NO. 2009-CA-00903-COA

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ARCADIA FARMS PARTNERSHIP *Plaintiff-Appellant*

V.

AUDUBON INSURANCE COMPANY *Defendant-Appellee*

APPEAL FROM THE CIRCUIT COURT
OF COAHOMA COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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Arcadia is entitled to recover "the time value of money" that accrued during the two and half year period from the date of Audubon's initial denial of coverage until Audubon reluctantly paid what it owed. Not surprisingly, Audubon wants to keep for itself the interest it earned during the period it wrongfully denied Arcadia's claim. Such a result would not only be unfair, since it would lead to the unjust enrichment of Audubon, but contrary to Mississippi law.

The basic premise of Audubon's Appellee Brief is that Miss. Code Ann. §75-17-7 does not allow any plaintiff, regardless of the claim asserted, the ability to collect prejudgment interest for the time period preceding the filing of a complaint. This is a misinterpretation of the statute. Miss. Code Ann. §75-17-7 distinguishes between claims based on breach of contract and claims not based on breach of contract. The statute states as follows:

> 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 the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

Miss. Code Ann. §75-17-7.

In Williams v. Duckett, 991 So. 2d 1165 (Miss. 2008), the Mississippi Supreme Court expressly held that the prohibition against allowing prejudgment interest to accrue prior to the filing of the complaint only applies to non contract cases. Williams, 991 So.2d at 1181. That is consistent with the plain language of the statute, since the first sentence

deals with contract cases and the second sentence, which contains the prohibition, begins with the phrase "All other judgments or decrees."

If this Court were to adopt Audubon's position, no defendant who was guilty of a breach of contract would have to pay a plaintiff for the "time value of money" from the date of the breach of contract to the filing of the Complaint. This would actually give defendants, such as Audubon, an incentive to delay and not to pay what was owed under the contract.

As noted in Appellant's principal brief, it has long been the law in Mississippi that the prevailing party in a breach of contact suit is entitled to have added legal interest computed from the date of the breach of contract to the date of the decree. This Court should not deviate from this precedent based solely on Audubon's misinterpretation of Miss. Code Ann. §75-17-7.

To be sure, Audubon has offered this Court no legal precedent tending to support its reading of the statute. In fact, the cases that Audubon cites actually support Arcadia's position regarding the "time value of money." For example, in Home Ins. Co. v. Olmstead, 355 So. 2d 310 (Miss. 1978), the Mississippi Supreme Court held that allowing prejudgment interest to accrue from the date of the breach of contract was entirely appropriate in cases where the amount owed was liquidated and the insurance company had acted in bad faith. Id. at 313-314. Both elements exist in the case at bar.

Along these same lines, American Fire Protection, Inc. v. Lewis, 653 So. 2d 1387 (Miss. 1995), does not support Audubon's position. The main issue in Lewis was whether prejudgment interest itself was appropriate, not the date upon which said interest started to accrue. In fact, the Court held that the lower had erred in failing to award prejudgment

interest, and cited Miss. Code Ann. §75-17-7 as support for that conclusion. Id. at1392. The Court did not hold, as Audubon seems to suggest, that a plaintiff is unable to obtain prejudgment interest starting from the date of the breach of contract.

Finally, Audubon goes to great lengths in its Appellee Brief to try and convince this Court that it had no idea until approximately a month before trial that Arcadia was seeking prejudgment interest. The basis of this argument is the failure of Arcadia to include the term "prejudgment" in its Complaint.

Audubon's position in this regard would be laughable if it was not so cynical. Even a cursory review of the record demonstrates Arcadia's intention to always pursue prejudgment interest and to collect the "time value of money" from the date of the breach of the insurance contract. The portions of the record evidencing these efforts on the part of Arcadia are cited in detail in the Appellant's Brief. The claim for prejudgment interest was even contained in the Pretrial Order that both parties agreed to prior to the first trial setting. (R. 1192).

Clearly, Audubon knew that Arcadia was seeking to recover prejudgment interest. To the extent that an amended pleading is even necessary under Mississippi Rule of Civil Procedure 15(a), such an amendment to add the word "prejudgment" would not prejudice Audubon in any way. Allowing Audubon to escape liability on a hypertechnical reading of the Complaint and a disingenuous argument regarding prejudice would certainly not serve the ends of justice.

CONCLUSION

For the above reasons, Arcadia respectfully requests that this Court reverse the trial court's order dismissing this case and remand this case for trial.

THIS, the 12th day of July, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, S. Ray Hill, III, of Clayton O'Donnell, PLLC, do hereby certify that I have caused this day to be mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant in both paper and electronic form to:

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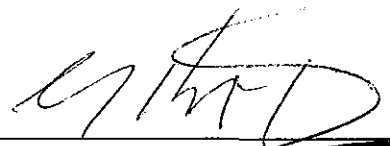
THIS, the 12th day of July, 2010.



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