THE SUPREME COURT OF FLORIDA

S.Ct. Case No.: SC01-1622
3DCA Case No.: 3D00-2464

Lt. Case No.: 97-18291 CA 20

ALLSTATE INSURANCE COMPANY,
a foreign insurance company,

Petitioner/Cross-Respondent,

vs.

JULIAN MARTINEZ,

Respondent/Cross-Petitioner
_____/

CROSS-PETITIONER'S REPLY BRIEF ON CROSS-APPEAL

Respectfully submitted,

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THE INSURED WAS ENTITLED TO PREJUDGMENT INTEREST FROM THE DATE OF LOSS, RATHER THAN THE DATE OF PAYMENT UNDER THE POLICY.

Allstate intimates that Argonaut Ins. Co. v. May Plumbing Company, 474 So. 2d 212 (Fla. 1995) codifies the rule applicable to tort actions, and that "This is a contract action with an entirely different rule. . .." (Reply/Answer Brief pp. 11-12). That is **not** the case.

In Argonaut, the insurance company paid damages to the owner of an apartment complex damaged by fire due to the negligence of a May Plumbing employee. Argonaut then brought a **subrogation** action against May Plumbing and its insurer and obtained a judgment, to which the trial court added prejudgment interest. The district court reversed the award of prejudgment interest, which was reinstated by this Court. This Court concluded, under the loss theory of prejudgment interest, that the insurer's failure to surrender money it owed, was a wrongful deprivation of the plaintiff's property, which should be restored. This Court observed:

> [N]either 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 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. Id. at 215.

This rule has long been applied to **contract** actions. See e.g. Maingate Development, Inc. v. Lakeview Marketing Group, Inc., 758

So. 2d 1290 (Fla. 4th DCA 2000) (prejudgment interest awarded from date of breach); Public Health Trust v. State, Dept. of Management Services, 629 So. 2d 189 (Fla. 3d DCA 1993) (same for breach of contract for failure to pay hospital expenses on insurance claim); Sanek v. Gerson, 717 So. 2d 117 (Fla. 3d DCA 1998) (same).

Allstate relies heavily on Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 117 F.3d 1328 (11th Cir. 1998) an Eleventh Circuit case interpreting Florida law. (Reply/Answer Brief p. 11). In federal diversity cases, however, a federal court must apply the law of the forum state in which it sits. See LaTorre v Connecticut Mutual Life Ins. Co., 38 F.3d 538, 540 (11th Cir. 1994). A federal appellate court must decide the case the way it appears **this Court** would. See Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1290 (11th Cir. 2001). In the absence of a Florida Supreme Court decision, the federal court "must adhere to the decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." Insurance Co. of North America v. Lexow, 937 F.2d 569, 571 (11th Cir. 1991). Thus this Court is the ultimate arbiter of Florida law – not the Federal Court – which must, by necessity, follow this Court's decisions.

Neither Golden Door nor Columbia Casualty Co. v. Southern Flapjacks, Inc., 868 F.2d 1217 (11th Cir. 1989) actually helps Allstate. In Golden Door the Eleventh Circuit opined in dictum that Lumbermen's Mutual Casualty Co. v. Percefull, 653 So. 2d 389, 390 (Fla. 1995) "seemingly reversed" the Third District's decision

in Independent Fire Ins. Co. v. Lugassy, 593 So. 2d 570 (Fla. 3d DCA 1992). See Golden Door, 117 F.3d at 1341.

There are two problems with this analysis. First, for one case to have the effect of overruling another, "the same questions must be involved, they must be affected by a like state of facts and a conclusion must be reached in hopeless conflict with that in the former case." State ex. rel. Garland v. City of West Palm Beach, 141 Fla. 244, 247-48, 193 So. 297, 298 (1940). Lugassy and Percefull, however, address different issues and are consistent.

In Lugassy, 593 So. 2d at 570, the insurer denied liability for a fire loss, forcing its insured to litigate a claim for benefits under the policy. Although the policy contained a payment of benefits provision similar to that here, the Third District held that the insurer could not invoke it, because "by denying liability, the insurer waive[d] its right to withhold payment pursuant to a contractual provision deferring payment." Id. at 572.

The Lugassy decision was founded on certain policy issues equally applicable here:

> Holding the insurer liable for prejudgment interest recoverable from the time of the loss--where there is a wrongful refusal to pay--is consistent with two public policies as expressed by the Supreme Court of Florida: (1) It encourages the prompt settlement of insurance claims, and (2) corrects the inequity created in contracts crafted by insurers which would deny prejudgment interest to the insured as an element of "just compensation" for pecuniary loss. (Citations omitted).

Independent Fire Ins. Co. v. Lugassy, 593 at 571.

The issue before this Court in Percefull was whether an

insured was required to come out of pocket before he could recover prejudgment interest. In holding that the insured was **not** so required, the Court **approved** the Fourth District's decision, which was based on Lugassy. Id. at 390, approving, Lumbermen's Mutual Casualty Co. v. Percefull, 638 So. 2d 1026, 1028 (Fla. 4th DCA 1994). Indeed, the Fourth District's decision in Percefull stated that its decision "was furthering" the policies outlined in Lugassy. Percefull 638 So. 2d at 1028. Thus, Percefull did not "reverse" Lugassy. Indeed, this Court did not even **mention Lugassy**. These cases are consistent and both remain good law. See Lumberman's Mutual Casualty Co. v. Percefull, 653 So. 2d at 389.

The second problem with the dictum in Golden Door is that the authoring court of Lugassy does not believe its decision was overruled. It continues to distinguish Lugassy on the basis that it involves "a carrier's repudiation of coverage." Liberty Mutual Ins. Co. v. Alvarez, 785 So. 2d 700, 701 (Fla. 3d DCA 2001).

Columbia Casualty Co. v. Southern Flapjacks, Inc., 868 F.2d 1217 (11th Cir. 1989), which Allstate also cites, is likewise in this Plaintiff's favor. The facts are these. Southern, the insured, submitted its proof of loss to its insurer, Columbia, for vandalism damage secondary to fire damage. Some four months later, Columbia denied coverage. When Southern threatened to sue, Columbia withdrew its coverage declination, and requested an appraisal. The umpire ultimately rendered a substantial appraisal award in the insured's favor, on which the insured sought prejudgment interest.

The insurer then filed a declaratory judgment action in federal court seeking a determination that it owed its insured no prejudgment interest. It urged that "Florida law did not permit an award of interest on the insurance proceeds until after the completed appraisal." The district court **rejected** this argument and awarded the insured prejudgment interest from 30 days after submission of its proof of loss.

On appeal, the Eleventh Circuit likewise rejected the insurer's claim that prejudgment interest was prospective from the date of the appraisal award, rather than the **earlier** date. Citing this Court's "definitive statement on interest" in Argonaut, the Eleventh Circuit concluded that the district court properly awarded interest from a date earlier than that of the appraisal award. Columbia Casualty, 868 F.2d at 1223 (Emphasis added).[1]

In sum, Lugassy is still valid law and correctly applies the rule in Argonaut. It is the Third District's decision here which conflicts with Argonaut. Allstate simply has no answer for the sound policy reasons cited in Plaintiff's Initial Brief, which mandate quashing the Third District's decision.

In the instant case, the trial court found that Allstate acted wrongfully in denying coverage, and it awarded Mr. Martinez prejudgment interest from the date of his loss. The Third District reversed holding that "[t]he trial court erred when it ordered

[1] The policy contained a provision requiring payment within 30 days from proof of loss. Prejudgment interest was assessed from that date, not the later date of the appraisal report.

prejudgment interest to be paid from the date of loss." Allstate Ins. Co. v. Martinez, 790 So. 2d 1151, 1152 (Fla. 3d DCA 2001). This decision is directly in conflict with Argonaut and warrants quashing.

CONCLUSION

For all of the foregoing reasons, the Court should quash the part of the Third District's decision on prejudgment interest that is in conflict with Argonaut.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF SIZE AND TYPE

Undersigned counsel hereby certifies that the size and type of this brief is Courier New, 12 pt.

By: _____
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