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SID J. WHITE
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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Supreme Court No.: 84,045

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 LUMBERMANS MUTUAL CASUALTY,

Petitioner,

vs.

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

Respondent.

_____/

AMENDED
BRIEF ON THE MERITS OF RESPONDENT KAY C. PERCEFULL, AS GUARDIAN OF THE PERSON AND PROPERTY OF RIP VON PERCEFULL, INCOMPETENT

LIGGIO & LUCKMAN
and
PERSE, P.A. and GINSBERG, P.A.
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West Palm Beach, FL 33405
Counsel for Respondent

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I.

INTRODUCTION

1. "PERCEFULL" or Plaintiff shall refer to PLAINTIFF/ RESPONDENT, KAY C. PERCEFULL, as guardian of the person and property of RIP VON PERCEFULL, incompetent.

2. "DEFENDANTS" shall collectively refer to PETITIONER, LUMBERMANS/RESERVE/PROFESSIONAL.

3. "PETITIONERS" shall collectively refer to LUMBERMANS/RESERVE/PROFESSIONAL.

4. "R" shall refer to the original record on appeal.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

A.

PREFACE

PETITIONERS statement of the case and the facts simply overlooks the most pertinent facts as to the prejudgment interest issue. PERCEFULL deems it necessary, therefore, to include herein this statement of case and facts.

B.

THE PERTINENT FACTS

The LUMBERMANS insurance policy in question was issued with an effective date of May 9, 1984. The policy term is six months, and it had been continuously renewed and was maintained in force.

PERCEFULL'S Amended Complaint (R 1191-1239) contains the following pertinent allegations:

> "6. On or about the 5th of June, 1984, RIP VON PERCEFULL, was involved in an automobile/motorcycle collision in which he suffered severe trauma and injuries.
>
> "7. As a result of the injuries received in the above-mentioned collision, RIP VON PERCEFULL, has been forced to undergo several periods of hospitalization. He will continue to require extensive medical care treatment and hospitalization for a indeterminate time in the future. He has extremely gross brain injury which requires a diverse specialized care program.
>
> "8. On the date of the aforesaid collision, RIP VON PERCEFULL, had two policies of hospitalization/health insurance in full force and effect. The first policy was with New York Life Insurance Company for hospital and surgical expenses . . . The second policy was with the DEFENDANT, LUMBERMANS and was a major medical expense policy. . .

"14. The LUMBERMANS policy . . . specifically states on the cover thereof "excess insurance". However, the LUMBERMANS policy is primary for any benefits which are specifically excluded and/or not covered by the aforementioned New York Life policy.

"19. The PLAINTIFF has furnished the DEFENDANTS, and each of them, with timely notice and proof of claim of all hospital and medical expenses incurred from the date of the injury up till and including the present time and has otherwise performed all conditions precedent to entitle her to recover under the insurance policies for all of RIP VON PERCEFULL'S medical expenses including expenses incurred in the various hospitalizations.

"20. Up to the date of fling this Complaint, the DEFENDANTS, LUMBERMANS and/or RESERVE and/or PROFESSIONALS, and each of them, have refused and continue to refuse to pay the such medical expenses.

The underlying lawsuit was filed after years of the DEFENDANTS lack of payments/inadequate payment of numerous medical expenses which, as of the filing of this suit in the aggregate, amounted to several hundred thousand dollars. Claims for expenses under the aforesaid policy were processed through submission by PERCEFULL'S attorneys to the DEFENDANTS; each submission made with a cover letter. (For example, see PLAINTIFF'S exhibits 1-13 and Exhibit list at R.1512, and PLAINTIFFS' 3-13 and 18, which are listed at R.1518). During the course of dealings between PERCEFULL and the DEFENDANTS in the years prior to commencement of this action, DEFENDANTS never asked for any follow-up information in regard to any of the bills submitted. DEFENDANTS merely processed, adjusted or paid the bills as they saw fit. This conduct continued, despite the fact that long prior to commencement of this action, PERCEFULL'S counsel filed two Civil Remedy's notices with DEFENDANTS and threatened them with a bad faith action (R. 745-

755). Mary Lynn Marcotte, Assistant Vice-President of Insurance Services and Claims Manager of the DEFENDANT, PROFESSIONAL, testified that it was not until five months after this action was commenced that DEFENDANTS ever asked for a breakdown. (R. 243)

This case was finally scheduled for a jury trial on June 17, 1991. The trial judge stated that he would not try this case and strongly recommended -- not to say directed -- the parties to mediate the case that day. Mediation commenced immediately. During the course of mediation, DEFENDANTS complained that they had not had enough time to evaluate the situation. This, at a point in time when the parties had been in litigation for at least nine months. PERCEFULL'S counsel then agreed to give DEFENDANTS 45 days to further evaluate the situation and either pay certain bills or file objections to whichever bills they found objectionable. (R.597-625) After that date, the DEFENDANTS finally commenced their efforts to evaluate or re-evaluate PERCEFULL'S claim in earnest. On August 7, 1991, the DEFENDANTS unilaterally paid $6,402.21 for various charges made by PERCEFULL's medical providers which were part and parcel of this litigation. Most, if not all, of those charges had been outstanding and unpaid for several years.

On August 28, 1991, this case came on for a non-jury trial before the Court on those bills that the DEFENDANTS still contested. At the beginning of the hearing, DEFENDANTS' counsel stated that DEFENDANTS were then prepared to pay some $225,000 of new medical bills. Counsel stated that there were seventy-some thousand dollars that DEFENDANTS were still objecting to paying and

that the Court would have to, eventually, rule on the number of future bills which DEFENDANTS had to pay. (R. 45-46) Again, most, if not all, of the additional medical bills that the DEFENDANTS had finally agreed to pay had been outstanding for several years. Although at least one Provider, New Medico, had charged interest on the unpaid balance, (R-1518). DEFENDANTS made absolutely no provision for the payment for pre-judgment interest as to any of the bills that they finally agreed to pay and moreover, strenuously objected to having to pay any pre-judgment interest as to the still disputed bills.

On January 31, 1992, the trial court entered a final judgment. The Court denied PERCEFULL'S claim for prejudgment interest stating:

> "11. With respect to PLAINTIFF'S demand for prejudgment interest on the medical bills and controversy, the 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 the amounts in controversy, the PLAINTIFF is not entitled to prejudgment interest on those bills and therefore, PLAINTIFF'S claim for prejudgment interest is hereby denied."

In due course, DEFENDANTS timely commenced an appeal and, PERCEFULL, cross-appealed on several grounds, including the Trial Court's denial of the prejudgment claim. The Fourth District, subsequent to a motion for rehearing as to its original opinion, issued a decision on June 22, 1994. LUMBERMANS MUTUAL CASUALTY COMPANY, et al. v. PERCEFULL, 638 So.2d 1026 (Fla. 4th DCA June 22, 1994).

The Fourth District reversed the Trial Court's denial of pre-judgment interest 593 So.2d at 572, holding:

> "The denial of prejudgment interest is reversed. See Independent Fire Insurance Co. v. Lugassy, 593 So.2d 570 (Fla. 3rd DCA 1992). While appellant claims that Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985), requires interest only on out-of-pocket losses, neither Argonaut nor the later case of Alvarado v. Rice, 614 So.2d 498 (Fla. 1993), involve the issue of prejudgment interest in a contract action. It has long been the rule that in contract actions interest is allowable from the date that the debt is due. Parker v. Brinson Constr. Co., 78 So.2d 873 (Fla. 1955). English & American Ins. Co. v. Swain Groves, Inc., 218 So.2d 453 (Fla. 4th DCA 1969). We do not interpret Argonaut or Alvarado as receding from this rule.
>
> In the instant case the policy provided for immediate payment following written proof of loss. Thus, prejudgment interest is payable from that date. In so finding, we are not only following established case law but also furthering the two public policies noted in Lugassy."
>
> > "(1) It encourages the prompt settlement of insurance claims, see Wollard v. Lloyd's & Companies of Lloyd's, 439 So.2d 217 (Fla. 1983), and (2) corrects the inequity created in contracts drafted by insurers which would deny prejudgment interest to the insured as an element of "just compensation" for pecuniary loss See Argonaut..."

The Fourth District did, however, certify conflict with the Third District Court of Appeals in Cigna Property and Casualty Company v. Ruden, 621 So.2d 714 (Fla. Third DCA 1993).

In due course, the instant Petition was filed.

III.

SUMMARY OF ARGUMENT

The District Court's decision is a proper application of the well settled rule in contract actions that prejudgment interest is recoverable from the date that the debt is due. This rule, especially as to insurance contracts, encourages the prompt settlement of insurance claims and corrects the inequity created in contracts drafted by insurers who administer policies on an ad hoc arbitrary basis so as to deny and delay payment of policy proceeds.

In the instant case, as opposed to the argument presented by PETITIONER, DEFENDANTS were requested over several years to properly and expeditiously pay benefits. PERCEFULL'S counsel cajoled, begged and even threatened DEFENDANTS with bad faith if the claims weren't properly paid.

The DEFENDANTS were really the ones who received a gift and want to hold on to the gift, because by virtue of their failure to properly pay insurance benefits for PERCEFULL'S medical expenses, the DEFENDANTS retained the use of the money they were obligated to pay under the contract of insurance. An award of interest is certainly not a wind-fall for PERCEFULL, who has been subjected to these unpaid medical balances for years now.

Denial of prejudgment interest to PERCEFULL violates the public policy of the State of Florida, as stated in prior decisions of this Court and the lower Appellate Courts in this state, as well as, the legislative requirements of Fla. Stat. §627.613.

IV.

ARGUMENT

PETITIONERS, base their argument on four separate grounds which, for purposes of clarity, the Respondent, PERCEFULL, will address seriatim.

PETITIONERS' first ground is that PERCEFULL'S insurance policy is a health insurance policy, whereas two of the cases cited below, Independent Fire Insurance Company v. Lugassy, 593 So.2d 570 (Fla. 3rd DCA 1992); and English and American Insurance Company v. Swain Groves, Inc., 218 So.2d 453 (Fla. 4th DCA 1969) involved property losses. PETITIONERS attempt to distinguish those cases on the basis that those losses involved the loss of use of certain "assets" whereas PERCEFULL'S claim for unpaid medical bills was not such an "asset". In so doing, PETITIONERS ignore what the Fourth District is Swain Groves, supra said at page 457:

> "In actions ex contractu it is proper to allow interest at the legal rate from the date the debt was due. The fact that there is an honest and bona fide dispute as to whether the debt is actually due has no bearing on the question. 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, 78 So.2d 873 (Fla. 1955)."

In accord see Warren v. Old Dominion Insurance Company, 465 So.2d 1376, 1378 (Fla. 5th DCA 1985).

PETITIONERS then argue that a "windfall" of prejudgment interest at the rate of 1% per month would induce insureds such as PERCEFULL to prolong the litigation! Such argument ignores the

real world. It should certainly be no surprise to PETITIONERS that a health insurer's refusal to pay benefits can affect the ability of the insured to receive care. It should certainly be no surprise that insureds could be and often are subject to harassment by health care providers and/or collection agencies. Certainly, it should be no surprise to PETITIONERS that outstanding medical bills would, at the very least, impair the credit of their insureds. Further, such argument ignores the fact that in such cases, and especially herein, the insurance company had the use and benefit of the monies that it was obligated to pay pursuant to the policy of insurance that DEFENDANT/LUMBERMANS issued up until and including the present time. This case is a classic example of the inequity of bargaining power between insureds and their insurers as noted in Lugassy, supra, and further by this Court in Wollard v. Lloyd's and Companies of Lloyd's, 439 So.2d 217 (Fla. 1983).

In this case, DEFENDANTS certainly could have avoided any liability for prejudgment interest by properly adjusting and paying the bills upon receipt. DEFENDANTS apparently could not even determine their liability, even after several years of demands to pay, after PERCEFULL'S counsel's spoon fed them throughout the litigation up to the very date of trial.

Finally, PETITIONERS attempt to distinguish this Court's previous pronouncement in Parker v. Brinson Construction Company, 78 So.2d 873 (Fla. 1955) as cited by the Fourth District in its decision below. Parker, involved the wrongful withholding of workers' compensation payments.

Any distinction between this case and Parker is weak at best and, it is respectfully submitted, is in fact no distinction at all.

PETITIONERS second argument, is that an insured is not entitled to prejudgment interest where no "property right" is lost. PERCEFULL respectfully submits that such ground is nothing more than a reargument of the first ground since, at least by implication, PETITIONERS are suggesting a different rule for property and casualty insured losses as opposed to PERCEFULL'S health insurance claims (as well as perhaps life and disability insurance claims). In so doing, PETITIONERS cite both the Third District Court of Appeals decision in Cigna Property and Casualty v. Ruden, 621 So.2d 714 (Fla. 3rd DCA 1993) and further discuss this Court's analysis in Alvarado v. Rice, 614 So.2d 498 (Fla. 1993).

PETITIONERS ignore the fact that PERCEFULL has an absolute right under the contract of insurance to prompt, adequate payment. Frankly, the Third District Court of Appeals in Ruden, supra was wrong, and its reliance on Alvarado, supra was misplaced. In Alvarado the Plaintiff did not have any contract with the Defendant to pay medical bills. Such case was a personal injury action and the verdict in the trial court established the liability of the defendant for damages. That is not the case herein, and it's not even close.

Examining for a moment the circumstances of Ruden, supra; Ruden involved a claim under a Marine insurance policy for coverage

of reasonable, incidental and consequential costs and salvage expenses incurred by the insured due to the loss of his vessel. The Third District reversed the pre-judgment interest award for several items not yet paid by the insured, with a caveat that if the vendors charged interest to the insured, such interest would be included in the damage award. It is apparent that the Third DCA is unsure within itself as to the proper rule in regard to prejudgment interest in insurance cases. Please compare Ruden, supra, with State Farm Insurance Company v. Albert, 618 So.2d 278 (Fla. 3rd DCA 1993) and Lugassy supra.

Further, PETITIONERS cite the case of A. C. R. Electronics, Inc. v. Switlek Parachute Company, Inc., 624 So.2d 1144 (Fla. 4th DCA 1993). That case involved a commercial contract dispute between a buyer and seller of parts used in the buyer's manufacturing business. The seller attempted to terminate the contract by refusing to sell at the contract price and as a result, the buyer had to mitigate his damages by having to pay more to purchase the parts from another source. The Fourth District held that, in that commercial context, prejudgment interest was recoverable, but only from the dates that the buyer covered and/or mitigated by purchasing such parts elsewhere.

Such case is distinguishable from this case. Surely PETITIONER is not implying that an insured facing hundreds of thousands of dollars of medical bills is not entitled to prejudgment interest until the insured purchases insurance to pay those bills elsewhere? In this case, the trial Court found and the

Fourth District Court agreed that the insurance company, by not following its own policy requirements in regard to proof of loss was obligated to accept PERCEFULL's proof of loss, and thus pay covered expenses. Indeed a review of those expenses which were denied below reveals them to be an extremely small percentage of PERCEFULL's overall claim. DEFENDANTS neither paid the bulk of PERCEFULL's claims nor did they, until well into the underlying litigation, even ask for a breakdown of the bills so that they could analyze coverage of such bills pursuant to the terms of the policy. All this despite PERCEFULL'S repeated requests for payment, cajoling, and threats of bad faith!

As their third ground, PETITIONERS cite a number of uninsured motorist cases Cooper v. Aetna Casualty & Surety Company, 485 So.2d 1367 (Fla. 2nd DCA 1986); 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) and one Federal product liability case O'Conner v. Kawasaki Motors Corporation, U.S.A., 699 F.Supp. 1538 (S.D. Fla. 1988), which included a breach of warranty count. Even though the uninsured motorists cases involved contracts of insurance, such cases all arose in tort. The uninsured motorist carrier's duty to pay is contingent upon a finding of liability of the tortfeasor, and damages caused thereby. Further, in the products liability case, O'Conner, supra, as correctly pointed out by PETITIONERS the Court noted even though the Plaintiff's personal injury warranty claim were contractual, the injuries still arose in tort, hence there was

no right to prejudgment interest. There is nothing in any of those cases which would justify a denial of prejudgment interest herein.

As their final ground, PETITIONERS again argue that an allowance of prejudgment interest to PERCEFULL is a windfall profit. The cases cited by PETITIONERS are inapposite, neither Juvenile Diabetes Research Foundation v. Rievman, 370 So.2d 33 (Fla. 3rd DCA 1979); nor Pembroke v. Caudhill, 37 So.2d 538 (Fla. 1948) discuss prejudgment interest. Maxfly Aviation, Inc. v. Gill, 605 So.2d 1297 (Fla. 4th DCA 1992) cited by PETITIONERS, in fact specifically included an award of prejudgment interest but limited same to the period of time until the Plaintiff in that case was able to sell the aircraft which was the subject matter of the litigation.

PETITIONERS, in their entire argument, would have this Court ignore the longstanding public policy of the State of Florida in insurance contract cases. Parker, supra at page 875 states:

> "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 . . .
>
> Inherent in the act itself is the intention that if such an award is wrongfully withheld (and under the law it is wrongfully withheld if it be eventually determined that it should have been paid), the person or the party which should have paid it should be compelled to pay, as damages for its detention, lawful interest thereon from the date it should have

been paid, and the amount thereof is to be determined by applying Section 687.01."

In accord, Warren v. Old Dominion Insurance Company, supra; Underwriters Insurance Company v. Kirkland, 490 So.2d 149, 153 (Fla. 1st DCA 1986); State Farm Fire and Casualty Company v. Albert, supra and Mosure v. Mutual Hospital Insurance, Inc., 525 So.2d 452 (Fla. 2nd DCA 1988).

Mosure, supra, is perhaps the case that most directly contradicts PETITIONERS argument. Mosure, involved a claim by an executor of an estate of a woman who had been insured under a health insurance policy for nursing care. The Second DCA correctly decided that the insured, under that health insurance policy, was entitled to prejudgment interest for unpaid benefits. The Second DCA correctly noted that such ruling was consistent with this Court's previous decision in Argonaut Insurance Company v. May Plumbing Company, 474 So.2d 212 (Fla. 1985).

Finally, as was noted in the facts, the policy which is at issue here was continuously renewed up through the time of the trial on a six month basis. The policy renewal dates were therefore each 9th of May and 9th of November, since the initial effective date of May 9, 1984.

In 1991, the Florida Legislature enacted Florida Statute 627.613 which is applicable to "policies issued, renewed, delivered on or after October 1, 1991." (emphasis added). Such statute specifically provides time limits for payment or denial of health insurance claims. Subsection 6 of such statute specifically provides that:

> "all overdue payments shall bear simple interest at the rate of 10% per year."

There is no requirement in the statute, such as that proposed by PETITIONERS herein, for the insured to prepay any outstanding medical bills as a condition precedent to receiving interest. It is clear, that the Legislature expressed and thus codified the longstanding public policy of the State of Florida that a health insurer that does not timely pay health insurance claims shall be subject to prejudgment interest on any overdue payments regardless of whether or not the insured has advanced the payment of such medical bills.

IV.

CONCLUSION

Based on the aforesaid facts and argument, RESPONDENTS respectfully request this Honorable Court to disapprove RUDEN, supra, and approve the decision below, or in the alternative, distinguish RUDEN from the instant cause, discharge the writ and approve the decision below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 3rd day of November, 1994 to: BARD D. ROCKENBACH, ESQ., Sellars, Supran, Cole & Marion, P.A., 1250 Northpoint Parkway, West Palm Beach, FL 33407-3767.

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