, and RESERVE LIFE INSURANCE COMPANY, a foreign corporation, as successor in interest and/or assignee of PROFESSIONAL INSURANCE CORPORATION, a Florida corporation, as successor in interest and/or assignee of LUMBERMAN'S MUTUAL CASUALTY,

Petitioner,

vs.

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

Respondent.

_____/

84,045

FILED
SID J. WHITE
SEP 15 1994
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

INITIAL BRIEF ON THE MERITS OF PETITIONER

LUMBERMANS MUTUAL CASUALTY

Submitted by:

Daniel M. Bachi, Esquire
Florida Bar No. 443808
and
Bard D. Rockenbach, Esquire
Florida Bar No. 771783

SELLARS, SUPRAN, COLE & MARION, P.A.
P.O. Box 3767
1250 Northpoint Parkway
West Palm Beach, Fl 33402
(407) 471-3300
Attorneys for the Respondent,
LUMBERMANS MUTUAL CASUALTY COMPANY

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DESIGNATIONS

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STATEMENT OF THE CASE AND OF THE FACTS

This case involves a claim for health insurance benefits made by Rip Von Percefull (hereafter "PERCEFULL") against Lumbermans Mutual Casualty Company (hereafter, LUMBERMANS). After several days of a non-jury trial, the court held that the LUMBERMANS policy only covered charges incurred at accredited "hospitals" and that the facilities used by PERCEFULL were not "hospitals" as defined by the policy. The court further held, however, that LUMBERMANS waived its right to contest the payment of expenses incurred at these facilities because it failed to comply with certain contract provisions. With regard to the voluntary payment of other medical bills prior to trial, the trial court held that:

> "...[T]he court finds that there was no evidence presented that any payment was made by the Plaintiff of any of the medical bills in controversy. The court therefore finds that because there was no payment made by the Plaintiff of any of the amounts in controversy, the Plaintiff is not entitled to prejudgment interest on those bills and therefore, the Plaintiff's claim for prejudgment interest is hereby denied." (R. 1635)

The testimony of Kathy Schwartz, a representative of one of the facilities, showed, in addition to the fact that PERCEFULL had never paid any of the bills, that the facility was "gracious enough" to not charge PERCEFULL any interest. (R-362 through 363)

On June 22, 1994 the Fourth District Court of Appeal, on a Motion for Clarification and/or Certification, reversed the trial court holding that the trial court incorrectly created coverage by waiver or estoppel. The district court also held that PERCEFULL was entitled to prejudgment interest on the amounts paid by LUMBERMANS prior to trial even though PERCEFULL never personally

paid any of his medical bills and was charged no interest by the medical facilities. In doing so, it reasoned that since prejudgment interest was historically an element of contract damages PERCEFULL was entitled to an award of prejudgment interest even if he had suffered no loss of a vested property right. That decision was certified to be in conflict with the Third District Court of Appeal in Cigna Property & Casualty Co. v. Ruden, 621 So. 2d 714 (Fla. 3d DCA 1993). The court distinguished this court's decision in Alvarado v. Rice , 614 So. 2d 498 (Fla. 1993) because it was a personal injury action and the present case deals with a contract claim.

SUMMARY OF ARGUMENT

The district court's decision is contrary to the well established rule that a plaintiff is not entitled to prejudgment interest on damages awarded for past medical bills, when the plaintiff has made no payments of the medical bills prior to the entry of final judgment. This rule is based on the fact that the plaintiff had suffered no loss of a vested property right.

In the instant case, PERCEFULL requested, and stands to be awarded, prejudgment interest on the damages which represent the amount of his past medical bills even though he never paid any of these bills prior to final judgment and was never charged interest by the medical facilities. What PERCEFULL is really asking for is a gift. PERCEFULL would have this court award him prejudgment interest as damages where he did not suffer any such damages. Rather he incurred expenses for treatment at medical facilities for which he did not pay and for which he was not charged interest by the medical facilities despite the fact that he did not pay. He was never charged "interest" and never lost the use of an asset (his money) and therefore never sustained the loss of a vested property right. An award of "interest" where a loss of a property right was not sustained would be a windfall. This Court should not permit the creation of such a windfall.

Although prejudgment interest has generally been permitted in cases arising out of contract, this is not justified by the mere fact that the action sounds in contract. Rather, prejudgment interest has been permitted because the aggrieved party has lost a

vested property right. The aggrieved party has usually either paid out actual money, provided his services, or lost the use of an asset. This is what this court has termed the loss of a "vested property right." Courts have refused to award prejudgment interest in contract cases where the claimant has not suffered the loss of a vested property right or has himself paid the bill. Requests for prejudgment interest have also been denied to parties claiming under contract for damages that were essentially based on personal injury.

It is clear that the Fourth District Court of Appeal has created an unnecessary and inequitable dividing line between contract based claims and personal injury claims with regard to which ones justify prejudgment interest. This court should reject the faulty distinction made and, instead, follow the reasoning of its own decisions and that of the Third District that prejudgment interest is available only when the plaintiff has suffered a loss. LUMBERMANS has paid the full amount of PERCEFULL's medical expenses and it would be inequitable to require it to pay anything more.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED BY HOLDING THAT PREJUDGMENT INTEREST IS AVAILABLE TO AN INSURED UNDER A HEALTH INSURANCE POLICY WHERE THE INSURED HAS BEEN CHARGED NO INTEREST BY MEDICAL FACILITIES, AND HAS SUFFERED NO LOSS OF A VESTED PROPERTY RIGHT.

In the underlying case, the Fourth District Court of Appeal held that Respondent, PERCEFULL was entitled to prejudgment interest on his claim against Petitioner, LUMBERMANS even though PERCEFULL had not been charged any interest by the medical facilities nor had he personally paid any medical bills. By doing so the Court drew an arbitrary and inequitable line between contract cases and personal injury cases, awarding prejudgment interest to parties on the contract side of the line and denying it to parties on the personal injury side. Upon determining that PERCEFULL's claim was contractual in nature the Court held that PERCEFULL was, automatically, entitled to prejudgment interest. The Fourth District Court of Appeal rejected the applicability of this court's opinion in Alvarado v. Rice, 614 So. 2d 498 (Fla. 1993), reasoning that Alvarado only applied to personal injury cases and conflicted with Cigna Property & Casualty Co. v. Ruden, 621 So. 2d 714 (Fla. 3d DCA 1993).

In support of this new criteria for awarding prejudgment interest, the Court cited Independent Fire Ins. Co. v. Lugassy, 593 So. 2d 570 (Fla. 3d DCA 1992); Parker v. Brinson Const. Co., 78 So. 2d 873 (Fla. 1955); and English & American Insur. Co. v. Swain Groves, Inc., 218 So. 2d 453 (Fla. 4th DCA 1969). Although these cases do note that prejudgment interest is typically permitted in

contract actions, they do not justify the sharp distinction that the Fourth District Court of Appeal has drawn between contract actions and personal injury actions with regard to which type of action permits collection of prejudgment interest. An analysis of their facts shows that those decisions follow the Alvarado reasoning and are not a reason for creating a new distinction.

For example, in both Independent Fire Ins. Co. v. Lugassy and English & American Ins. Co. v. Swain Groves, the claimant sustained the loss of property. In Lugassy, the claimant insured suffered personal property losses and loss of use of his home. Although the Court did not specifically address whether there had been any out of pocket loss, the facts clearly show there were. Therefore, the Court's award of prejudgment interest to the claimant was appropriate under the Alvarado reasoning. Similarly, in English & American Insur. Co. v. Swain Groves the claimant insured suffered the loss of his citrus crops which were destroyed by a hurricane. This decision would also have conformed to the Alvarado rule.

Obviously in these cases prejudgment interest was a proper element of damages. The claimants lost the use of an asset which, had it not been lost, could have been continually employed to earn interest. Because the claimants lost their assets from the time the loss was sustained until the time the assets were recovered they are entitled for damages for the actual loss of earning power, that is interest. In this case PERCEFULL did not lose the use of an asset because he did not pay the medical bills incurred at the medical facilities. Furthermore, he was not charged interest by

the medical facilities for the time the bills were outstanding. Therefore PERCEFULL has not incurred the loss of "interest" that he claims.

Even the Fourth District Court of Appeal's reference to the public policy arguments in Lugassy: that allowance of prejudgment interest 1) encourages insurers to quickly settle and 2) corrects the inequities in contracts drafted by the insurer, fails to justify drawing a bright line distinction simply based on the nature of a claim. The policies listed are still upheld when prejudgment interest is awarded to only those who have sustained the loss of a vested property right by either paying the bills, being charged interest, or losing the use of another asset. Insurers will still be inclined to settle in order to avoid accumulating prejudgment interest whenever the claimant has paid anything out of his own pocket, suffered any property loss, or lost the use of any personal assets. Other concerns such as availability of claims for bad faith failure to settle and for attorneys fees will also continue to encourage insurers to timely settle.

Awarding the windfall that PERCEFULL has requested will actually have the opposite affect. An insured who is personally going to earn one percent (1%) of the amount in dispute for every month it is in dispute will naturally want to prolong the litigation as long as possible, especially since the attorneys' fees for doing so will also be paid by the insurer. This is justified when the insured has lost the use of an asset such as

actual money or a home, but it is not justified when the insured has lost nothing.

Finally, the district court's reliance on Parker v. Brinson Construction Co. also fails to justify its cursory distinction between contract cases and personal injury cases. In Parker the Court addressed the issue of whether a claimant suing for withheld worker's compensation benefits was entitled to prejudgment interest. In explaining its decision to allow prejudgment interest, the court stated:

> "Such rule places no hardship upon the carrier or employer and compensates the beneficiary for the loss of the use of 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 that 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..."

Parker, 78 So. 2d at 876.

Like the other decisions cited by the district court, Parker actually militates against the award of prejudgment interest to PERCEFULL. In Parker prejudgment interest was given to the workers' compensation claimant in because he was without money that he was due and required to borrow (hire) money to replace it. Under those circumstances the claimant should be awarded prejudgment interest, of course, but the decision does not at all support an award to someone who has not made those out of pocket expenditures or been charged interest by the facilities.

The Fourth District Court of Appeal committed reversible error by holding that PERCEFULL was entitled to prejudgment interest on

his claim against LUMBERMANS. It ignored the sound reasoning employed in cases such as Alvarado and Ruden and instead drew an arbitrary and inappropriate line between contract cases and personal injury cases, awarding prejudgment interest to claimants on one side of the line and denying it to claimants on the other.

Prejudgment Interest Not Available When No Property Right is Lost

Regardless of the nature of a claim (contract or personal injury), prejudgment interest should not be permitted when the claimant has suffered no loss of a vested property right. In other words, if the claimant has not paid out any money or lost the use of an asset, he is not entitled to prejudgment interest.

In Ruden, the Third District Court of Appeal addressed the issue of whether the plaintiff insured was entitled to prejudgment interest on his claim against defendant insurer. In the underlying action, the plaintiff sued his insurance company for claims made under his marine insurance policy. The trial court ruled in favor of the plaintiff and included prejudgment interest in the award. The plaintiff was even awarded prejudgment interest for items which he had never actually paid. Ruden at 715. The defendant appealed the award of prejudgment interest on these unpaid items.

The Third District Court agreed with defendant's argument and ruled that prejudgment interest could not be awarded on items never actually paid by the insured. In reaching its decision, the Court relied on the reasoning in Alvarado (holding that plaintiff was not entitled to prejudgment interest on medical bills which she had not

paid prior to final judgment). The Ruden court correctly reasoned that since the plaintiff had suffered no loss of property he was not entitled to prejudgment interest on them.

When the Florida Supreme Court decided Alvarado, it set down the only distinction necessary in determining whether prejudgment interest is available to a plaintiff. In that case, the plaintiff sued the defendant for personal injuries suffered in an automobile accident. The jury awarded plaintiff a substantial award and the defendant satisfied it. The plaintiff then filed a post-trial motion requesting prejudgment interest on the amount awarded for past medical expenses. The motion was denied by the trial court and the denial was affirmed by the Fourth District Court of Appeal. The issue was then certified to this court as a matter of great public importance.

On certification this court held that the plaintiff was not entitled to prejudgment interest for her past medical expenses. This holding was based on the fact that the plaintiff had not paid any of her medical bills prior to the entry of final judgment. It was noted that the plaintiff "had not suffered the loss of a vested property right... nor had she been forced to use her private funds to pay medical bills." In answering the certified question this court stated "a claimant in a personal injury action is only entitled to prejudgment interest on past medical expenses when the trial court finds that the plaintiff has made actual, out of pocket payments on those medical bills prior to the entry of judgment." The opinion also noted that as of the date of the decision, all

cases recognizing a right to prejudgment interest had involved the loss of a vested property right.

This court should reach the same ultimate conclusion in the instant case as was reached in Ruden and Alvarado: prejudgment interest is unavailable when the plaintiff suffered no loss of a property right. In the instant case, as in Ruden, the claimant (PERCEFULL) is basing his claim on a contract of insurance. The only distinction is that PERCEFULL's policy was for health insurance and the Ruden plaintiff's policy was for marine insurance. As did the plaintiff in Ruden, PERCEFULL in the instant case is requesting prejudgment interest on items which he never actually paid. This court should follow the reasoning in Ruden and deny PERCEFULL prejudgment interest.

The instant case is also very similar to Alvarado. As did the plaintiff in Alvarado, PERCEFULL is attempting to collect prejudgment interest on past medical bills which he never actually paid prior to final judgment and for which he was never charged interest. PERCEFULL, like the plaintiff in Alvarado has suffered no loss of a vested property right.

The only distinction between Alvarado and the instant case is that Alvarado was a personal injury case and the instant action is a contract case. Although this is the distinction the Fourth District Court of Appeal focused on in holding that PERCEFULL was entitled to prejudgment interest, it is an illusory distinction without meaning. This court did not rely on such a distinction in deciding Alvarado, rather, this Court distinguished between parties

who sustained losses of property and those who did not. Those claimants who have not paid the charges and have not been charged interest are not entitled to interest.

Even the Fourth District Court of Appeal has itself made the distinction based upon when the vested property right is lost. In ACR Electronics, Inc. v. Switlek Parachute Company, Inc., 624 So. 2d 1144 (Fla. 4th DCA 1993) the defendant breached a contract with the plaintiff to supply him with a product. The court refused to award prejudgment interest from the date the defendant breached the contract. Rather, the court held that prejudgment interest was proper only from the period at which the plaintiff purchased the product from another party at an increased price, i.e at the time the plaintiff suffered damages.

As did the courts in Ruden, Alvarado, and ACR, this court should deny the claimant prejudgment interest for items which he had not actually paid prior to the entering of final judgment. PERCEFULL has not paid out any money, has not suffered any property damage, has been charged no interest nor has he lost the use of any of his assets.

Nature of the Claim Does Not Dictate Availability of Prejudgment Interest

Although the Fourth District Court of Appeal draws a sharp line between contract claims and personal injury claims with regard to availability of prejudgment interest, several cases demonstrate that such a line is arbitrary. Several cases have held that a

claimant is not entitled to prejudgment interest even when his claim is based on contract.

In Cooper v. Aetna Casualty & Surety Company, 485 So. 2d 1367 (Fla. 2d DCA 1986), the Court held that the plaintiff was not entitled to prejudgment interest on his claim against his insurance company because his claim, although based on a contract was essentially one for personal injury damages. After an automobile accident with another individual, the Cooper plaintiff sued his insurance company under the "uninsured / underinsured" portion of his policy. Id. at 1367. Following final judgment in the plaintiff's favor, the trial court denied the plaintiff's request for prejudgment interest. The Second District Court of Appeal upheld the denial of prejudgment interest, stating "Although the Cooper's action was based upon a contract of insurance, it was still essentially one for the recovery of personal injury damages, and accordingly, the Coopers were not entitled to prejudgment interest."

The Fourth District Court of Appeal followed the reasoning of Cooper in two similar cases: United Services Automobile Association v. Strasser, 530 So. 2d 1026 (Fla. 4th DCA 1988) and Aetna Casualty & Surety Company v. Langel, 587 So. 2d 1370 (Fla. 4th DCA 1991). In Strasser, the estate of an individual killed in an automobile accident sued the decedent's insured under an uninsured motorist provision in the policy. Strasser at 1027. The Strasser court affirmed the trial court's denial of prejudgment interest to the plaintiff, reasoning that even though the action

was in the nature of contract, it was essentially one for personal injury damages. Likewise in Langel, the Fourth District Court of Appeal recognized that although the plaintiff's claim under his mother-in-law's uninsured motorist policy arose out of contract, the damages were essentially in the nature of personal injury and, therefore, prejudgment interest was unavailable.

In addition, the United States District Court of the Southern District of Florida followed the reasoning of Cooper in O'Conner v. Kawasaki Motors Corporation, U.S.A., 699 F.Supp. 1538 (S.D. Fla. 1988). In O'Conner a renter of a Jet Ski brought a products liability action against the Jet Ski distributor after he was injured on the Jet Ski. The renter's claims included breach of express and implied warranty. One issue dealt with by the Court was whether the plaintiff was entitled to prejudgment interest on his claim. The Court held, relying on Cooper, that even though the plaintiff's warranty claims were contractual, his claims were essentially for personal injury and, therefore, prejudgment interest was inappropriate.

The Cooper line of cases clearly show that the appropriateness of prejudgment interest can not be determined solely by labeling a case as a contract case or a personal injury case. Courts must make the determination as to whether prejudgment interest is appropriate in each particular case. It is error for a court to make this determination by referring to the arbitrary dividing line suggested in the instant case by the Fourth District Court of Appeal.

If any dividing line should be drawn, it should be between the claimants who have suffered the loss of a vested property right and those that have not. Prejudgment interest should be awarded to those individuals who have suffered the loss of property, regardless of whether their claim is based on contract or personal injury. An individual who has sustained no out of pocket loss should not be further compensated with prejudgment interest.

A Windfall Profit is Not a Proper Element of Contract Damages

As a final point it should be noted that the result reached by the district court is contrary to its own reasoning. The court decided that prejudgment interest was allowed because it is traditionally a part of contract damages. This is not a correct statement of the law. Damages in a breach of contract case are intended to place the parties in the same position that they would have been had the contract been fully performed. Juvenile Diabetes Research Foundation v. Rievman, 370 So. 2d 33 (Fla. 3d DCA 1979); Pembroke v. Caudhill, 160 Fla. 948, 37 So. 2d 536 (1948); Maxfly Aviation, Inc. v. Gill, 605 So. 2d 1297 (Fla. 4th DCA 1992). PERCEFULL was placed in the position in which he would have been had the contract been fully performed when the amounts due under the contract were paid to the facilities and the debt related to those charges were totally satisfied because the facilities charged no interest. The only debt still owed by PERCEFULL is for charges that were not covered by the contract. If PERCEFULL has been fully compensated under the contract and the law, what justification is

there to pay him more? Requiring LUMBERMANS to pay prejudgment interest would actually place PERCEFULL in a position that is better than he would be had the contract been fully performed.

The award of prejudgment interest to a plaintiff simply because it is a contract claim would be analogous to awarding lost wages to a personal injury claimant who has lost no wages. Certainly lost wages has historically been an element of damages in a personal injury action, but it cannot be awarded unless the claimant has suffered that type of damage. Prejudgment interest should likewise be limited to plaintiffs who have incurred that element of damages. The award should be limited to situations where the plaintiff has been charged interest by the health care provider, paid the bills with his own funds, or done without the use of his own property. To do otherwise would be a gift to the claimant of excess damages.

CONCLUSION

The award of prejudgment interest to a party who has suffered no out of pocket loss simply because he brought suit to collect payment of money to health care providers should not be allowed because it sanctions recovery of a windfall profit by an insured. This court should quash the decision of the District Court and hold that the recovery of prejudgment interest is allowed only where the Plaintiff has lost a vested property right by paying the bills personally, being charged interest by the health care providers or losing the use of an asset.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to EDWARD A. PERSE, Esquire, Perse & Ginsburg, P.A., Co-Attorney for Percefull, 410 Concord Building, Miami, Florida 33130; JEFFREY M. LIGGIO, Esquire, Attorney for Percefull, 804 North Olive Avenue, West Palm Beach, Florida 33401, this 12th day of September, 1994.

SELLARS, SUPRAN, COLE
& MARION, P.A.
Attorneys for Defendants/
Appellants
1250 Northpoint Parkway
P.O. Box 3767
West Palm Beach, FL 33402

By _____
Daniel M. Bachi, Esquire
Fla. Bar No. 443808

By _____
Bard D. Rockenbach, Esquire
Fla. Bar No. 771783