NO. 2009-CA-00903

IN THE MISSISSIPPI SUPREME COURT

ARCADIA FARMS PARTNERSHIP *Plaintiff-Appellant*

V.

AUDUBON INSURANCE COMPANY *DefendantAppellee*

APPEAL FROM THE CIRCUIT COURT
OF COAHOMA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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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 disqualifications or recusal:

1. Arcadia Farms Partnership, the Plaintiff and Appellant, which operates a farm in Coahoma County, Mississippi. The partnership consists of the following partners: Leah, Inc.; T&S Farms, Inc.; S&F Farms, Inc.; T&M Farms, Inc.; F&P Farms, Inc.; Bobo Farms, Inc., all of which are Mississippi corporations, and T. P. Graydon Flowers, Jr.; J. Roy Flowers and Suzanne F. Weiss.

2. Audubon Insurance Company, a Defendant and the Appellee hereto, is a Louisiana corporation with its principal place of business in Baton Rouge, Louisiana and is a wholly owned subsidiary of American International Group, Inc.

THIS, the 12th day of February, 2010.

DAVID D. O'DONNELL, MSB [redacted]
Attorney for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Arcadia Farms Partnership, the Plaintiff and Appellant in this cause, believes that oral argument would not materially assist the Court in resolving the issues on this appeal given the straightforward nature of the issues raised herein; namely, whether the lower court erred as a matter of Mississippi law in holding that Arcadia Farms Partnership was not entitled to seek prejudgment interest in this bad faith breach of insurance contract action for the time predating the filing of the Complaint in this cause.

STATEMENT OF THE ISSUES

1. Whether Arcadia Farms Partnership was entitled, as a matter of Mississippi law, to recover damages in the form of prejudgment interest arising out of Defendant's bad faith breach of an insurance contract during the time prior to the filing of the Complaint in this cause.

2. Assuming the lower court erred as a matter of law in holding that Arcadia Farms Partnership was not legally entitled to recover prejudgment interest, did the lower court abuse its discretion in refusing to grant Plaintiff's leave to amend the Complaint to seek prejudgment interest.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Arcadia Farms Partnership ("Arcadia") filed this action against Audubon Insurance Company ("Audubon") alleging that Audubon breached, without arguable basis, the clear terms of an insurance contract issued to Arcadia when Audubon denied coverage of a loss insured under the terms of the subject insurance policy. Two and a half years after its coverage denial, Audubon finally paid Arcadia for its insured loss when it acknowledged that the loss reported years earlier was indeed covered by the terms of its policy. Several months later, Arcadia filed its Complaint against Audubon alleging that Audubon's coverage denial and two and a half year delay in acknowledging that Arcadia's loss was indeed covered under the terms of its policy constituted a bad faith breach of the subject insurance contract. Arcadia sought to recover damages, in the form of interest accruing from the date of the bad faith breach of the contract through the date of the filing of the Complaint and beyond to the date of judgment. After a lengthy period of discovery, the lower court granted Audubon's Motion to Limit Damages Proof, holding that Arcadia was not legally entitled to recover prejudgment interest from the date of the bad faith breach of contract through the date of the filing of the subject Complaint and, as a consequence, granted Audubon's subsequent Motion for Summary Judgment dismissing this action.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This bad faith breach of contract action was filed by Arcadia initially against Defendant The Mitchell Company, Inc., on June 25, 2002. (R. 9-12). It was alleged that

Arcadia had purchased several pieces of farm machinery on October 30, 2001 from a local dealer (Wade, Inc.) including one John Deere cotton picker. At the time of purchase, Arcadia was insured under a farm operations insurance policy issued by Audubon Insurance Company for which The Mitchell Company and the J. H. Johnson & Company served as local insurance agents. (R. 10, 22-23). It was further alleged that employees of The Mitchell Company were advised of Arcadia's purchase of the farm equipment on or before October 1, 2001, yet The Mitchell Company failed to notify Audubon of the purchase, and therefore, the equipment purchased from Wade, Inc. on August 30, 2001 was not included on the schedule of equipment specifically insured under the policy at the time of purchase. (Complaint, ¶XII, R. 11). The subject cotton picker purchased on August 30, 2001 was destroyed by fire on October 16, 2001, and Arcadia was informed by Mitchell after that date that the subject insurance policy did not provide coverage because the equipment was not identified under the Audubon policy's equipment list. (Complaint, ¶X, XII, R. 11).

After a period of discovery, Arcadia amended its Complaint on October 14, 2004. (R. 20-26, Amended Complaint). The filing of the Amended Complaint named an additional defendant, Audubon Insurance Company, and included claims alleging Audubon's bad faith breach of the subject insurance contract for refusing to indemnify Arcadia for the loss of the cotton picker destroyed by fire on October 16, 2001. (Amended Complaint, ¶15-17, R. 24-25). After an additional period of discovery relating to Arcadia's claims against Audubon, Audubon filed a Motion for Summary Judgment, contending that its initial coverage denial in October 2001 was supported by an arguable basis and, further, that Arcadia could not sustain a claim for punitive damages under Miss. Code Ann. §11-1-65. (R. 293-303). After

Arcadia filed its response to the Motion for Summary Judgment and further briefing was completed, the lower court held a hearing on the Motion and initially held the matter in abeyance but later entered a ruling denying Audubon's motion finding that there were genuine issues of material fact as to Audubon's bad faith breach of the subject insurance contract. (R. 1460). Eventually, Audubon then filed a Motion to "Limit Damages Proof," seeking the lower court's determination that Arcadia was not entitled to obtain "prejudgment interest" as to the amount of the contract claim from the date Arcadia's insurance claim was initially denied (October 2001) through the date of the filing of the Complaint against Audubon (October 14, 2004) pursuant to Miss. Code Ann. §75-17-7. (R. 1094-1108). After Arcadia filed its response in opposition to the motion, the lower court entered its Order granting Audubon's motion, finding that Arcadia had no entitlement to prejudgment interest for any period of time predating the filing of its Complaint against Audubon and, further, that Arcadia had failed to specifically plead a request for "prejudgment" interest. (R. 1458-59). Based on that ruling, Audubon filed its second Motion for Summary Judgment on the grounds that absent a right to recover prejudgment interest, Arcadia did not have any other proof of "damages" given that Audubon had eventually paid Arcadia's insurance claim prior to the filing of the Complaint. (R. 1485-88). Arcadia responded to Audubon's second Motion for Summary Judgment and the Court's prior Order granting Audubon's Motion to Limit Damages Proof by filing its Motion for Reconsideration or, in the Alternative, Leave to File an Amended Complaint to "specifically" plead a claim for "prejudgment" interest. (R. 1495-1501).

On May 4, 2009, the lower court entered its Order granting Audubon's second Motion for Summary Judgment and denying Arcadia's request for leave to amend the Complaint to specifically plead the claim for "prejudgment" interest. (R. 1552). On May 29, 2009, Arcadia filed its Notice of Appeal from the Order granting Arcadia's second Motion for Summary Judgment and denying leave to amend. On June 2, 2009, the lower court entered a Judgment of Dismissal, dismissing co-defendant The Mitchell Company (based upon a mutual agreement between The Mitchell Company and Arcadia to enter the voluntary dismissal), thereby finally dismissing all claims against all defendants. Accordingly, Arcadia filed its Second Notice of Appeal on June 9, 2009. (R. 1560-61).

STATEMENT OF FACTS

Prior to August 1, 2001, Arcadia was an insured under a commercial insurance policy issued by Audubon Insurance Company with an effective policy period from May 7, 2001 through May 7, 2002. (R. 22). The policy was issued with the assistance of two local Clarksdale, Mississippi agents, The Mitchell Company and J. H. Johnson & Company. The policy provided coverage, *inter alia*, for casualty and loss to certain itemized "mobile agricultural equipment" owned and operated by Arcadia pursuant to its farming operations. (Amended Complaint, R. 22; Audubon Insurance Policy, R. 28-64).

For present purposes, the Audubon insurance policy also provided coverage commonly referred to as "newly acquired" coverage for the farm equipment purchased by Arcadia subsequent to the issuance of the policy. Essentially, the "newly acquired" provision provided coverage for "replacement" equipment or "additional" equipment, as defined by the policy and in reference to the equipment originally identified in the policy's endorsements. (R. 1022-1030, Policy - Equip Coverage Form - Sec. 5 - "Coverage Extensions" - R. 1022).

On August 30, 2001, Arcadia purchased several pieces of additional farm machinery from a local John Deere retailer, including a John Deere cotton picker as a "replacement" of one of the previously insured cotton pickers identified in the Audubon policy's endorsements. (Amended Complaint, ¶6, R. 22). During the course of this transaction, Arcadia, through the local John Deere dealer, informed The Mitchell Company of the purchase, requesting that appropriate steps be taken to obtain coverage under the Audubon policy. After Arcadia took delivery of the "replacement" equipment, one of the "replacement" cotton pickers was destroyed by fire on October 16, 2001. (Amended

Complaint, ¶10, R. 23). As a consequence, Arcadia's president, Taylor Flowers, appeared at The Mitchell Company offices on October 17, 2001, to report the loss and make a claim under the policy. (R. 1283-84). The Mitchell Company, in turn, advised its fellow agent, J. H. Johnson, of the loss. Johnson determined that coverage was unavailable under the policy since the subject destroyed cotton picker was not identified on the list of equipment on the Audubon policy's endorsements and so informed Taylor Flowers. This determination was then communicated directly to Audubon's Vice President of claims, Matt Lorch, on October 19, 2001. (R. 1284; 1032-34). Taylor Flowers was therefore informed by both Johnson and The Mitchell Company that there was no coverage for the loss of the cotton picker under the Audubon policy in October 2001. Thereafter, after several attempts over the ensuing two and a half years to make a claim under the subject Audubon policy (R. 935-38), Audubon finally acknowledged that its policy did indeed provide coverage for the October 2001 loss pursuant to the policy's "after acquired" property coverage provisions since the destroyed cotton picker was a "replacement" of another cotton picker previously listed under the policy's endorsements. Given the two and a half year period from Audubon's initial and repeated denials and eventual payment to Arcadia for the loss in March 2004, Arcadia brought the present action against Audubon alleging that Audubon was guilty of a bad faith breach of the subject insurance contract when it denied Arcadia's claim in October 2001, a denial which persisted until March 2004. The Amended Complaint included a demand for "interest" and later discovery detailed this demand to include "prejudgment" interest. (R. 1506-1507, 1512-1525).

SUMMARY OF THE ARGUMENT

The lower court's order granting Audubon's Motion to "Limit Damages Proof," based on the holding that Miss. Code Ann. §75-17-7 precludes claims for "prejudgment interest" for any time preceding the date of the filing of a civil complaint, is clear legal error. This holding is contrary to the terms of Section 75-17-7 and this Court's construction of that section delineated in Williams v. Duckett, 991 So. 2d 1165 (Miss. 2008). Because this is a "breach of contract" action arising out of Audubon's October 2001 coverage denial, a denial which was maintained for two and a half years until Audubon finally acknowledged that its insurance policy provided coverage for Arcadia's 2001 property loss, Arcadia is entitled to recover the "time value" of the money it was contractually entitled to for the period between October 2001 (the date of the coverage denial) through March 2004 when Audubon finally paid Arcadia's insurance claim. As an element of damages, Arcadia was entitled to pursue the "interest" on the amount of its claim ($100,000) even though Audubon paid the insurance claim prior to the filing of the subject Complaint in October 2004. A claim for "prejudgment" interest in this case as measured from the date of the breach of contract is consistent with Section 75-17-7 and the Williams v. Duckett holding. Further, denying Arcadia a right to recover for the "time value" of its contract benefits would unjustly enrich Audubon, a result not contemplated by Section 75-17-7 involving contract claims.

Further, in the event the lower court's determination constituted clear legal error, the lower court abused its discretion in finding that Arcadia had not pled a claim for "prejudgment" interest and that it should not, in any event, be permitted to amend its Complaint to specifically plead a claim for "prejudgment" interest. The record before the

lower court on this issue demonstrated that considerable discovery as to Arcadia's "prejudgment" claim had taken place during the years preceding the filing of the Defendant's Motion to Limit Damages Proof. Further, there was no showing of any "prejudice" which might accrue to Audubon in the event the trial court granted leave to amend the Complaint to clarify Arcadia's interest claim as one including one for "prejudgment" interest. Thus, as a matter of law and as a matter of abuse of discretion, the lower court's dismissal of Arcadia's claim should be reversed and this matter should be remanded for further proceedings, including trial.

ARGUMENT

A. ARCADIA IS LEGALLY ENTITLED TO RECOVER PREJUDGMENT INTEREST PURSUANT TO SECTION 75-17-7.

This Court has made crystal clear that, in cases involving breach of contract, a party is entitled to recover "prejudgment" interest calculated from the date of the breach of contract – not from the date of the filing of the Complaint as Audubon contends. For example, in Williams v. Duckett, 991 So.2d 1165 (Miss. 2008), the Court considered the extent to which Section 75-17-7 limited a party's right to recover "prejudgment" interest. This Section provides 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.

Construing this Section, the Williams Court distinguished between judgments based on a contract and all other judgments, holding that "under Section 75-17-7, if the judgment of the lower court is not based on a contract or note, and the lower court decides to award prejudgment interest at 'a per annum rate set by it,' it may only calculate that interest 'from a date determined by the court to be fair but in no event prior to the filing of the complaint.'" Judgments based on a contract, on the other hand, permitted an award of prejudgment interest calculated from the date of breach. Thus, the language of Section 75-17-7 which limits the calculation of prejudgment interest to the date of the filing of the complaint until the date of judgment applies only to non-contract cases. Accordingly, in Williams, because the plaintiff had not alleged that the defendant breached the contract at issue, the Court held

that the lower court was in error in calculating prejudgment interest "from a date prior to the filing of the complaint." Id. at 1181.

Arcadia's Complaint against Audubon clearly alleges that Audubon "breached" the subject insurance contract, and did so in "bad faith." In accordance with Williams, Arcadia is therefore entitled to an award of prejudgment interest to be calculated from the date of the alleged breach (October 19, 2001). *See also*, Thompson v. Womack, Inc., 2005 U.S. Dist. LEXIS 31692 (S.D. Miss. 2005) (it has been the law in Mississippi that prejudgment interest may be awarded in a breach of contact suit from the date of the breach); Sentinel Industrial Contracting Corp. v. Kimmins Industrial Services Corp., 743 So.2d 954 (Miss. 1999) (Mississippi has long held that prevailing party in breach of contact suit is entitled to have added legal interest computed from date of the breach of contract to the date of the decree).

B. LEAVE TO AMEND THE COMPLAINT TO ADD REQUEST FOR "PREJUDGMENT" INTEREST SHOULD BE GRANTED.

As stated in Arcadia's Response to Audubon's Motion to Limit Damages Proof, Arcadia's Complaint does include a claim for "interest." (Amended Complaint, ¶21, R. 26). Reading the term "interest" as used in the Complaint both narrowly and in the manner which necessarily "excludes" a claim for prejudgment interest is contrary to the spirit of the Mississippi Rules of Civil Procedure which encourages both "notice" pleading and a liberal and fair construction of Arcadia's pleadings. In any event, even assuming that a general claim for interest is insufficient to raise a claim for prejudgment interest, Arcadia is entitled to leave to amend its Complaint in order to correct any hypertechnical failure to include the term "prejudgment" in reference to its claim for interest as stated in the Complaint.

As this court is well aware, motions for leave to amend a complaint are left to the sound discretion of the trial court. *See* Moeller v. American Guaranty & Liability Ins. Co., 812 So.2d 953, 961 (Miss. 2002). Construing Mississippi Rule of Civil Procedure 15(a), the Supreme Court has frequently observed that leave to amend "shall be freely given when justice so requires; this mandate is to be heeded ... if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Estes v. Starnes, 732 So.2d 251, 252 (Miss. 1999). Further, "in the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" Id. *See also* Preferred Risk Mut. Ins. Co. v. Johnson, 730 So.2d 574, 579 (Miss. 1998).

The record before the trial court simply does not permit a finding that Audubon would be "prejudiced" in the event leave to amend were allowed to include a claim for "prejudgment" interest. For example, Arcadia's discovery responses starting in August 2006, clearly stated an intent to seek "prejudgment" interest calculated from the date of the alleged breach of the insurance contract (see Arcadia's Response to Audubon's Interrogatory No. 6). Later, on May 29, 2007, Arcadia provided a supplemental response to Interrogatory N. 6 (R. 1506-07), explaining its claim for compensatory damages as follows:

> This number [$100,000] 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. ...

Arcadia's response to this interrogatory was again supplemented on March 4, 2008, which reiterated Arcadia's claim for "prejudgment" interest as follows:

> 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 attorneys 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. ... The amount of interest owed by Audubon based on this prevailing rate would be $26,000.00 [as of the date of the interrogatory response].

(R. 1512-1525). Finally, the Final Pretrial Order jointly submitted by the parties in September 2008 (within two weeks of the September 2008 trial setting which was later continued) further pressed Arcadia's claim for "prejudgment interest." (Amended Pretrial order, R. 1190-1218). On page 3 of the Pretrial Order, for example, Arcadia again specifically delineated its claim for "prejudgment interest." (R. 1192). On page 7 of the Pretrial Order, which sets out Audubon's defenses to Arcadia's claim, there is no mention of any issue with respect to Arcadia's claim for prejudgment interest (R. 1195-96, Section 6, Pretrial Order). In Section 7, which identifies the "Issues of Law" to be advanced by Audubon during the trial of this cause, there is again no mention of any issue with respect to Arcadia's entitlement to prejudgment interest. (R. 1198-99, Section 7, Pretrial Order).

Under the circumstances set forth above, Arcadia was entitled to amend its Complaint to cure any technical failure to use the term "prejudgment" in relation to its claim for interest as set forth in its Complaint. Leave to amend should be granted under Rule 15(a) in the absence of any prejudice to Audubon, and Audubon cannot seriously contend that it would be "prejudiced" by the granting of Arcadia's request for leave to amend its Complaint at this juncture. *See* Preferred Risk, 730 So.2d at 579-80 (trial court's grant of request to amend complaint to add claim for prejudgment interest six years after action was filed not an abuse of discretion because defendant insurer not prejudiced by amendment); *see also* Moeller, 812 So.2d at 962 (trial court abused its discretion when it denied motion to amend complaint to add claim for prejudgment interest during the trial; no showing of prejudice to defendant).

CONCLUSION

The Order dismissing this case based on a legally erroneous construction of Miss. Code Ann. §75-7-17 and an abuse of discretion should be reversed and this case should be remanded for further proceedings including trial.

THIS, the 12th day of February, 2010.

Respectfully submitted,

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DAVID D. O'DONNELL, MSB [redacted]

CERTIFICATE OF SERVICE

I, David D. O'Donnell, 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 Brief of Appellant in both paper and electronic form to:

Michael O. Gwin, Esq.
Louis B. Lanoux, Esq.
Watkins & Eager, PLLC
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Jackson, MS 39205

THIS, the 12th day of February, 2010.

DAVID D. O'DONNELL, MS [redacted]

ADDENDUM

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS
CHAPTER 17. INTEREST, FINANCE CHARGES, AND OTHER CHARGES
GENERAL PROVISIONS

GO TO MISSISSIPPI STATUTES ARCHIVE DIRECTORY

Miss. Code Ann. § 75-17-7 (2009)

§ 75-17-7. Interest on judgments and decrees

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.

HISTORY: SOURCES: Codes, Hutchinson's 1848, ch. 47, art. 2 (3), ch. 54, art. 2 (38); 1857, ch. 50, arts. 1, 3, ch. 62, art. 100; 1871, §§ 1269, 2279, 2281; 1880, §§ 1141, 1143, 1958; 1892, § 2350; 1906, § 2680; Hemingway's 1917, § 2078; 1930, § 1949; 1942, § 39; Laws, 1975, ch. 336, § 1; Laws, 1989, ch. 311, § 5, eff from and after July 1, 1989.

NOTES: EDITOR'S NOTE. --Laws of 1975, ch. 366, § 2, effective July 1, 1975, reads as follows:

"SECTION 2. This act shall apply only to judgments and decrees rendered on or after the effective date of this act. Judgments or decrees rendered prior to the effective date of this act shall continue to bear interest at the same rate as was applicable at the time the judgment or decree was rendered."

Laws of 1989, ch. 311, § 7, effective from and after July 1, 1989, provides as follows:

"SECTION 7. The provisions of this act shall apply only to causes of action accruing on or after July 1, 1989."

CROSS REFERENCES. --Judgments in chancery court, see § 11-5-79.

Applicability of interest rate provided for in this section to notes securing rents due on leases of prison agricultural lands, see § 47-5-66.

Payment of interest on monthly installment loans, see § 75-67-39.

Payment of money secured by mortgage or deed of trust, see § 89-1-49.