IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Supreme Court No. 84,045

4TH DCA CASE NO: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.
_____/

REPLY BRIEF ON THE MERITS OF PETITIONER

LUMBERMANS MUTUAL CASUALTY COMPANY

Submitted by:

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SUMMARY OF ARGUMENT

A party to a contract is entitled to prejudgment interest under the "loss theory" when that party has suffered a "loss." Prejudgment interest is not awarded as a punishment of the defendant but as further compensation for the plaintiff to make the plaintiff whole.

The award of prejudgment interest under the "loss theory" has no application to this case because Percefull has suffered no "loss." The only contract right that Percefull had was to secure the payment of medical expenses for health care providers. She had no right to secure compensation for herself and, therefore, suffered no loss as a result of the defendant's failure to pay the health care providers. Without a "loss," Percefull has no right to prejudgment interest under the "loss theory."

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.

The Respondent and Amicus Curiae have argued that the contract gave Percefull the right to receive payment for medical bills and, since that payment was withheld, he is entitled to prejudgment interest. This, they argue, is an accurate application of the "loss theory" on which the entitlement to prejudgment interest is based. Argonaut Insurance Company v. May Plumbing, 474 So. 2d 212 (Fla. 1985). Their position is unfounded.

The fallacy of their argument lies in its failure to point out the "loss" which would entitle Percefull to recover prejudgment interest. The "loss theory" is more than just words. It is a reflection of the basic tenet of "damages." A person is entitled to compensation for a loss of a property right or the use of property. In the words of this court:

> "...the loss itself is the wrongful deprivation by the defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss once the finder of fact has determined the amount of damages and the defendant's liability therefor."
>
> Argonaut, 474 So. 2d at 215.

The object of the rule is to make the plaintiff whole and that object requires the imposition of prejudgment interest where the plaintiff has been deprived of some property right which he owned. It does not necessarily follow, however, that all plaintiffs in all contract disputes receive prejudgment interest. The "loss theory" authorizes an award of prejudgment interest only to those plaintiffs who have suffered a "loss."

In the case of a plaintiff who had the right to personally receive

money or property under a contract it is obvious that the plaintiff has suffered a "loss" by not receiving the money or property as promised in the contract. This is the "wrongful deprivation" that this court discussed in Argonaut. In a case such as the one sub judice, however, where the plaintiff had no right to personally receive money or property and is pursuing the lawsuit to secure the payment of money for another, there is no loss to justify the award of prejudgment interest under the "loss theory." Percefull did not lose the use of money or property, was not charged interest and was not "deprived" of any money or property. Percefull cannot be made any more "whole" than he already is. If Percefull is awarded prejudgment interest on payments that were secured for another, then that award will be nothing but profit. It will not represent compensation for any loss to Percefull.

The existence of an identifiable loss is the basic principle on which all damages claims are founded. As this court stated in Hanna v. Martin, 49 So. 2d 585 (Fla. 1950):

> "The fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which give rise to the action. In other words, the damages awarded should be equal to and precisely commensurate with the injury sustained."
>
> Hanna v. Martin, 49 So. 2d at 587.

This concept was also recognized in Fisher v. City of Miami, 172 So.2d 455 (Fla.1965) where this court stated the primary basis for an award of damages is compensation and that the objective is "to make the injured party whole." Prejudgment interest, as an element of damages, is bound by this fundamental restriction and cannot be awarded unless to do so is

necessary for the just compensation of the injured party. Percefull has not been injured as a result of the failure to pay benefits on time and should have no right to prejudgment interest.

The Respondent and Amicus have argued that Percefull had a contractual right to benefits and the simple breach of that right is a sufficient basis for the award of prejudgment interest. This argument ignores the basis for an award of damages and the fact that Percefull's only right was the right to sue to obtain payment for the health care providers. The breach of that contract right by the defendant would only result in a "loss" to Percefull is he paid the medical bills himself or was charged interest by the health care providers. Since the trial court specifically found that Percefull did not pay the bills, a factual finding which has not been disputed, and the record supports the trial court's conclusion that no interest was charged, Percefull has shown no loss. Because of the facts of this case, the mere existence of a contract does not support the award of prejudgment interest.

The cases cited by the Amicus is support of their argument are a very good example of the distinction between the facts of this case and the facts of other prejudgment interest cases. Barnes Surgical Specialties, Inc. v. Bradshaw, 549 So. 2d 1189 (Fla. 2d DCA 1989); International Community Corp. v. Overstreet Paving Co., 493 So.2d 25 (Fla. 2d DCA 1986). Both cases involve plaintiffs who were personally entitled to payment under a contract (commissions and payment for construction services) and were out-of-pocket the amount stated in the contract until they were paid. Those plaintiffs were properly awarded prejudgment interest. Those facts should be distinguished from the facts of this case on the basis that

Percefull was not entitled to any personal compensation. If all the medical bills were paid under the contract in a timely fashion, Percefull would have personally received nothing. Given the fact that the health care providers did not charge interest and Percefull did not pay the bills with his own funds, he is no worse off as a result of the late payment. He is in exactly the same position. It should also be noted that one of the decisions relied upon by the Amicus, Peavy v. Dyer, 605 So. 2d 1330 (Fla. 5th DCA 1992), has been questioned by the originating court and the issue certified to this court. Utica Mutual Insurance Company v. Pennsylvania National Mutual Casualty Insurance Company, 639 So. 2d 41 (Fla. 5th DCA 1994). Although it has been questioned, the opinion appears to have no real relevance to the outcome of this case in any event since it deals with whether interest should be charged on prejudgment interest and not the entitlement to prejudgment interest.

Contrary to the assertions in the Initial Brief, Percefull in his Answer Brief has claimed that New Medico Rehabilitation Hospital charged interest and cited R-1518 for that statement. (See Answer Brief, page 9) Page 1518 of the record is the Plaintiff's Exhibit List and is not the actual exhibit or testimony containing the fact asserted. The New Medico bills in evidence (Plaintiff's Exhibit #27 listed on the exhibit list cited) do not show any interest charges. There is no evidence that Percefull was held liable for interest charges either before or after the payment was made by Lumbermans in September 1991 or that Percefull actually paid interest charges. Upon this evidence the trial court determined that Percefull was not entitled to prejudgment interest. The trial court was eminently correct and its conclusion is supported by the medical bills in

the record. The Fourth District Court of Appeal erred as a matter of law by reversing the trial court's finding when there is record evidence to support it. It is the burden of the plaintiff to prove each element of a breach of contract action, including the damages that flow from the alleged breach. Knowles v. C.I.T. Corporation, 346 So. 2d 1042 (Fla. 1st DCA 1977).

Section 627.613, Fla. Stat. (1991) Was Not in Effect

In addition to the foregoing, Percefull has raised the application of § 627.613, Fla. Stat. (1991) as grounds for an award of prejudgment interest. This is the first time that the terms of that statute have been mentioned by either party. Basically stated, Percefull is attempting to use the enactment of a statute effective October 1, 1991 as a basis for awarding interest on overdue payments that were incurred and paid before October 1, 1991. Clearly this argument should fail.

The answer brief in this petition is the first time that Percefull has ever mentioned the possible application of § 627.613, Fla. Stat. (1991). Neither the trial court nor the Fourth District Court of Appeal were asked to consider it as a basis for the award of prejudgment interest. This court has consistently refused to consider issues appeal that were not considered by the trial court, Century Village v. Wellington E, F, K, L, J, M & G Homeowners Association, 361 So. 2d 128 (Fla. 1978); South Dade Farms v. Peters, 107 So. 2d 30 (Fla. 1958), and the issue of applying § 627.613, Fla. Stat. to this case should meet with a similar fate. The Respondent's argument concerning the legislature's intent when enacting the cited statute is a subject that could have been explored properly had it

been brought timely. It is certainly just as probable that the legislature's only intent was to create a rate at which interest which is due under the common law should be calculated and that no one intended to alter the law of entitlement. Whatever the legislative intent may have been, it is impossible to determine this issue at this late date.

Even ignoring the untimeliness of this issue, being brought for the first time in this court, the statute has no application to the facts of this case because the payment by Lumbermans was made on September 3, 1991 and the terms of § 627.613, Fla. Stat. only apply to policies issued or renewed after October 1, 1991. The policy in this case was first issued in 1984 and renewed every six months after that date. The payment of medical bills upon which the claim for prejudgment interest is based occurred on September 3, 1991 and was for payment of bills which were, obviously, incurred before that date. All of the events that would be relevant to the application of a statute, policy issue, policy renewal, date of injury, date of treatment and date of payment, all occurred before § 627.613, Fla. Stat. was effective.

To use a statute that was effective on October 1, 1991 to justify an award of prejudgment interest on payments made before October 1, 1991 would clearly be a violation of the contracts clause of the Florida and United States Constitution prohibiting retroactive application of a statute unless the legislature makes clear its intention to have the statute apply retroactively. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976); Florida Constitution Art. I, Sec. 10; United States Constitution, Art. I, Sec. 10. The mere fact that this contract was renewed after October 1, 1991 does not justify holding Lumbermans responsible for its actions under the new terms

of the contract. The statute must have been in effect on the date the policy was renewed before breach in order to apply to the claim for the breach.

Policy Considerations

The brief of the Academy of Florida Trial Lawyers makes the argument that the right to have payments made to a third party is a property right which has been taken away from the insured as a result of late payment. (AFTL Brief, page 9) Equating the right to receive property personally with the right to have another receive property is a great leap of logic, however, since the two situations are so different. Cases awarding prejudgment interest do so because the plaintiff lost the use of something that was his and to which he had the immediate right of possession. That is a vested property right. Percefull, on the other hand, has no immediate right to possession of anything. Percefull only has the right to file a lawsuit to collect money for a third party, a right which is clearly not property. Obviously it is in Percefull's best interest to file a lawsuit so that the bills are paid because, without doing so, he will be responsible for payment. If he actually did pay the bills, then he would have lost a vested property right.

And that is the distinction that needs to be drawn in this case. It is the difference between the potential loss of a property right and the actual loss of property. While Percefull may have had the risk of payment or the request for payment, which would be a potential loss, he never had actual loss of a property right because of payment or interest charges. He has lost nothing.

The argument that Percefull is entitled to prejudgment interest because he received collection notices, harassing telephone calls or had his credit rating impaired is similarly without merit because those would be separate elements of damages for which Percefull could have sought compensation if there was proof that such credit problems caused damages. See generally, Daniel International Corporation v. Better Construction, Inc., 593 So. 2d 524 (Fla 3d DCA 1991). If Percefull incurred damages such as impaired credit as a result of a breach of the contract, then that would be something that he could plead and prove at trial. To argue that a person is automatically entitled to a windfall profit from prejudgment interest because he may have received collection notices is contrary to the basic rule of compensatory damages. Prejudgment interest, like every other element of damages, requires proof that a person has suffered a loss that should be compensated.

Another policy consideration discussed by the Academy of Florida Trial Lawyers concerns identifying who had the use of the money during litigation. The Academy urges this court to rule against Lumbermans because Lumbermans had the use of the disputed funds during the litigation. This new rule would require that this court change the basis of an award of prejudgment interest from a loss theory to a benefit theory where the focus would not be on whether the plaintiff suffered the loss of a vested property right but whether the defendant received a benefit by not paying the third party. The court would then award prejudgment interest as a means to wrest from the defendant this gain and give it to the plaintiff as a reward.

The Academy has obviously realized that Percefull can show no loss

and would like this court to focus instead on the benefit derived by the insurer. It is true that Lumbermans would have had the use of the funds during the period before repayment, but why does that fact entitle Percefull to a gift? There is no logical reason why Percefull should be given something that he does not deserve merely to prevent an insurer from deriving a benefit. There would be no fairness in this new rule. This situation is no different than where a health care provider decides to charge less than the reasonable and customary charge for a particular service. When that happens, the insurer is not required to award the insured with a check for the difference between what could have been charged and what was charged. The insurer alone benefits because the health care provider charged less.

The same should be the result when a health care provider decides not to charge interest on an outstanding balance. Whether to charge interest is a matter within the discretion of the health care provider. If the provider does not charge interest, then that is no reason to send the interest that could have been charged to the insured as a gift. The argument that not awarding interest to the insured will force health care providers to automatically charge interest for themselves is, if one can pardon the pun, interesting. The Academy has not set forth by what reasoning the health care providers would come to the conclusion that they need to protect the windfall of the insureds, especially since by charging interest the health care providers automatically deprive the insureds of the windfall, nor has the Academy explained why the outcome of this case would influence the behavior of health care providers at all. Health care providers are entitled to interest if they charged it regardless of the

outcome of this case. The only change that a decision in favor of Lumbermans in this case will force is the closure of a loophole created by the erroneous decision of the Fourth District Court of Appeal through which plaintiffs stand to reap profits. It will not change the actions of health care providers who do not presently charge interest.

Nothing argued by Percefull or the Amicus should effect the outcome of this case. All of the arguments raised rely on general propositions of law allowing for recovery of prejudgment interest without any analysis of whether such a result is warranted. Where an insured is merely enforcing a third party's right to payment and suffers no loss of a vested property right or the loss of use of his own property, prejudgment interest should not be awarded. This court has consistently linked the award of prejudgment interest with the identification of a loss to the party seeking interest and that policy should not be changed.

CONCLUSION

In this contract action the insured is not entitled to prejudgment interest unless she has sustained an actual out-of-pocket loss. The portion of the decision of the Fourth District Court of Appeal dealing with the award of prejudgment interest to Percefull should be quashed and the holding in Cigna Property & Casualty Co. v. Ruden, 621 So. 2d 714 (Fla. 3d DCA 1993) should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to ARNOLD GINSBERG, Esquire, Perse & Ginsburg, P.A., Co-Attorney for Percefull, 410 Concord Blvd., Miami, Florida 33130; JEFFREY M. LIGGIO, Esquire, Attorney for Percefull, 804 North Olive Avenue, West Palm Beach, Florida 33401 and PHILIP M. BURLINGTON, Esquire, Suite 3A, 1615 Forum Place, West Palm Beach, Fl 33401, this 22nd day of November, 1994.

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