STATE OF MICHIGAN

COURT OF APPEALS

THE CINCINNATI INSURANCE COMPANY, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED July 5, 2011
v	No. 295871 Genesee Circuit Court
V.K. VEMULAPALLI, Defendant-Appellant/Cross-Appellee.	LC No. 99-065843-NO

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant owned and operated the Genesee Towers building in downtown Flint. Plaintiff was the property and casualty insurer for the building and filed a declaratory judgment action after questions arose regarding coverage related to replacement costs for a fire alarm system. After granting summary disposition in favor of defendant, the trial court awarded statutory interest to defendant. Defendant appeals as of right the award of the statutory interest, arguing that penalty interest pursuant to the Uniform Trade Practices Act ("UTPA"), MCL 500.2001 et seq., should have been awarded instead. Plaintiff, in turn, cross-appeals the decision to award any interest. We reverse and remand.

I. BASIC BACKGROUND FACTS

This is the second time this case has been before this Court. Some of the background facts are set forth in our previous opinion. See *The Cincinnati Ins Co v Vemulapalli*, unpublished opinion per curiam of the Court of Appeals, issued December 6, 2002 (Docket No. 233235). At issue in the prior appeal was whether defendant was entitled to a judgment for the replacement cost of a fire alarm system. This Court concluded that the trial court properly determined that the fire alarm system was a covered loss. However, this Court reversed the trial court's order granting summary disposition to the extent that it required plaintiff to pay defendant any replacement cost in excess of the actual cash value that defendant had yet to incur. This Court remanded the case to the trial court to enter judgment in favor of defendant for the fire system's actual cash value and any actual replacement costs in excess of that amount as those costs were incurred. Additionally, this Court stated that "The circuit court may, if necessary, hold an evidentiary hearing to determine the proper amount of the judgment and may order [plaintiff] to pay [defendant] for the actual replacement costs as he incurs the costs."

Vemulapalli, unpub op at pp 11-12. After remand, defendant moved in the trial court to recover penalty interest under the Uniform Trade Practices Act ("UTPA"), MCL 500.2001 *et seq*. The trial court denied the motion, finding that the UTPA was inapplicable because the claim was reasonably in dispute. The trial court concluded, instead, that interest was calculable under MCL 600.6013.

The evidentiary hearings that this Court had referenced when it remanded the case never occurred. Consequently, the parties stipulated to submitting the issue to binding arbitration, but expressly reserved the issue of interest for the court. After accepting a master's findings, the trial court entered a judgment in favor of defendant for $579,407.76, which plaintiff paid, receiving a partial satisfaction of judgment. The trial court reiterated that interest was to be calculated as provided in MCL 600.6013. Nearly four years later, defendant again moved to have interest calculated under the UTPA. Plaintiff also filed a motion seeking to have the court enforce its prior orders regarding interest. On December 22, 2009, the trial court entered an order requiring plaintiff to pay defendant $205,826.80 in interest pursuant to MCL 600.6013 for the period of time from the date of the filing of the complaint to May 25, 2005, which was the date that plaintiff paid the $579,407.76 judgment. In accordance with that order, plaintiff deposited $205,826.80 with the Clerk of the Genesee Circuit Court.

On January 6, 2010, defendant filed this appeal, seeking reversal of the trial court's use of the statutory interest calculations instead of the calculations provided by the UTPA. On February 1, 2010, plaintiff filed a cross-appeal, claiming that no interest should have been awarded under either MCL 600.6013 or the UTPA.

II. PENALTY INTEREST UNDER MCL 500.2006

Defendant argues that the trial court erred when it failed to award penalty interest under the UTPA. We agree that the court erred in applying the law, but a remand is necessary to fully determine whether penalty interest is due. A trial court's award of statutory interest is reviewed de novo. *Farmers Ins Exch v Titan Ins Co*, 251 Mich App 454, 460; 651 NW2d 428 (2002).

MCL 500.2006 of the UTPA provides, in pertinent part, the following:

> (1) A person must pay on a timely basis to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant the benefits provided under the terms of its policy, or, in the alternative, the person must pay to its insured, an individual or entity directly entitled to benefits under its insured's contract of insurance, or a third party tort claimant 12% interest, as provided in subsection (4), on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims as provided in subsection (4) is an unfair trade practice unless the claim is reasonably in dispute.
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> (2) A person shall not be found to have committed an unfair trade practice under this section if the person is found liable for a claim pursuant to a judgment rendered by a court of law, and the person pays to its insured, individual or entity

> directly entitled to benefits under its insured's contract of insurance, or third party tort claimant interest as provided in subsection (4).
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> (3) An insurer shall specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days. If proof of loss is not supplied as to the entire claim, the amount supported by proof of loss shall be considered paid on a timely basis if paid within 60 days after receipt of proof of loss by the insurer. Any part of the remainder of the claim that is later supported by proof of loss shall be considered paid on a timely basis if paid within 60 days after receipt of the proof of loss by the insurer. . . .
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> (4) If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. The interest shall be paid in addition to and at the time of payment of the loss. If the loss exceeds the limits of insurance coverage available, interest shall be payable based upon the limits of insurance coverage rather than the amount of the loss. If payment is offered by the insurer but is rejected by the claimant, and the claimant does not subsequently recover an amount in excess of the amount offered, interest is not due. Interest paid pursuant to this section shall be offset by any award of interest that is payable by the insurer pursuant to the award.

While there is no doubt that penalty interest is not recoverable in a third-party claim if the claim was reasonably in dispute, there has been considerable question regarding how a reasonably disputed claim affects a first-party claim.

In *Yaldo v North Pointe Ins Co*, 457 Mich 341; 348 n 4; 578 NW2d 274 (1998), the Supreme Court stated that the "reasonably in dispute" language of MCL 500.2006(4) only applied to third-party claims. But this Court, in *Arco Indus Corp v American Motorists Ins Co*, 233 Mich App 143, 147-148; 594 NW2d 74 (1998), abrogated by *Griswold Properties, LLC v Lexington Ins Co* (*Griswold II*), 276 Mich App 551; 741 NW2d 549 (2007), refused to follow *Yaldo* because it determined that, since the issue before *Yaldo* was whether MCL 600.6013(5) or MCL600.6013(6) applied for the purpose of computing interest, any discussion related to MCL 500.2006(4) was dictum and not binding. *Id*. at 147-148. The *Arco* Court, while relying on *Siller v Employers Ins of Wausau*, 123 Mich App 140; 333 NW2d 197 (1983), decided that MCL 500.2006 did not apply when the claim was reasonably in dispute, regardless of the claim being a first-party or third-party claim. *Id*. at 148-149.

In *Griswold Properties, LLC v Lexington Ins Co* (*Griswold I*), 275 Mich App 543; 740 NW2d 659 (2007), this Court was confronted with whether a first-party insured was entitled to

the penalty interest prescribed in MCL 500.2006(4). The Court disagreed with the *Arco* analysis, but followed the precedent because it was bound to do so. *Id*. at 551. The Court reasoned that the analysis in *Yaldo* was proper: the "reasonably in dispute" language applies only to third-party tort claims because the language only exists in the second sentence of MCL 500.2006(4) and not the first. *Id*.

A special panel then was convened in *Griswold II* to address the conflict between the opinions expressed in *Griswold I* and *Arco*. The *Griswold II* Court adopted the position advocated by the *Griswold I* Court and held that the "reasonably in dispute" language of MCL 500.2006(4) only applied to third-party claims. *Griswold II*, 276 Mich App at 553. The Court noted that the *Arco* Court heavily relied on *Siller*. *Griswold II* discounted any reliance on *Siller* because the *Siller* Court only analyzed the language of MCL 500.2006(1) and "did not acknowledge that the 'reasonably in dispute' language is not included in the first sentence of MCL 500.2006(4)." *Id*. at 559. The *Griswold II* Court also held that the *Yaldo* Court's discussion of MCL 500.2006(4) was not dictum because, even though the discussion was not necessarily decisive of the controversy, it was nonetheless germane to the controversy. *Id.* at 564. Thus, as the *Griswold I* Court was bound to follow *Arco*, this Court is bound to follow *Griswold II*.

Plaintiff argues that *Griswold II* should not be applied retroactively in this instance. The general rule is that judicial decisions are to be given full retroactive effect. *Pohutski v City of Allen Park*, 465 Mich 675, 695; 641 NW2d 219 (2002). However, where injustice might result, a more flexible approach is warranted. *Id*. at 696. Factors to consider include the following: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id.* Here, none of these factors would weigh against retroactive application of *Griswold II*. The purpose of the *Griswold II* holding and the statutory scheme of MCL 500.2006 is to promote the protection of the population against unfair trade practices by insurance companies, which would be thwarted by not retroactively applying it. Next, there is no evidence that plaintiff relied on the prior holding of *Arco* when it decided to make certain payments and withhold certain payments. Thus, with there being no reliance on the old law,[1] its retroactive application is favored. Finally, it is not clear how *Griswold II* would negatively impact the administration of justice if it was given full retroactive effect. Accordingly, there is no compelling reason for deviating from the general rule of full retroactivity.

As a result, *Griswold II* mandates that penalty interest of MCL 500.2006(4) can apply to first-party claims irrespective of whether the claim was reasonably in dispute. Thus, in the present case, the only issue is whether plaintiff was dilatory. Specifically, penalty interest is to be assessed if a claim is not paid within 60 days of a satisfactory proof of loss being submitted. MCL 500.2006(4). Defendant, on appeal, does not identify that any proof of loss was ever

[1] We note that, while plaintiff relied on *Arco* in making its arguments to the trial court, there is no evidence that it made its decisions regarding payment/nonpayment based on that holding.

submitted for the replacement of the fire alarm system. Plaintiff argues that this fact alone means that MCL 500.2006(4) cannot trigger and no penalty interest could be due. However, a claimant can be excused from submitting a satisfactory proof of loss if an insurer fails to comply with MCL 500.2006(3). *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 486; 717 NW2d 341 (2006). MCL 500.2006(3) requires insurers to "specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days." Because the trial court relied on *Arco* in deciding that penalty interest was not applicable, it never had to determine whether a satisfactory proof of loss was ever submitted. Thus, a remand is necessary to make this determination. On remand, if the trial court determines that a satisfactory proof of loss was never submitted, then it must then determine whether plaintiff complied with MCL 500.2006(3).[2] If the trial court determines that defendant supplied a satisfactory proof of loss, or that it was excused, the court must then determine whether the claim was paid within 60 days of that proof of loss, and any applicable penalty interest is to be calculated.

III. STATUTORY INTEREST UNDER MCL 600.6013

Plaintiff argues that the trial court erred when it awarded statutory interest under MCL 600.6013 to defendant. We agree. A trial court's award of statutory interest is reviewed de novo. *Farmers Ins Exch*, 251 Mich App at 460.

The trial court awarded statutory interest to defendant as described in MCL 600.6013(6) and MCL 600.6013(8). The statute's relevant subsections provide the following:

> (6) For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).
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> (8) Except as otherwise provided in subsections (5) and (7) and subject to subsection (13), for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including

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[2] We note that, in any event, a proof of loss could not have been submitted until after this Court's remand on December 6, 2002, because any liability had not triggered yet because defendant had yet to replace the fire alarm system. *Vemulapalli*, unpub op at 11-12.

attorney fees and other costs. The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney.

Plaintiff relies on *Amerisure Ins Co v Graff Chevrolet, Inc* (*Amerisure II*), 469 Mich 1003; 674 NW2d 379 (2004), as establishing a clear bar to defendant receiving any statutory interest under MCL 600.6013. *Amerisure* involved a dispute between two insurance companies, which arose from an automobile accident. *Amerisure Ins Co v Graff Chevrolet, Inc* (*Amerisure I*), 257 Mich App 585, 587; 669 NW2d 304 (2003), rev'd in part 469 Mich 1003 (2004). While Debra Rahn's own vehicle was being repaired, she rented a vehicle from defendant Graff Chevrolet. *Id*. The rental agreement allowed Rahn's fiancé to drive the vehicle, but the contract stated that insurance coverage was excluded when the rental car was used to carry property for consideration. *Id*. The fiancé was driving the vehicle, while delivering pizzas for Hungry Howie's, when he collided with another car. *Id*. The other driver agreed to accept $180,000 in settlement. *Id*. Because Graff's and Hungry Howie's insurers could not agree on who was responsible for coverage, each contributed $90,000 to the settlement and agreed to determine coverage in a subsequent proceeding. *Id*. at 587-588. The trial court and this Court determined that the exclusionary provision was effective, which relieved Graff's insurer of any liability. *Id*. at 597. Accordingly, Graff's insurer was awarded $90,000 as reimbursement. *Id*. at 600. This Court, on appeal, ruled that the defendant-insurer was entitled to statutory interest because the statutory reference to "the complaint" referred to the complaint that initiated the action. *Id*. But the Supreme Court reversed this part of the decision because it determined that "[p]rejudgment interest accrues from the date that the complaint is filed *against the party upon whom prejudgment interest is being taxed*." *Amerisure II*, 469 Mich at 1003 (emphasis added). And since the defendant did not timely file a counterclaim, the award of prejudgment interest was not available under MCL 600.6013. *Id*.

Here, defendant argues that *Amerisure II* is not applicable because the parties were both insurance companies. We disagree. Whether the parties were individuals, corporations, insureds, or insurers did not play a role in the Supreme Court's analysis or decision. *Id*. at 1003. Defendant also invites this Court to treat his answer to the complaint as the equivalent of a complaint for purposes of MCL 600.6013. We again disagree. The Supreme Court did not say that prejudgment interest accrues from the date that a *pleading* is filed against a party – it is from the date that a *complaint* is filed against a party. *Id*.; *Rittenhouse v Erhart*, 424 Mich 166, 217-218; 380 NW2d 440 (1985). Accordingly, we decline defendant's invitation. As a result, defendant cannot avail itself of MCL 600.6013 because he did not have an active complaint or counter-complaint.

Defendant argues that, aside from any other issue, plaintiff is judicially estopped from arguing that it should not pay statutory interest. "Under the doctrine of judicial estoppel, a party that has unequivocally and successfully set forth a position in a prior proceeding is estopped from setting forth an inconsistent position in a later proceeding." *Detroit Int'l Bridge Co v Commodities Export* Co, 279 Mich App 662, 672; 760 NW2d 565 (2008). The purpose of the doctrine is to maintain the consistency of court rulings and to keep litigants from abusing the legal system. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 736; 761 NW2d 454 (2008). But, because it is an extraordinary remedy, it is to be applied with caution. *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999). Additionally, judicial estoppel is not

meant to be a technical defense for litigants seeking to derail potentially meritorious claims. *Id*. Michigan utilizes the "prior success" model of judicial estoppel. *Id*. at 365. Under this model, application of the doctrine is limited to "where a party attempts to invoke the authority of a second tribunal 'to override a bargain made' with a prior tribunal." *Id*.

Here, defendant cites to two instances of plaintiff allegedly arguing for interest under MCL 600.6013. First, defendant references a letter that plaintiff's counsel wrote to opposing counsel on June 27, 2005. This letter was not a proclamation before any tribunal, so it is not appropriate to consider in a judicial estoppel context. Second, defendant cites plaintiff's counsel's statements in the hearing that was conducting on December 7, 2009. There, plaintiff's counsel stated,

> Judge, this matter comes before the Court on our motion to enforce this Court's prior order. And as this Court is well aware, I cited the *Amerisure* case and indicated that because the plaintiff didn't file a counter complaint in this matter, they weren't entitled to interest.
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> Judge, water has gone under the bridge since I filed this motion. I've been trying to see if we couldn't put a final end to this 1999 case and come to terms. . . .
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> [Defendant] come[s] up with $205,826.80 [for interest calculations].
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> Judge, to bring this case to a resolution, that's good by me. You could enter an order in that amount and if they don't want it, I'll pay it into the Court and you can set up an account and I'll take care of it this week.
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> * * *
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> [A]nd my client is willing to do that if we can get this thing to a final order.

This statement is not an unequivocal assertion that interest should be paid or is owed. Instead, it appears to be an attempt to simply conclude a case that has been ongoing for over ten years. Moreover, assuming that plaintiff did make assertions to the trial court that MCL 600.6013 was applicable, that would not be *wholly* inconsistent with plaintiff's position on appeal. Plaintiff's position is that MCL 600.6013 is *applicable*, but because defendant failed to file a counter-complaint, the *governing* statute, MCL 600.6013, precludes him from recovering interest.[3] Thus, judicial estoppel is not implicated in the present case.

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[3] Plaintiff's November 12, 2009, motion stated this premise precisely: "[T]his Court has ruled that MCL 600.6013 controls the computation of interest in the present action, [but] the failure to file a counter[-]claim requires this Court to award no interest pursuant of the terms of said statute . . . ."

As a result, because (1) the Supreme Court established that a defendant must have filed a counter-complaint in order to be able to be awarded interest under MCL 600.6013 and (2) plaintiff was not judicially estopped from claiming that defendant did not meet the requirements of MCL 600.6013, defendant is not entitled to statutory interest under MCL 600.6013.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering