IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2009-CA-00903

ARCADIA FARMS — PLAINTIFF-APPELLANT

VS.

AUDUBON INSURANCE COMPANY — DEFENDANT-APPELLEE

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# BRIEF OF AUDUBON INSURANCE COMPANY, APPELLEE

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**Appeal from the Circuit Court**
**of Coahoma County, Mississippi**

**Oral Argument Not Requested**


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**VS.**

**AUDUBON INSURANCE COMPANY** **DEFENDANT-APPELLEE**

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal:

1. Arcadia Farms Partnership.

   Leah, Inc.;
   T&S Farms, Inc.;
   S&F Farms, Inc.;
   T&M Farms, Inc.;
   F&P Farms, Inc.;
   Bobo Farms, Inc.;
   T.P. Graydon Flowers, Jr.;
   J. Roy Flowers;
   Suzanne F. Weiss.

2. Audubon Insurance Company, a wholly-owned subsidiary of Chartis, Inc.

3. David D. O'Donnell, Attorney for Plaintiff

4. S. Ray Hill, III, Attorney for Plaintiff

5. Michael O. Gwin, Attorney for Defendant

6. Louis B. Lanoux, Attorney for Defendant

This the 24 day of MAY, 2010.

Michael O. Gwin

MICHAEL O. GWIN

## TABLE OF CONTENTS


Certificate of Interested Persons ..... i

Table of Contents ..... ii

Table of Authorities ..... iv

Statement Regarding Oral Argument ..... vi

Statement of the Issues ..... vii

Statement of the Case ..... 1

A. Introduction ..... 1

B. Background ..... 2

Statement of the Facts ..... 5

A. Arcadia's Shifting Damages Claim ..... 5

1. Arcadia's complaint ..... 5

2. Audubon's discovery requests ..... 6

3. First discovery answer ..... 6

4. Scheduling order ..... 8

5. Arcadia supplements discovery ..... 8

6. Arcadia opposes additional discovery ..... 8

7. Second discovery answer ..... 9

8. Audubon moves to compel ..... 10

9. Court-ordered damages response ..... 11

10. Third discovery answer ..... 11

11. First pretrial order damage claim ..... 13

12. Second pretrial order damage claim ..... 13

13. Audubon moves to limit damages ..... 13

14. Arcadia abandons attorney fee claim ..... 14

15. Audubon's motion for summary judgment ..... 15

16. Hearing on summary judgment ..... 16

17. Final judgment ..... 16

B. Arcadia's Underlying Claim ..... 16

Summary of Argument ..... 19

Argument ..... 20

I. Arcadia's Statutory Prejudgment Interest Claim is Barred by the Statute ..... 20

II. The Trial Court Properly Denied Arcadia's Motion to Amend ..... 25

Futility ..... 25

No complaint demand for prejudgment interest ..... 26

Arcadia's burden to prove diligence ..... 28

Audubon's prejudice ..... 29

Conclusion ..... 32

Certificate of Service ..... 33

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*,
690 F.2d 1157 (5th Cir. 1982) ..... 28

*Thompson v. Womack*,
2005 U.S. Dist. LEXIS 31692 (S.D. Miss. 2005) ..... 24

### STATE CASES

*American Fire Protection, Inc. v. Lewis*,
653 So. 2d 1387 (Miss. 1995) ..... 21, 22, 24

*Century 21 Deep South Properties, Ltd. v. Keyes*,
652 So. 2d 707 (Miss. 1995) ..... 26

*Home Insurance Co. v. Olmstead*,
355 So. 2d 310 (Miss. 1978) ..... 20, 21, 32

*Lanterman v. Roadway Express, Inc.*,
608 So. 2d 1340 (Miss. 1992) ..... 22

*Magee v. Smith*,
639 So. 2d 1258 (Miss. 1994) ..... 23

*Maryland Casualty Co. v. Less*,
247 So. 2d 812 (Miss. 1971) ..... 26

*Microtek Medical, Inc. v. 3M Co.*,
942 So.2d 122 (Miss. 2006) ..... 31

*Moeller v. American Guarantee and Liability Insurance Co.*,
813 So. 2d 953 (Miss. 2002) ..... 31

*Preferred Risk Mutual Insurance Co. v. Johnson*,
730 So. 2d 574 (Miss. 1998) ..... 31

*Sentinel Industrial Contracting Corp. v. Kimmins Industrial Services Corp.*,
743 So. 2d 954 (Miss. 1999) ..... 25

*Smith v. Jackson Construction Co.*,
607 So. 2d 1119 (Miss. 1992) . . . . . 22

*Upchurch Plumbing, Inc. v. Greenwood Utilities Commission*,
964 So. 2d 1100 (Miss. 2007) . . . . . 26, 31

*Walden Lumber Yard v. Miller*,
742 So. 2d 785 (Miss. App. 1999) . . . . . 22, 23

*Wal-Mart Supercenter v. Long*,
852 So.2d 568 (Miss. 2003) . . . . . 25, 29, 30

*Webb v. Braswell*,
930 So. 2d 387 (Miss. 2006) . . . . . 25, 28, 29, 30

*William Iselin & Co.*,
433 So. 2d 911 (Miss. 1983) . . . . . 29

*Williams v. Duckett*,
991 So. 2d 1165 (Miss. 2008) . . . . . 20, 23, 24

*Wirtz v. Switzer*,
586 So. 2d 775 (Miss. 1991) . . . . . 26

**STATE STATUTES**

Miss. Code Ann. §75-17-7 . . . . . 1, 2, 7, 14, 15, 16
19, 20, 21, 22,
23, 24, 25, 26

## STATEMENT REGARDING ORAL ARGUMENT

As the very statute under which Arcadia seeks damages expressly bars the damages sought, Audubon Insurance Company does not believe that oral argument would assist the court in further understanding the facts and law in this case.

## STATEMENT OF THE ISSUES

1. Whether Arcadia's claim for statutory prejudgment interest prior to the filing of its complaint is barred by the language of the statute stating: "but in no event prior to the filing of the complaint." Miss. Code Ann. §75-17-7.

2. Whether the trial court abused its discretion in denying Arcadia's requested amendment, twelve (12) days before trial (and after the expiration of the pleadings amendment deadline and the discovery deadline), to seek unattainable, statutory prejudgment interest.

## STATEMENT OF THE CASE

### A. Introduction

Arcadia Farms Partnership ("Arcadia") sued its own local insurance agent for malpractice (June 2002) claiming a failure to acquire property insurance on a cotton picker later destroyed by fire. Arcadia pursued that lawsuit two and a half years before ever joining Audubon Insurance Company ("Audubon") in the suit (October 14, 2003). Indeed , Arcadia only joined Audubon in the suit in the last two days before the expiration of the three year statute of limitations. Further, Arcadia only sued Audubon after Audubon had already paid in full the claim made by Arcadia for partial coverage of the cotton picker.

After Audubon's last-minute joinder in Arcadia's two and a half year-old suit, Audubon made consistent and determined efforts to divine both the specific damages sought by Arcadia against Audubon and the basis for those damages. Despite Audubon's efforts, Arcadia's damages claim constantly evolved, changed and shifted right up to the very eve of trial. In fact, after the case had been pending against Audubon for over four years-- from October 2004 to March 2009 --it was only three weeks before the scheduled trial of April 13, 2009 that Arcadia ever moved to amend its complaint to seek the only compensatory damage now claimed – statutory prejudgment interest pursuant to Miss. Code Ann. §75-17-7. Arcadia had by then presented the trial court with years of inconsistent, incoherent and illogical damages claims as to Audubon. Nevertheless, a month before trial, Arcadia changed its damages position yet again. At a hearing twelve days before

the trial, Arcadia argued to the trial court that it was "clearly legally entitled to prejudgment interest pursuant to Miss. Code Ann. §75-17-7." (R. 1495) Arcadia further advised the trial court that were it not allowed to pursue this claim for prejudgment interest "Arcadia will not be in a position to present proof as to compensatory damages during the trial of this case." (R. 1502)

In response, the trial court: a) correctly found that Arcadia was not entitled to the statutory prejudgment interest requested and b) correctly denied Arcadia's untimely, prejudicial amendment request. (R. 1552) The very statute under which Arcadia claimed prejudgment interest, Miss. Code Ann. §75-17-7, expressly prohibited prejudgment interest prior to the filing of the complaint ("but in no event prior to filing of the complaint"). The trial court certainly did not abuse its discretion in so ruling and Arcadia presents no reason to reverse the trial court's decision.

## B. Background

Arcadia, a sophisticated agricultural conglomerate, purchased three large mechanical cotton pickers valued at $235,000 each from a local John Deere dealership. Arcadia financed the purchase of the three cotton pickers through John Deere for a total of $822,907.66. (R. 13-14) Though John Deere required Arcadia to obtain property insurance on the financed equipment, Arcadia failed to insure the three cotton pickers. *Id.*

Arcadia purchased the three cotton pickers on August 30, 2001 but waited until October 1, 2001 to actually take possession of the equipment from John

Deere. (R. 22, 356) When Arcadia drove the cotton pickers off the John Deere lot, a full month after purchase, Arcadia still had not made sure property insurance was in place on the three cotton pickers, worth approximately three quarters of a million dollars. Two weeks later, on October 16, 2001, one of the three cotton pickers caught fire in a field and was destroyed. (R. 11) John Deere denied responsibility and, in fact, pursued Arcadia for recovery of the full value of the burned picker ($235,000) under its financing agreement. (R. 268-74) For its part, Arcadia sued, not Audubon, but Arcadia's long-time local insurance agent, the Mitchell Company ("Mitchell"), (June 25, 2002). (R. 9-12) Arcadia claimed that it thought the John Deere dealership had advised Mitchell of the purchase of the three pickers and by "course of dealing" Mitchell should have therefore known to insure the three pickers. Arcadia claimed negligence, malpractice, by its insurance agent in failing to obtain property insurance and sought the $235,000 purchase price from Mitchell. *Id.*

Mitchell answered denying it had ever been told to insure the pickers, alternatively asserting that Arcadia had failed to mitigate its damages by ever even making claim against its pre-existing insurer, Audubon. (R. 15-18) Audubon had previously issued Arcadia a property insurance policy insuring other farm equipment, not the three cotton pickers. This policy provided limited coverage of $100,000 for "newly purchased" equipment damaged within 30 days of "acquisition". (R. 348-49) Even after receipt of its agent's answer telling Arcadia that no claim had ever been made against Audubon as to the burned picker,

Arcadia did nothing as to Audubon – sending no letters, making no phone calls, and otherwise taking no action. Instead, Arcadia and its counsel decided to proceed for a year and a half solely with the malpractice suit against Mitchell for the full value of the burned picker, $235,000, before ever contacting Audubon.

Arcadia got around to deposing Mitchell well over a year after suing it (August 2003). (R. 375-383) In that deposition, upon questioning by Arcadia's counsel, Mitchell confirmed that Arcadia had limited "newly purchased" coverage with Audubon for which Arcadia had never made claim. *Id.* Arcadia still waited after this deposition until October, 2003 – now two years after the fire – before Arcadia's counsel wrote Audubon requesting the limited coverage of $100,000 for "newly acquired" equipment. Arcadia admitted in discovery:

> After discovery revealed the existence of the "Additional Acquired Property – Newly Purchased" provision in the policy, counsel for plaintiff wrote to Audubon in October of 2003 requesting that it [Audubon] pay out under this provision since the cotton picker clearly met the definition of "newly purchased" farm equipment.

(R. 1104 – Arcadia's March 4, 2008 Answer to Interrogatory No. 6.)

After receiving the letter from Arcadia's counsel, Audubon investigated the then two-year old loss, ultimately paying the full amount of the limited coverage of $100,000. (R. 392-93) Meanwhile, Arcadia still maintained its insurance agent/malpractice suit against Mitchell for the $235,000.

Over six months after Audubon paid its full policy limits and at the very end of the three-year statute of limitations (three years after the fire had occurred)

(October, 2004), Arcadia decided to join Audubon in its two and a half year-old suit against Mitchell claiming Audubon's "two and a half year delay" constituted bad faith justifying punitive damages. (R. 436-442)

After the trial court dismissed Audubon on summary judgment, Arcadia continued pursuing Mitchell for the balance of the purchase price of the burned picker – $135,000 ($235,000 purchase price less the $100,000 paid by Audubon). Arcadia settled days before trial with Mitchell for $145,000, and a final judgment was entered in this case. (R. 1570-73)

## STATEMENT OF FACTS

### A. Arcadia's Shifting Damages Claim

Throughout the trial proceedings and even after the deadline for amendment of the pleadings and the deadline for the completion of discovery, Arcadia attempted to change and amend its damages claim.

**Arcadia's complaint.** As the master of its complaint, a plaintiff is entitled to tailor the damage it seeks to its circumstances. But Arcadia's complaint sets forth no specific compensatory damage claim against Audubon, nor did Arcadia explain the factual basis for a compensatory damage against Audubon, requesting only ". . . an award of compensatory damages and punitive damages against Audubon Insurance Company in the amount of $3.5 million, together with an award of costs, interest and attorney's fees."[1] (R. 436-442)

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[1] Arcadia, in ¶19 of its Complaint, did request an additional $50,000 under a policy provision ("replacement") separate from the "newly purchased" provision under which

**Audubon's discovery requests.** Audubon sent interrogatories and requests for production of documents to Arcadia to determine the damages sought against it. Arcadia failed to respond to these discovery requests for over a year and a half. (R. 180) In fact, the only reason Arcadia responded even then was on October 27, 2006, the Coahoma County Clerk filed a "Motion to Dismiss for Want of Prosecution" with a deadline date of November 27, 2006. (R. 189, 1114) Arcadia waited until November 16, 2006 before finally responding to Audubon's discovery – now over two years after suing Audubon. (R. 192-200)

**First discovery answer.** Arcadia's November 2006 answer to interrogatory no. 6, specifically directed to damages sought, states:

> **Response**: The Plaintiff requests compensatory damages in the full amount of the purchase price of the cotton picker, said amount totaling about $300,000, which would include the replacement cost of the picker. Plaintiff also request to be compensated for all interest payments made and other consequential damages incurred, including attorney's fees, as a result of the Defendants failure to pay the covered loss in a timely fashion. Additionally, Plaintiff is entitled to interest accrued – and continuing to accrue – on all of the above amounts. Plaintiff also requests punitive damages in the amount of $3,000,000.00. (R. 1120)

Significantly in the context of this appeal, the interrogatory answer does not request "prejudgment interest" as to the $100,000 amount already paid by Audubon, nor can the answer be fairly interpreted to do so. The answer certainly

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Arcadia was paid the $100,000. (R. 26; 436-442) Arcadia later abandoned that "replacement" claim, no doubt because the policy provision was inapplicable. That provision only applied within 30 days "after the date of purchase".

does not seek statutory prejudgment interest pursuant to Miss Code Ann. §75-17-7. The compensatory damage that is requested, upon examination, is illogical, confusing and was later abandoned by Arcadia. The answer basically sets forth three categories of compensatory damage: 1) $300,000 for the "replacement cost of the picker"; 2) "interest payments made, and other consequential damage including attorney fees"; and 3) "interest accrued – and continuing to accrue – on all of the above amounts." Examining each of these damage requests, as to Audubon Arcadia was not entitled to "the full amount of the purchase price of the picker", and certainly not "the replacement cost of the picker". In fact, Arcadia had already made demand and received from Audubon the policy amount Arcadia requested, the limited amount of $100,000 under the "newly purchased" coverage. Further, the burned picker cost $235,000; the "$300,000" demanded in this interrogatory answer apparently refers to the alleged value of a new cotton picker. Arcadia, however, does not claim in this answer that it in fact bought a new cotton picker. As to the claimed consequential damage of "interest payments made", Arcadia fails to explain what those are or why Audubon would be responsible for these unknown, unidentified "interest payments made". Similarly, Arcadia's vague request for "interest accrued – and continuing to accrue – on all of the above" was equally unilluminating. In any event, whatever the legal and contractual merits of the damages set forth in Arcadia's interrogatory answer, the answer does not assert a claim for statutory prejudgment interest on the already paid $100,000 now claimed by Arcadia on appeal. Tellingly, Arcadia elected to

not even quote this interrogatory answer in its brief on appeal, though Arcadia wrongly now claims the answer "clearly stated an intent to seek prejudgment interest calculated from the date of the alleged breach of the insurance contract." (Arcadia brief p. 13)

**Scheduling order.** Following Arcadia's responses to discovery in November 2006 the parties agreed to a scheduling order to have an orderly completion of discovery. (R. 80-81) The scheduling order was entered January 31, 2007, providing an amendment of pleadings deadline of February, 2007, and a discovery deadline of May 31, 2007. Arcadia never supplemented or explained its requested damages set forth in its November 2006 interrogatory answer until the very end of discovery. At this time, Arcadia abandoned its prior (November 2006) damage request, sought new damages and opposed any additional discovery. (R. 179-85)

**Arcadia supplements discovery.** Arcadia was deposed May 3, 2007. At that time Arcadia stated it would be amending its discovery responses to provide yet new facts, documentation and information regarding its claimed damages. A letter dated May 29, 2007 confirming this fact was sent by Arcadia's counsel to Audubon's counsel. (R. 179-225; 1135)

**Arcadia opposes additional discovery.** Based on Arcadia's statement that it would supplement with additional information and facts to support damages, Audubon filed a motion to amend the discovery deadline on May 23, 2007. (R. 112; 179-225) Arcadia opposed the discovery extension stating that though it

would supplement with new damages information and a new damages claim, it never-theless objected to Audubon conducting discovery as to the new claim. (R. 1135)

**Second discovery answer.** Separately, on May 29, 2007 – two days before the discovery deadline expired – Arcadia then filed a supplemental discovery response (R. 1174), now completely changing its damages claim:

> **Supplemental Response**: The Plaintiff claims that it is at a minimum entitled to compensatory damages from Audubon in the amount of $100,000.00.
>
> This number was obtained by calculating interest at 8% per month on the $100,000 that Audubon failed to pay out under the "Additional Acquired Property – Newly Purchased" clause for three (3) years after the loss. Also included in this calculation is the $35,000.00 dollars the Plaintiff had to pay in attorney's fees to recoup the $100,000.00. Also included in this figure are costs related to the replacement picker, which was purchased for approximately $265,000. The bill of sale for this picker was previously produced by the Plaintiff. Had the $100,000 been timely paid, then the Plaintiff would not have had to have financed the entire replacement purchase.
>
> The Plaintiff will also seek compensatory damages in the amount of $235,000 based on the failure of Audubon and/or Audubon's agents to procure insurance for the picker prior to the time it was destroyed, and all interest related to this omission.
>
> The plaintiff also seeks punitive damages in the amount of $3,000,000.00.

Similar to the prior response, this response was illogical and confusing. It also was internally contradictory and sought a double recovery. Like the prior

discovery response, this damage response was later abandoned by Arcadia. In this response, Arcadia initially stated that "at a minimum" it was entitled to compensatory damages of $100,000. Arcadia claimed "interest at 8% a month", (resulting in an astounding annual interest rate of 96%) for "three years after the loss" – though Audubon paid Arcadia in March 2004, two years and five months after the loss. Arcadia further claimed it purchased a replacement picker for $265,000 (not the prior $300,000) and Audubon, inexplicably, should pay for "costs related to the replacement picker" – which costs were somehow "also included in this figure [the $100,000]." Then, abandoning even the pretense of limiting itself to the ill-explained prefatory $100,000 figure, Arcadia sought "compensatory damages in the amount of $235,000", the price of the burned picker. Given this answer at the close of discovery, Audubon was both perplexed and concerned.

**Audubon moves to compel.** Audubon filed a motion to compel against Arcadia in August of 2007. (R. 226-63; 1151) Audubon pointed out that Arcadia had failed to adequately explain or identify damages, though it had repeatedly promised to do so. Arcadia never supplemented or explained its discovery response further and ultimately the Circuit Court of Coahoma County conducted a hearing on Audubon's motion to compel (February 13, 2008). At this hearing, Arcadia acknowledged to the Court that its prior responses to discovery had been inadequate and Arcadia stated it would amend with more detail and information. (R. Supp. Vol. 1, P. 52, l. 15 - P. 55, l. 8 - February 13, 2008 hearing)

**Court-ordered damages response.** The Court ordered the plaintiff to produce the damages information within twenty days of the hearing. (R. 1551) At this point (March 2008), discovery was over under the court-established discovery deadlines. Arcadia was actively pushing for a trial date, though its damages claim was still ever evolving. (R. 276; 819-20; 900)

**Third discovery answer.** On March 4, 2008, Arcadia ,yet again, answered Audubon's Interrogatory No. 6 first sent in June, 2005. (R. 1219) And Arcadia, yet again, changed its claimed damages, even though the discovery deadline was now past.

> **Supplemental Response:** The Plaintiff seeks compensatory damages from Audubon in the amount of $61,000.00. This number consists of two items: 1) the interest owed on the $100,000 that was wrongfully withheld for three (3) years and 2) the attorney's fees Arcadia was forced to pay to recoup the $100,000 paid out under the "Additional Acquired Property – Newly Purchased" clause of the policy.
>
> As for the interest owed, the number was obtained by calculating interest at 8% per annum on the $100,000 that Audubon failed to pay out under the "Additional Acquired Property – Newly Purchased" clause for three (3) years after the loss. The Plaintiff's expert, accountant Ricky Churchwell, will testify that this is the appropriate interest rate to use in calculating interest owed by Audubon on the $100,000. His testimony will be based on his educational background, the facts of this case, his work experience as an accountant, and the prevailing interest rate. The amount of interest owed by Audubon based on this prevailing rate would be $26,000.00.
>
> In regard to attorneys fees, the Plaintiff had to pay $35,000 dollars in attorney's fees and costs to recoup

> the $100,000. These fees were paid to Plaintiff's counsel pursuant to an agreement between Plaintiff's counsel and Arcadia Farms wherein Plaintiff's counsel would be entitled to $33.3% of any recovery, plus expenses. A copy of the contingency fee contract is being produced. This would bring the total compensatory damages to $61,000.00
>
> The Plaintiff also seeks punitive damages in the amount of $3,000,000.00. A $3,000,000 dollar punitive damage award is appropriate given the staggering net worth and income of Audubon and its successor American Insurance Group (AIG). AIG is the sixth (6) largest insurance company in the world. AIG and its subsidiaries had a net income in 2006 of more than $14,000,000,000. A $3,000,000 punitive damage award would represent less than three (3) hours of net income and would clearly be in line with constitutional standards.

Even this new, albeit lower, compensatory damage claim made no sense. As stated, the fire was October, 2001; Audubon paid the claim in March 2004 – so that was only, at most, two years and five months, not 3 years. Further the time period fails to account for a reasonable investigation period by Audubon after the claim is made. The interest calculation also makes no sense. 8% per annum simple interest for $100,000 over 3 years is $24,000, not the $26,000 claimed. Compound interest is close to, but still not, $26,000. How expert accountant Ricky Churchwell calculated $26,000 or why he believed 8% "was an appropriate interest rate" was never revealed. However, Arcadia was not nearly through changing its damages claim.

At this point, though it had changed its damages claim yet again, Arcadia opposed any further discovery and instead sought a trial date. In May 2008,

Arcadia filed a motion for a trial. Without holding a hearing, the trial court entered an order in June, 2008 setting the case for trial on September 22, 2008, requiring the submission of a proposed pretrial order by August 22, 2008. (R. 900)

**First pretrial order damage claim.** In the plaintiff's portion of the proposed pretrial order submitted to the Court on August 22, 2008, the plaintiff attempted to yet again change its damages claim. (R. 1100-1101) This time Arcadia reverted back to its interrogatory answer of May 29, 2007, which Arcadia had specifically amended pursuant to the Court's order of March, 2008. The trial court conducted a hearing August 26, 2008 at which Audubon fully explained and objected to Arcadia's change in damages claim from Arcadia's court-ordered March 2008, interrogatory answer. (R. Supp. Vol. 1, pp. 89, l. 19 - p. 90, l. 6 – August 26, 2008 hearing) Rejecting Arcadia's latest change, and referring to the March 2008 interrogatory answer, the trial court stated: "[A]s far as I'm concerned, the last thing sought would probably be a reasonable basis upon which the defense counsel may rely." (R. Supp. Vol. 1, p. 94, l. 21-24)

**Second pretrial order damage claim.** Following this hearing, on September 2, 2009, Arcadia once again changed its damages claim in the proposed pretrial order, now reverting back to the March 2008 interrogatory answer. (R. 1190)

**Audubon moves to limit damages.** Given Arcadia's ever shifting damages claim, on September 9, 2008 in advance of the September 22, 2008 trial sought by Arcadia, Audubon filed its "Motion to Limit Damages Proof" (R. 1094),

setting forth the history outlined in this brief. Audubon requested that the Court: a) limit Arcadia's damages claim to Arcadia's court-ordered March 2008 response to Interrogatory No. 6; and b) once so limited, find that Arcadia was not entitled to recover the two elements of damage then sought – attorneys fees and prejudgment interest. Audubon specifically pointed out that Arcadia had never pled, properly revealed during the court-ordered discovery period, nor was it legally entitled to recover, prejudgment interest.

The September 22, 2008 trial was continued because the Court had a conflicting trial and the trial date was reset for April 13, 2009. (R. 1343)

**Arcadia abandons attorney fee claim.** In the interim, Arcadia responded to Audubon's "Motion to Limit Damages Proof" on October 30, 2008. (R. 1411) As to attorneys fees, Arcadia once again changed position, abandoning its claim for $35,000 in attorneys fees from both its March 2008 interrogatory answer and the proposed pretrial order. Arcadia now stated that it would be "impossible to put a precise dollar figure on the amount of attorney's fees to which Arcadia will be entitled". (R. 1417) Arcadia further made clear that it abandoned a claim for attorney's fees as compensatory damage altogether stating that Arcadia would agree that it "will not be entitled to an award of its attorneys fees . . . until such time as the jury and this Court determine that Audubon acted without arguable basis." (R. 1418) As to prejudgment interest, Arcadia now claimed that it was entitled to statutory prejudgment interest pursuant to Miss. Code Ann. §75-17-7.

The Court held a hearing on Audubon's "Motion to limit Damages" on

March 3, 2009. Following extensive argument by counsel, the court took Audubon's motion under advisement. Following the hearing, on March 6, 2009, the Court issued its order properly finding that the very statute under which Arcadia now claimed prejudgment interest, Miss. Code Ann. §75-17-7, actually prohibited Arcadia from obtaining prejudgment interest and, in any event, Arcadia had failed to request prejudgment interest in its complaint. (R. 1458)

**Audubon's motion for summary judgment.** Based on the trial court's March 6, 2009 ruling, Audubon then moved for summary judgment (March 16, 2009) asserting that as the Court had properly disallowed proof as to Arcadia's only claim for compensatory damage, Audubon was entitled to summary judgment. (R. 1485) At this point, the case was set for trial in four weeks, April 13, 2009. Arcadia's response (R. 1495) three weeks before trial (March 26, 2009) was three-fold: 1) Arcadia requested the Court to reconsider its prior ruling limiting Arcadia's damages proof; 2) Arcadia requested permission to amend its complaint to now assert a claim for statutory prejudgment interest pursuant to Miss. Code Ann. §75-17-7 ( "Arcadia is legally entitled to recover prejudgment interest under 75-17-7 . . . ." R. 1500); and 3) Arcadia now claimed, after all its prior years of gyrations as to damages, its only proof of compensatory damage was a claim for statutory prejudgment interest. ("[A]bsent the right and ability to present proof of compensatory damage in the form of a claim for prejudgment interest, Arcadia will not be in a position to present proof as to compensatory damages during the trial of this case.") (R. 1502)

**Hearing on summary judgment.** The hearing on these motions was held April 1, 2009 – twelve days before trial (R. Vol. 12) At the hearing, Arcadia vigorously argued for an interpretation of Miss Code Ann. §75-17-7 it believed justified its recovery of prejudgment interest pursuant to the statute ("Arcadia is clearly legally entitled to prejudgment interest pursuant to Miss. Code Ann. §75-17-7. . . ."). (R. 1495; R. Vol. 12, p. 16, l. 6 - p. 19, l. 15) Following an extensive hearing and a full consideration of the law and cases, the trial court properly denied the Arcadia's motion to amend to assert a claim for statutory prejudgment interest; denied Arcadia's request for rehearing of the court's ruling on the motion to limit damages; and granted summary judgment on the basis that Arcadia's sole theory presented for compensatory damage – statutory prejudgment interest under Miss. Code Ann. §75-17-7 – was prohibited by the statute. (R. Vol. 12, P. 25, L. 15-25; R. 1552)

**Final judgment.** Following this ruling in favor of Audubon, Arcadia settled with Mitchell in the days before trial for $145,000. Following entry of final judgment (R. 1559), Arcadia appealed claiming the trial court committed reversible error by: a) not allowing Arcadia to recover statutory prejudgment interest prior to Arcadia's filing a complaint, though the statute states: ". . . but in no event prior to filing of the complaint"; and b) not letting Arcadia amend its complaint to assert this unattainable new damage claim twelve days before trial.

### B. Arcadia's Underlying Claim

The fact is that though Audubon was advised of the burned picker shortly

after the fire in October 2001, Audubon was also simultaneously advised that no claim was being made by Arcadia. (R. 359-60 – Johnson to Audubon: "There has been no demand on us as of now and we are sending this for information only.") Arcadia had elected to first pursue a claim against John Deere and its local agent Wade Inc. for a full recovery of the purchase price of the burned picker. (R. 362 – Mitchell to Arcadia "[Arcadia/Flowers] indicated that he was looking to John Deere and/or Wade, Inc. to cover the loss.") Arcadia never advised Audubon otherwise until Arcadia's attorneys wrote Audubon two years later, in October 2003 . Audubon's timelines explaining these events with citations to the evidence are found at R. 768-771; R. 1466-1470.

It is also useful to know that Arcadia's first and initial "claim" in this matter was always a malpractice claim that its own insurance agent, James Maclin of the Mitchell Company, should have known "by course of dealing" to insure the three cotton pickers sometime before a fire destroyed one of them. (R. 9-12) Accordingly when Taylor Flowers, the Arcadia principal, was told there was "no insurance" for the burned picker, it was in response to Flowers' heated charge that Maclin negligently failed to obtain property insurance fully covering the three pickers prior to the fire. This fact is illustrated by an April 2002 letter Maclin wrote Arcadia's counsel. (R. 362) In the Spring of 2002, Flowers/Arcadia retained an attorney to sue Maclin (Mitchell) for malpractice. Following an exchange of letters and communication between Maclin (Mitchell) and Arcadia, Maclin directly wrote Arcadia's counsel in April 2002 telling Arcadia's counsel:

> He [Flowers] did not indicate the fire until I informed we would order coverage on the three, he then indicated that one was destroyed by fire. He did not know which of the three. I informed we could not cover the destroyed picker. He did not know which of the three was destroyed. He later called in it's description. At that time he indicated that he was looking to John Deere and/or Wade, Inc. to cover this loss. (R. 362)

By stating then, and earlier, "we could not cover the destroyed picker", Maclin was not issuing a "denial" of a claim for coverage under the "newly purchased" provision of the pre-existing Audubon policy. Rather, Maclin was responding to the claim which was being pursued by Arcadia -- the negligence of Maclin (Mitchell) in not initially obtaining insurance.[2] Indeed, two months later when Maclin (Mitchell) was in fact sued by Arcadia (June 2002) Mitchell filed an answer stating that Arcadia had failed to ever even make claim under the Audubon policy – thus clearly advising Arcadia a) that Arcadia could make a claim against Audubon, and b) no one had ever done so. (R. 15-19)

If it was Arcadia's intent to make a claim under the pre-existing Audubon policy in June 2002, or earlier, Arcadia took no action to clear up any miscommunication or misunderstanding. In fact, after June 2002 when it sued Mitchell, Arcadia made no effort to pursue a claim against Audubon at all until Arcadia's counsel wrote Audubon in October 2003. (R. 768-771; R. 1466-70)

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[2] Arcadia has acknowledged that the only person it communicated with regarding the fire loss was James Maclin with Mitchell. (R. 443, Depo. of Flowers, p. 32, l. 3-8; p. 45, l. 13 - p. 48, l. 7)

## SUMMARY OF ARGUMENT

1. **Arcadia's statutory prejudgment interest claim is barred.** After years of shifting damages claims, Arcadia ultimately advised the trial court that it was "clearly legally entitled to prejudgment interest pursuant to Miss. Code Ann. §75-17-7" (R. 1495) and that otherwise, it would "not be in a position to present proof as to compensatory damages during the trial of this case." (R. 1502). Arcadia sought to recover prejudgment interest prior to the filing of its complaint and Miss. Code Ann. §75-17-7 prohibits such interest: ". . . but in no event prior to the filing of the complaint". The trial court properly disallowed the damages claim.

2. **The Motion to Amend was properly denied**. Arcadia's damage claim evolved to the point that it asked for damage not even sought in its complaint. Not only was the relief – statutory prejudgment interest prior to the filing of the complaint – not allowable under the law, the amendment request was made after the expiration of all pertinent court-imposed deadlines, twelve days before trial. The trial court properly exercised his discretion to deny the motion to amend.

## ARGUMENT

### I. ARCADIA'S STATUTORY PREJUDGMENT INTEREST CLAIM IS BARRED BY THE STATUTE

In large, bold letters Arcadia argued to the trial court that: "Arcadia is legally entitled to recover prejudgment interest pursuant to Section 75-17-7". (R. 1496) Miss. Code Ann. §75-17-7 states:

> All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by such judge to be fair, but in no event prior to the filing of the complaint. (emphasis added)

"Mississippi Code Section 75-17-7 governs the awarding of prejudgment interest." *Williams v. Duckett,* 991 So.2d 1165, 1180, ¶ 33 (Miss. 2008). "The purpose of prejudgment interest is to provide parties with compensation for the retention of money overdue." *Id.* at 1182, ¶ 40. Prior to 1989, the second sentence of the statute simply read: "All other judgments and decrees shall bear interest at the rate of eight percentum (8%) per annum." After the 1989 amendment, the statute barred the recovery of prejudgment interest before the filing of suit, except to recover a debt under a contract which contained a stated interest rate.

Amendment of the statute was perhaps a legislative enactment of the principle regarding prejudgment interest set forth by the Mississippi Supreme Court in *Home Ins. Co. v. Olmstead*, 355 So.2d 310 (Miss. 1978). The Olmsteads were homeowners who sustained a fire loss on September 7, 1969. On June 16,

1971, the Home Insurance Company denied the claim for failure to appear for an examination under oath. The Olmsteads waited four years to file suit, September 3, 1975 – almost six years after the fire loss – and just before the statute of limitations expired. At trial, the Olmsteads claimed that they had never refused to submit to an examination under oath, but had only declined to appear that particular day. The Olmsteads recovered a judgment for actual damages sustained in the fire loss, punitive damages and prejudgment interest dating to the date of the loss, September 7, 1969. On appeal, The Mississippi Supreme Court reversed the award for prejudgment interest. The Court held that it would "be unjust to hold that the insureds could sit by idly and let the interest run up for four years before filing suit." *Olmstead*, 355 So.2d at 314.

The 1989 statutory prohibition of prejudgment interest prior to suit was affirmed by the Mississippi Supreme Court in *American Fire Protection, Inc. v. Lewis*, 653 So.2d 1387 (Miss. 1995). The plaintiff, Lewis, sued for breach of contract claiming that American Fire operated in bad faith by waiting almost a year to pay him for sprinkler installation work he performed. Lewis obtained a judgment for the money owed based on breach of contract, but the trial court did not allow Lewis prejudgment interest.

Lewis appealed the denial of prejudgment interest on his contract claim. Quoting the entire two sentences of Miss. Code Ann. §75-17-7, the *Lewis* court found the second sentence (". . . but in no event prior to suit") controlling stating:

> The language of the second sentence implicitly authorizes the chancellor to allow prejudgment interest from the time Lewis' claim was filed because the document, which was recognized by the jury as a contract, did not designate any interest, yet the amount of damages was certain.

Nevertheless, the *Lewis* Court found that the plaintiff was entitled to prejudgment interest only "from the date a complaint is filed. Miss. Code Ann. §75-17-7 (Revised 1991)". *Lewis*, 653 So.2d at 1392.

The *Lewis* Court thus expressly rejected the argument that Arcadia made to the trial court – that is, that the statute controlled Arcadia's claim but somehow the second sentence of the statute was inapplicable to its claim. (April 1 2009 hearing – R. Vol. 12, pp. 17-19) Arcadia's argument also ignored the all-encompassing nature of the "All other judgments and decrees" language of the second sentence of the statute.

Other Mississippi appellate cases have confirmed that prejudgment interest prior to the filing of the complaint is barred for any suit which has no contract stating an interest rate. *Smith v. Jackson Construction Co.*, 607 So.2d 1119 (Miss. 1992) (Workers' compensation insurance claim: "Smith is entitled to interest only from the date his action was first instituted which would be July 29, 1986, the date Smith filed his petition to controvert."); *Lanterman v. Roadway Express, Inc.*, 608 So.2d 1340 (Miss. 1992) (Workers' compensation insurance claim: "Following this statute [Miss. Code Ann. §75-17-7] Lanterman should be entitled to interest only from the date this action was first instituted . . ."); *Walden Lumber Yard v.*

*Miller*, 742 So.2d 785, 789 (Miss. App. 1999) (Workers' compensation insurance claim: "Following this statute [Miss. Code Ann. §75-17-7] Miller is entitled to interest from the date this action was instituted. . . .") Similarly, the Mississippi Supreme Court in *Magee v. Smith*, 639 So.2d 1258 (Miss. 1994) reversed a trial court's award of prejudgment interest finding: "This statute [Miss. Code Ann. §75-17-7] does not justify the interest award since the contract did not specify any interest, and the interest was calculated from a time prior to the filing of the complaint or petition.")

Arcadia cites no cases contrary to the clear language of the statute or this well-established law. In fact, the cases cited in Arcadia's brief are the same cases which were cited by Arcadia to the trial court. These cases were discussed and distinguished at length before the trial court. (R. 1495-1501; April 1, 2009 hearing – Vol. 12, pp. 16-19)

The primary case relied upon by Arcadia, *Williams v. Duckett,* 991 So.2d 1165 (Miss. 2008) is in fact exactly contrary to Arcadia's position. The *Williams* court reversed a trial court's award of prejudgment interest prior to the filing of a complaint. Citing Miss. Code Ann. §75-17-7, the *Williams* Court held: "Therefore, the Chancery Court erred in calculating prejudgment interest from a date prior to the filing of the complaint." *Williams,* 991 So.2d at 1181. In fact, the Mississippi Supreme Court remanded the case "for a recalculation of the prejudgment interest . . . from a date not prior to the filing of the original complaint that the Court determines to be fair." *Williams,* 991 So.2d at 1184.

*Williams* is not contrary to the holding in *Lewis, supra*, where the court held the statutory language "but in no event prior to the suit" applicable to a breach of contract case. In fact, *Williams* cited *Lewis* for the proposition that Miss. Code Ann. §75-17-7 "governs the award of prejudgment interest." *Id.* at 1180, ¶ 33.

Arcadia apparently contends that because the claim in *Williams* was not "based on a contract" that one can somehow interpret *Williams* to mean that if a suit is "based on a contract" the *Williams* Court would have allowed prejudgment interest prior to the filing of suit. This tortured logic is flatly inconsistent with, not only the clear language of the statute, but this Court's prior rulings.

The remaining two cases cited by Arcadia are distinguishable primarily because they fail to address the issue presented in this case at all. *Thompson v. Womack*, 2005 U.S. Dist. LEXIS 31692 (S.D. Miss. 2005) is an unpublished federal district court case apparently decided by a Louisiana federal judge sitting by designation in Mississippi. The case is not only without precedential value, it is without persuasive value. The facts in *Thompson* are unclear when the complaint was actually filed in relation to the award of prejudgment interest. The Court awarded prejudgment interest beginning June 17, 2002 and the civil action number "02:02-511" indicates the suit was filed in 2002. So it appears the prejudgment interest did not pre-date the filing of the complaint. In any event, *Thompson* engages in no meaningful analysis of Miss. Code Ann. §75-17-7 or the cases cited herein; nor does it appear that any party addressed the issue present on this appeal.

Similarly, a reading of *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Services Corp.*, 743 So.2d 954 (Miss. 1999) reveals that after filing suit the plaintiff filed an amended complaint to allege the breach of a settlement agreement which had been entered into after the filing of suit. The case was presented based on breach of the post-suit settlement agreement. Prejudgment interest based on breach of the later settlement agreement would therefore not have been before the filing of the initial complaint. Further, the opinion is unclear whether either the initial contract or the subsequent settlement agreement contained a stated interest rate. In any event, the *Sentinel* opinion is not authority contrary to, distinguishing or overruling either the statute itself or well-established case law precluding prejudgment interest prior to the filing of suit based on Miss. Code Ann. §75-17-7.

## II. THE TRIAL COURT PROPERLY DENIED ARCADIA'S MOTION TO AMEND

Arcadia seeks to reverse the trial court for not allowing Arcadia to amend its complaint twelve days before trial to seek, as its only claimed compensatory damage, statutory prejudgment interest pursuant to Miss. Code Ann. §75-17-7. "Motions for leave to amend a complaint are left to the sound discretion of the trial court." *Wal-Mart Supercenter v. Long*, 852 So.2d 568, 570 (Miss. 2003). "Unless the trial court abused its discretion, the Court is without authority to reverse." *Id.*

**Futility**. One clear reason to deny amendment is that the proposed amendment would be futile. *Webb v. Braswell,* 930 So.2d 387, 393 (Miss. 2006)

(noting "futility of the amendment" as a reason to deny leave to amend). Here, though attaching no proposed amended pleading, Arcadia specifically sought leave to amend asserting: "Arcadia is legally entitled to recover prejudgment interest under §75-17-7 . . ." (R. 1500) As discussed above, since Arcadia is not entitled to recover the statutory prejudgment interest claimed prior to the filing of the complaint, any such amendment would be futile.

**No complaint demand for prejudgment interest.** Mississippi law has long required that "for prejudgment interest to be awarded, the party must make a proper demand for the interest in the pleadings. . ." *Wirtz v. Switzer*, 586 So.2d 775, 785 (Miss. 1991); *Maryland Cas. Co. v. Less*, 247 So.2d 812 (Miss. 1971) "Furthermore, a general prayer for relief is not sufficient to authorize a trial court's award of such interest." *Century 21 Deep South Properties, Ltd. v. Keyes*, 652 So.2d 707, 719, ¶21 (Miss. 1995). Where no request for prejudgment interest is made, it is error for the lower court to grant prejudgment interest. *Id.*

In *Upchurch Plumbing, Inc. v. Greenwood Utilities Commission*, 964 So.2d 1100, 1118 (Miss. 2007), the Court, sitting *en banc*, reaffirmed the requirement of pleading a specific demand for prejudgment interest stating:

> We wish to make clear today that while Miss.R.Civ.P. 8 does require that a party assert a demand for prejudgment interest in the appropriate pleading; on the other hand, Rule 8 does not require that a party seeking prejudgment interest must plead the specific date on which prejudgment interest allegedly is due.

Arcadia claims since it used the word "interest" in its complaint, it

somehow properly advised Audubon that Arcadia was making a demand for prejudgment interest as compensatory damage. Arcadia's complaint, however, demands: "And further, an award of compensatory and punitive damages against Audubon Insurance Company in the amount of $3.5 million, together with an award of costs, interest and attorney's fees." (R. 26) Arcadia itself did not read its own complaint to request prejudgment interest on the $100,000 previously paid by Audubon. As discussed above, when Arcadia first answered Audubon's discovery request as to damages in November 2006, Arcadia did not claim prejudgment interest on the $100,000 Audubon had already paid. Rather, that interrogatory answer sought a range of other confusing, illogical and unattainable "compensatory damage", which Arcadia later abandoned. (R. 1120) Significantly, that was the only interrogatory answer given before the deadline for amendment of the pleadings on February 28, 2007.[3] (R. 80) As shown, Arcadia only decided to request prejudgment interest on the previously paid $100,000 (as its claimed compensatory damage) well after the expiration of the discovery deadline.

Additionally, "costs, interest and attorneys fees" are all matters for post-judgment consideration, which is apparently exactly what Arcadia intended when it filed its complaint. "Costs" is a specific term with a defined meaning under

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[3] Arcadia engages in an extensive discussion claiming that the parties' submission of a proposed pretrial order somehow amended the complaint. The claim is specious. First these proposed pretrial orders were never signed and entered by the trial judge. (R. Vol. 1 - Docket; R. 1218) Further, at several places in the proposed pretrial order, Arcadia specifically objected to any claims of fact or law not "pled in the complaint or preserved in discovery." (R. 1193; 1197)

Miss.R.Civ.P. 54(d) and the comments thereto, and are allowed "of course to the prevailing party". Similarly, interest was meant to refer to post-judgment interest, also allowed of right to a plaintiff obtaining a money judgment. Attorneys' fees are sought as part of Arcadia's punitive claim. Not even Arcadia interpreted its claim for "interest" to seek anything other than post-judgment interest until immediately before trial when it suited Arcadia's then purpose.

**Arcadia's burden to prove diligence**. While amended pleadings are liberally permitted, "the rule is not absolute". *Webb v. Braswell*, 930 So.2d 387, 393 (Miss. 2006). "We have previously rejected the argument of an absolute right to amend, disallowing such an amendment based on reasoning that a party should not be allowed to later complain on an issue, when that party had ample opportunity and time to amend its complaint and has offered no justification for why it did not do so." *Id.* at 571. "This court does not view lack of diligence as a compelling reason to amend. Applications to amend the pleadings should be prompt and not the result of lack of diligence."

The Fifth Circuit is consistent with Mississippi law. In *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1163 (5th Cir. 1982) the Court stated:

> Mere passage of time need not result in a denial of leave to amend but delay becomes fatal at some period of time. [citation omitted] When there has been an apparent lack of diligence, the burden shifts to the movant to prove that the delay was due to excusable neglect. (emphasis added)

On this record, it is Arcadia's burden to prove why it should be entitled to amend, not Audubon's burden to disprove any claimed entitlement. Arcadia's lack of diligence is apparent. Arcadia had more than ample opportunity to simply state the damage it claimed. Arcadia failed to meet each of the court-imposed requirements to identify its damages: the complaint demand requirement; failing to prosecute its case; failing to timely respond to discovery; failing to meet the pleadings amendment deadline; failing to supplement before the discovery deadline; and failing to seek amendment in September, 2008 (7 months before trial) in response to Audubon's "Motion to Limit Damages Proof." Waiting until twelve days before trial is clearly a lack of diligence. Yet, Arcadia proffered no excuse or justification for its actions to either the trial court or on appeal. Arcadia unfairly sought to force Audubon into a trial for which Arcadia had not pled the sole compensatory damage sought. The trial court properly rejected the unexcused, unexplained request.

**Audubon's prejudice**. "Amending the complaint at this stage, well after the discovery deadlines, would without doubt cause undue prejudice to the defendants in the form of delay and costs." *Webb*, 930 So.2d at 395. "Amendments which are permitted in the latter stages of litigation may deny the important policy favoring finality of judgments and the expeditious termination of litigation." *William Iselin & Co.*, 433 So.2d 911, 913 (Miss. 1983) In *Webb v. Braswell, supra*, the Webbs filed their motion to amend four years after initiating suit and only a few months before trial. The *Webb* court, quoting *Wal-Mart*

*Supercenter v. Long*, 852 So.2d 568, 521 (Miss. 2003) (citations omitted) noted:

> The policy to freely grant amendments is not allowed to encourage delay, laches and negligence. Examples of when a motion to amend may be prejudicial include: where it would burden the adverse party with more discovery, preparation, and expense, particularly where the adverse party would have little time to investigate and acquaint itself with the matter. *Webb*, 930 So.2d at 394-95)

Audubon was certainly prejudiced by Arcadia's last-minute attempt to change its damages claim. As discussed, the nature and extent of Arcadia's damage was not a new issue in the case. Arcadia's damage claim continued to evolve even after the deadline for amending the pleadings and even after the deadline for discovery. As revealed by Arcadia's March, 2008 interrogatory response given after the close of discovery, Arcadia intended to call witnesses and put on evidence as to its prejudgment interest claim. (R. 1219)Prejudgment interest became the only compensatory damage sought. Audubon was entitled in the discovery period to be apprised of Arcadia's damage claim so it could take discovery, develop a strategy, hire experts if necessary, and otherwise properly prepare a defense. By contrast, as the record reveals, Arcadia was not only evolving its damages claim, it objected to further discovery and actively pushed the case for trial. It was Arcadia who, in May 2008, requested and received a trial setting for September 2008 (later moved to April 2009), after the discovery deadlines and while steadily objecting to any additional discovery. Prejudgment interest in this case was not simply a ministerial act to be performed by the Judge

based on an award of otherwise proven compensatory damages.[4]

Further, the *Upchurch Plumbing, Inc.* court held that it was no longer a pleading requirement that the plaintiff reveal "the specific date on which the prejudgment interest allegedly is due". *Upchurch Plumbing*, 864 So.2d at 1118. This did not mean that the plaintiff did not have a discovery obligation to reveal the information. But even the time period sought in Arcadia's belated March 2008 interrogatory answer (3 years) is different from the time period now claimed on appeal (2 ½ years; Arcadia brief p. 8) and different still from a realistic period. The loss occurred October 16, 2001 and a check was issued by Audubon March 23, 2004, a period a little over 2 years and 5 months, but Audubon was entitled to a reasonable notice and investigation time after claim was made even then. The plaintiff's response to summary judgment on March 26, 2009 – three weeks before trial – inexplicably contained yet a different and even longer time period. It requested prejudgment interest "calculated at a compounded 8 percent interest rate from October 19, 2001 through the date of the jury's verdict." (R. 1503)

"An award of prejudgment interest is normally left to the discretion of the trial judge." *Preferred Risk Mutual Ins. Co. v. Johnson*, 730 So.2d 574, 577 (¶11) (Miss. 1998). *Microtek Medical, Inc. v. 3M Co.*, 942 So.2d 122, 133, ¶ 33 (Miss. 2006) (On review of trial court's denial of prejudgment interest, even if no specific

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[4] *Moeller v. American Guarantee and Liability Ins. Co.*, 813 So.2d 953 (Miss. 2002), cited by Arcadia simply found that the trial court had abused its discretion in denying the motion to amend because a prior mandate of the Mississippi Supreme Court had specifically ordered prejudgment interest in that case.

findings, appellate court will review evidence of record in upholding trial court's discretion.) Here, in declining to allow prejudgment interest, the trial court correctly followed and applied not only the clear language of the statute, but also well-established prior Mississippi case law. Further, as in *Olmstead, supra*, the facts and circumstances of this case do not justify an award of prejudgment interest. The trial court's ruling should be affirmed.

## CONCLUSION

For the foregoing reasons, the trial court properly found Arcadia's sole claim for compensatory damage to be barred. Further, the trial court properly denied Arcadia's futile, prejudicial and untimely request to amend its damages claim. Respectfully, the trial court ruling should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Michael O. Gwin, do hereby certify that I have this day, caused a true and correct copy of the above and foregoing document to be mailed by United States Mail, postage fully prepaid, to the following:

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Honorable Kenneth L. Thomas
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This the 24th day of May, 2010.

MICHAEL O. GWIN