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October 26, 2000

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
360 James Robertson Parkway
Nashville, TN 37201

Re: Tariff Filings by all Telephone Companies Regarding Reclassification of Pay Telephone Service as Required by FCC Order 96-439
Docket No. 97-00409

Dear Mr. Waddell:

Please accept for filing the original and thirteen copies of a Motion for Prejudgment Interest filed on behalf of the Tennessee Payphone Owners Association in the above-captioned proceeding. Copies have been provided to parties of record.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

HW/nl
Enclosure

0678851.01
094693-000 10/26/2000

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: TARIFF FILINGS BY LOCAL EXCHANGE COMPANIES TO COMPLY WITH FCC ORDER 96-439 CONCERNING THE RECLASSIFICATION OF PAY TELEPHONES

DOCKET NO. 97-00409

MOTION FOR PREJUDGMENT INTEREST

The Tennessee Payphone Owners Association ("TPOA") requests that any refund awarded in this proceeding by the Tennessee Regulatory Authority ("TRA") include 10% interest,[1] from one of the following dates:

a. April 15, 1997 - the date by which local exchange carriers were required by federal law to fix cost-based rates for payphone access lines;[2] or

b. March 21, 2000 - the date when the TRA requested that the TRA reconvene the above-captioned proceeding, which had been suspended by agreement among the parties and the TRA, in light of the near completion of the TRA's "permanent pricing" docket and the March 2, 2000, Order of the FCC's Common Carrier Bureau which clarified the guidelines states must follow in setting payphone access line rates; or

---

[1] Prejudgment interest may not be "in excess of a maximum effective rate of ten percent (10%) per annum." T.C.A. § 47-14-123.

[2] A local exchange carrier "must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates." *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, FCC Docket No. 96-128, Order released April 15, 1997, paragraph 25.

c. October 25, 2000 - the date when the TRA heard this matter on the merits and when the TPOA requested that any subsequent refund include, at least, interest from that date forward.

This request is made in light of a 1998 decision of the Tennessee Supreme Court, *Myint v. Allstate*, 970 S.W. 2d 920, which changed the law on prejudgment interest in Tennessee. Prior to *Myint*, the case law indicated that prejudgment interest can never be awarded when a claim is reasonably disputed. See *Textile Workers Union v. Brookside Mills*, 326 S.W. 2d 671 (Tenn.1959) and *Mitchell v. Mitchell*, 876 S. W. 2d 830, 832 (Tenn. 1994). Those cases were specifically overruled in *Myint. Supra.*, at footnote 7. As recently explained by the Court of Appeals, the law in Tennessee now "favor[s] awarding prejudgment interest whenever doing so will more fully compensate plaintiffs for the loss of the use of their funds. Fairness will, in almost all cases, require that a successful plaintiff be fully compensated by the defendant for all losses caused by the defendant, including the loss of use of money the plaintiff should have received." *Scholz v. S.B. International*, 2000 Westlaw 1231430 (Tenn. Ct. App. , August 31, 2000).

Prejudgment interest may still be inappropriate, however, if the party seeking interest has been "inexcusably dilatory in pursuing a claim," "unreasonably delayed the proceedings after suit was filed," or "has already been otherwise compensated for the lost time value of its money." *Scholz, supra,* at 4.

Finally, trial courts have discretion — based on the facts of each case — in determining the date from which prejudgment interests will begin to run. *See, Razorback Marble v. D.D. Roberts*, 1998 WL 684326 (Tenn. Ct. App., July 1, 1998) (decided a month after the *Myint* opinion was issued.)

Copies of the *Myint, Scholz*, and *Razorback* opinions are attached to this motion. The TPOA will more fully address this motion in its brief to be filed on Tuesday, October 31, 2000.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2000, a copy of the foregoing document was served on the parties of record, via U.S. Mail, addressed as follows:

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Henry Walker

Supreme Court of Tennessee,
at Nashville.

Win MYINT and wife Patti K. Myint Plaintiffs/ Appellants,
v.
ALLSTATE INSURANCE COMPANY, Defendant/ Appellee.

June 1, 1998.

Insureds brought action against property insurer to recover for breach of contract, bad faith failure to pay, and violation of the Consumer Protection Act. The Chancery Court, Davidson County, Christina Norris, Special Chancellor, dismissed claim under Consumer Protection Act and entered judgment on jury verdict in favor of insureds and awarded prejudgment interest. Appeal and cross-appeal were taken. The Court of Appeals affirmed in part, reversed in part, and remanded. Insureds' appeal was permitted. The Supreme Court, Birch, J., held that: (1) Consumer Protection Act applies to acts and practices of insurance companies; (2) insurer's refusal to pay claim for fire loss on suspicion of arson was not unfair or deceptive and, therefore, did not violate Consumer Protection Act; (3) prejudgment interest can be awarded on basis of equitable considerations even when a claim is reasonably disputed, overruling Textile Workers Union and Howard G. Lewis Construction Company; and (4) insurer's reasonable basis for disputing liability did not preclude prejudgment interest.

Affirmed in part and reversed in part.

West Headnotes

[1] Consumer Protection ⚿6
92Hk6

[1] Insurance ⚿3335
217k3335

Bad faith statute permitting suit for failure to pay claim, if refusal was not in good faith, and Insurance Trade Practices Act prohibiting unfair claim settlement practices do not provide exclusive remedy for refusal to pay claim and, therefore, do not foreclose application of the Consumer Protection Act to insurance companies; provision of Trade Practices Act prohibiting unfair method of competition or an unfair or deceptive act or practice does not limit remedies available outside the Insurance Trade Practices Act. T.C.A. §§ 47- 18-101 et seq., 56-7-105, 56-8-101 et seq., 56-8-103.

[2] Appeal and Error ⚿893(1)
30k893(1)

Construction of a statute is a question of law reviewed de novo with no presumption of correctness.

[3] Statutes ⚿181(1)
361k181(1)

Role of the court in construing statutes is to ascertain and give effect to legislative intent.

[4] Statutes ⚿188
361k188

Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language.

[5] Consumer Protection ⚿6
92Hk6

[5] Insurance ⚿3417
217k3417

Consumer Protection Act applies to acts and practices of insurance companies; Act omits insurers from list of exemptions for certain entities, exempting them would frustrate Act's purposes, and Act makes powers and remedies provided by it cumulative and supplementary. T.C.A. §§ 47-18-102, 47-18-104(a), (b)(27), 47-18-109(a)(1), 47-18-111, 47-18-112.

[6] Consumer Protection ⚿6
92Hk6

[6] Insurance ⚿3417
217k3417

Mere existence of comprehensive insurance regulations does not prevent the Consumer Protection Act from also applying to the acts or practices of an insurance company. T.C.A. §§ 47-18-101, et seq., 56-7-105, 56-8-101 et seq., 56-8-103.

[7] Consumer Protection ⚿6
92Hk6

[7] Insurance ⚿3335
217k3335

Insurance Trade Practices Act, the bad faith statute, and the Consumer Protection Act are complementary legislation that accomplish different purposes, and, thus, Trade Practices Act and bad faith statute do not provide exclusive remedy for failure to pay. T.C.A. §§ 47-18-101 et seq., 56-7- 105, 56-8-101 et seq., 56-8-103.

[8] Consumer Protection ⚿6
92Hk6

[8] Insurance ⚿3360
217k3360

Property insurer's refusal to pay claim for fire loss on suspicion of arson was not unfair or deceptive and, therefore, did not violate Consumer Protection Act. T.C.A §§ 47-18-104(a), 47-18-109(a)(1).

[9] Consumer Protection ⚿6
92Hk6

[9] Insurance ⚿1560
217k1560

Sale of a policy of insurance is "trade" or "commerce" subject to Consumer Protection Act prohibiting unfair or deceptive acts or practices in trade or commerce. T.C.A § 47-18-103(9).

[10] Appeal and Error ⚿984(1)
30k984(1)

[10] Interest ⚿39(2.10)
219k39(2.10)

Prejudgment interest is within the sound discretion of the trial court, and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion.

[11] Appeal and Error ⚿946
30k946

Generally, the abuse of discretion standard does not authorize an appellate court to merely substitute its judgment for that of the trial court; thus, in cases where the evidence supports the trial court's decision, no abuse of discretion is found.

[12] Interest ⚿39(2.6)
219k39(2.6)

Court deciding whether to award prejudgment interest must decide whether the award is fair, given the particular circumstances of the case. T.C.A. § 47-14-123.

[13] Interest ⚿39(2.6)
219k39(2.6)

In reaching an equitable decision on claim for prejudgment interest, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing.

[14] Interest ⚿39(2.15)
219k39(2.15)

Prejudgment interest is allowed when the amount of the obligation is certain, or can be ascertained by a proper accounting, and the amount is not disputed on reasonable grounds.

[15] Interest ⚿39(2.6)
219k39(2.6)

Prejudgment interest is allowed when the existence of the obligation itself is not disputed on reasonable grounds.

[16] Interest ⚿39(2.15)
219k39(2.15)

Prejudgment interest can be awarded on basis of equitable considerations even when a claim is reasonably disputed; overruling Textile Workers Union v. Brookside Mills, Inc., 205 Tenn. 394, 402, 326 S.W.2d 671, 675 (1959); Howard G. Lewis Construction Co. v. Lee, 830 S.W.2d 60, 66 (Tenn.App.1991).

[17] Interest ⚿39(2.15)
219k39(2.15)

If the existence or amount of an obligation is certain, this fact will help support an award of prejudgment interest as a matter of equity.

[18] Interest ⚿39(2.15)
219k39(2.15)

Uncertainty of either the existence or amount of an obligation does not mandate a denial of prejudgment interest, and award of such interest is not automatically an abuse of discretion, provided the decision was otherwise equitable; certainty of the claim is only one of many nondispositive facts to consider when deciding whether prejudgment interest is equitable under the circumstances.

[19] Interest ⚿39(2.35)
219k39(2.35)

Property insurer's reasonable basis for disputing liability for fire loss on suspicion of arson by insureds did not preclude prejudgment interest, since damages were ascertainable by well-accepted methods of valuation, i.e., cost to repair the fire damage and calculation of the difference between the market value of the house prior and subsequent to the fire, since jury found no arson by insureds, and since possessed only unproductive property for about four and one-half years.

[20] Interest ⚿39(2.15)
219k39(2.15)

Prejudgment interest test for determining whether the amount of damages is certain is not whether the parties agree on a fixed amount; rather, test is whether the amount of damages is ascertainable by computation or by any recognized standard of valuation, even if there is a dispute over monetary value or if the parties' experts compute differing estimates of damage.

[21] Jury ⚿16(1)
230k16(1)

Insurer had no constitutional right to jury trial on the issue of prejudgment interest; right to a jury in an equitable matter is not the common law right guaranteed by the constitution. T.C.A. § 21-1-103.

***922** Joseph H. Johnston, Nashville, for Plaintiffs/Appellants.

Barry Friedman, Paige Waldrop Mills, John D. Schwalb, Nashville, Jon L. Fleischaker, Louisville, KY, for Defendant/Appellee.

OPINION

BIRCH, Justice.

In this cause, the insuror refused to pay a claim under a policy of insurance. The insured contends that such refusal constitutes an "unfair or deceptive act or practice," in violation of the Consumer Protection Act, Tenn.Code Ann. §§ 47-18-101, et seq. [FN1] In contrast, the insuror insists that Tenn.Code Ann. § 56-7-105, [FN2] commonly known as the "bad faith statute," is the exclusive remedy for the bad faith denial of an insurance claim. Because Title 56, Chapters 7 and 8 of the Tennessee Code comprehensively regulates the insurance industry, the insuror insists that the acts and practices of an insurance company are never subject to the Consumer Protection Act.

> FN1. Tennessee Code Annotated § 47-18-109 (1995) provides the remedies for a violation of the Consumer Protection Act: (a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, ... as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.
>
> ....
>
> (a)(3) If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper.
>
> FN2. Tennessee Code Annotated § 56-7-105(a)(1989) provides:
> [I]nsurance companies ..., in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest thereon, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of the policy....

We find, for the reasons stated herein, that the acts and practices of an insurance company may, indeed, be subject to the Consumer Protection Act. We conclude, however, that the facts before us do not

evince an act "affecting the conduct of any trade or commerce" such as would be subject to the Consumer Protection Act.

I

The property herein involved is a two-unit structure located at 224 Treutland Street in Nashville. The appellants, Win and Patti Myint, purchased it in 1983 and began leasing the units. Since 1989, they maintained insurance coverage on the structure with the appellee, Allstate Insurance Company, under a "landlord's package" policy. The structure was insured for its estimated market value--$61,000. In April 1991, the ground floor tenant reported water leaking from the second floor. Repairs were made, and the Myints received no further complaints.

In June 1991, Win Myint inspected the property and discovered that water leaking from the second-floor kitchen sink had extensively damaged the ceiling and walls of the ground-level unit. Win Myint then initiated the eviction process against the tenants so that he might make necessary repairs.

When one of those tenants applied for subsidized housing, the Metropolitan Development and Housing Authority investigated her housing status. In processing the application, a building codes officer inspected the *923 property and reported several code violations. On August 5, 1991, the Myints received notice of the codes violations from the chief housing inspector of the Codes Department of the Metropolitan Government of Nashville and Davidson County. The notice described the property as "unfit for human habitation," and a hearing was set for August 20, 1991. The Myints failed to attend the hearing, and the property was classified as "H-6." [FN3] The Myints were ordered to relocate the structure or demolish it.

> FN3. Dorsey Barnett, the Metropolitan Codes Department housing inspector who examined the property, explained that an H-6 structure is usually scheduled for demolition. However, not all H-6 structures are ultimately demolished. The Codes Department often lists borderline cases, such as this one, as H-6 in order to force the property owner to make the necessary repairs as soon as possible. Should repair of an H-6 structure be denied, the owner must first appeal to the Housing Appeals Board for a variance. The variance then entitles the owner to obtain a permit to repair the structure.

On September 27, 1991, the Myints filed a claim with Allstate for the damage caused by the water, and Allstate sent an adjuster to inspect the property. While the claim for water damage was pending, the Myints began to make repairs. On September 30, 1991, Allstate informed them that the claim had been denied because the damage had been caused by slowly leaking water, which is excluded from coverage by the terms of the policy.

On October 1, 1991, the codes officials ordered a halt to the repair process because the Myints had not obtained the appropriate permit. Consequently, the Myints applied for a permit, but this application was denied because the property had been previously scheduled for demolition.

On October 18, 1991, Allstate notified the Myints that the contract of insurance would be terminated as of December 2, 1991. At trial, an Allstate employee testified that the cancellation was due to the overall poor condition of the property, as Allstate's adjuster had observed when he inspected the water damage. On October 23, 1991, a small fire in the basement of the property caused minor smoke damage; it is unclear whether the Myints notified Allstate of this occurrence. Three days later, on October 26, 1991, a second fire engulfed the property and caused substantial damage. The Myints then applied for a variance in order to obtain a building permit. The Metropolitan Board of Housing Code Appeals granted the variance, giving the Myints until September 1, 1992, to bring the property into compliance with code requirements.

On January 10, 1992, the Myints filed with Allstate "sworn statements in proof of loss" for the fire damage. Because Allstate failed to respond as of June 17, 1992, the Myints' attorney wrote Allstate demanding a decision on the claim. On June 23, 1992, Allstate denied the claim, citing two policy violations: (1) the Myints intentionally set fire to the property for the purpose of collecting the insurance proceeds; and (2) the fire damage was the result of an increase in hazard created by the Myints' failure to maintain the property. While the parties stipulated that both fires had been intentionally set, the Myints have always denied any involvement in the setting of the fire.

The Myints subsequently filed suit against Allstate for breach of the insurance policy, violation of the bad faith statute, and violation of the Consumer Protection

Act. [FN4] Prior to trial, the trial court dismissed the claim for relief under the Consumer Protection Act. The jury found Allstate liable under the terms of the insurance policy and awarded the Myints $45,000 in damages, subject to a $250 deductible. The jury's award reflected the decrease in the market value of the residence, from approximately $50,000 to $5,000, caused by the fire. The jury further determined that Allstate did not deny the claim in bad faith; thus, the Myints were not entitled to additional damages under the bad faith statute. After the jury verdict, the trial court awarded $13,106 in prejudgment interest to the Myints, pursuant to Tenn.Code Ann. § 47-14-123 (1988).

> FN4. The Myints also sued the Metropolitan Government, seeking an injunction to prevent demolition of the property. The suit against the Metropolitan Government was subsequently dismissed for failure to state a claim upon which relief could be granted.

***924** The Court of Appeals reversed the trial court's prejudgment interest ruling and affirmed the judgment in all other respects. The Court of Appeals reasoned that the Consumer Protection Act is not applicable because the insurer's bad faith statute, Tenn.Code Ann. § 56-7-105, provides the exclusive remedy for the bad faith refusal to pay an insurance claim. The Myints now appeal that determination and also challenge the Court of Appeals' reversal of the trial court's award of prejudgment interest. Pursuant to Tenn. R.App. P. 11, we granted the Myints' application to address both issues. [FN5]

> FN5. With respect to the issue of whether the Consumer Protection Act may apply to an insurance company's decision to deny a claim, the following parties were granted leave to file briefs as amicus curiae: the Attorney General of the State of Tennessee, State Farm Automobile Mutual Insurance Company, Tennessee Farmers Mutual Insurance Company Association, National Association of Independent Insurers, and the Alliance of American Insurers.

II

[1] Allstate and the several insurance companies which filed amicus briefs argue that the Consumer Protection Act does not apply to the insurance industry because the comprehensive insurance regulations in Title 56, Chapters 7 and 8 of the Tennessee Code specifically address unfair or deceptive acts or practices on the part of the insurance industry. Each asserts that Tenn.Code Ann. § 56-7-105, which provides a penalty for an insuror's bad faith refusal to pay a claim, is the exclusive remedy for such refusal. The Myints and the Attorney General, on the other hand, urge that the purposes of the insurance regulations and the Consumer Protection Act are distinct, each with different standards of liability, and each with different remedies. They insist that under appropriate circumstances, both may apply. We note that while this Court has never explicitly held the Tennessee Consumer Protection Act applicable to insurance companies, we implicitly did so in Morris v. Mack's Used Cars, 824 S.W.2d 538, 539-40 (Tenn.1992). In Morris, we cited with approval to Skinner v. Steele, 730 S.W.2d 335 (Tenn.App.1987), a case in which the Court of Appeals expressly held that the insurance industry was not exempt from the Act.

[2][3][4] Construction of a statute is a question of law which we review de novo, with no presumption of correctness. Roseman v. Roseman, 890 S.W.2d 27, 29 (Tenn.1994). The role of the Court in construing statutes is to ascertain and give effect to legislative intent. Wilson v. Johnson County, 879 S.W.2d 807, 809 (Tenn.1994). Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. Carson Creek Vacation Resorts, Inc. v. Department of Revenue, 865 S.W.2d 1, 2 (Tenn.1993). Here, the language of the statutes at issue provide ample evidence that the legislature did not intend to exclude insurance companies from the purview of the Consumer Protection Act.

First, we examine the insurance regulations which Allstate and several amicae insist are the exclusive means of sanctioning insurance companies for unfair or deceptive acts or practices. The Insurance Trade Practices Act, Tenn.Code Ann. §§ 56-8-101 et seq., was passed in 1981 for the purpose of

> regulat[ing] trade practices in the business of insurance ... by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

Tenn.Code Ann. § 56-8-101 (1994). Section

56-8-104 specifically lists the acts which constitute unfair competition or deceptive acts, including unfair claim settlement practices. Tenn.Code Ann. § 56-8-104(8) (1994). The Insurance Trade Practices Act gives the Commissioner of Commerce and Insurance broad authority to investigate violations of the Act, issue cease and desist orders, impose civil penalties, and order suspension or revocation of insurance licenses. Tenn.Code Ann. §§ 56-8-107 & -109(a) (1994). No private right of action may be maintained under the Act. Tenn.Code Ann. § 56-8-104(8).

While the Insurance Trade Practices Act focuses on the comprehensive regulation of ***925** insurance industry practices, the bad faith statute, Tenn.Code Ann. § 56-7-105, focuses on specific instances of bad faith. Enacted in 1901, the bad faith statute provides a private right of action to an individual injured by an insurance company's refusal to pay a claim, if the refusal "was not in good faith."

We find nothing in either the Insurance Trade Practices Act or the bad faith statute which limits an insured's remedies to those provided therein. Allstate argues that Tenn.Code Ann. § 56-8-103 "plainly states that it is the sole means" for regulating unfair or deceptive insurance acts or practices. Section 56-8-103 (1995) provides:

> No person shall engage in this state in any trade practice which is defined in this chapter as, or determined pursuant to § 56-8-108 to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

This language cannot reasonably be construed as limiting the remedies available outside the Insurance Trade Practices Act. Likewise, the language in Tenn.Code Ann. § 56-8-101, explaining the purpose of the Insurance Trade Practices Act, is not relevant to whether a private right of action created outside the Act is available to a consumer who is harmed by an insurance company's act or practice. We therefore conclude that the insurance regulations in Title 56, Chapters 7 and 8 of the Tennessee Code do not foreclose application of the Consumer Protection Act to insurance companies.

[5] Next, we examine the Consumer Protection Act to determine whether the acts and practices of insurance companies are outside its scope. Clearly, they are not. The Consumer Protection Act is remedial, rather than regulatory in nature, and it specifically provides a private right of action for any "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn.Code Ann. §§ 47-18-104(a) & -109(a)(1) (1995 & Supp.1997). Within the Act is an nonexclusive list of the unfair or deceptive acts or practices which are prohibited. This list does not specifically address the acts or practices of insurance companies, but it includes a general, "catch-all" provision which prohibits "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person." Tenn.Code Ann. § 47-18-104(b)(27) (Supp.1997).

Additionally, it is significant that the Consumer Protection Act specifically exempts certain entities and transactions from the prohibitions of the Act. Tennessee Code Annotated § 47-18-111 (1995) states:

> (a) The provisions of this part do not apply to:
> (1) Acts or transactions required or specifically authorized under the laws administered by, or rules and regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States;
> (2) A publisher, broadcaster, or other person principally engaged in the preparation or dissemination of information or the reproduction of printed or pictorial matter, who has prepared or disseminated such information or matter on behalf of others without notification from the division that the information or matter violates or is being used as a means to violate the provisions of this part;
> (3) Credit terms of a transaction which may be otherwise subject to the provisions of this part, except insofar as the Tennessee Equal Consumer Credit Act of 1974, compiled in part 8 of this chapter may be applicable; or
> (4) A retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that such claims violated this part.

Insurance companies are not mentioned in this statute. Because exemptions in other areas have been explicitly addressed, the omission of an exemption for insurance companies strongly indicates that no such exemption was intended.

Moreover, to exempt insurance companies from the purview of the Consumer Protection Act would frustrate the purposes of the Act, which include:

> (1) To simplify, clarify, and modernize state law governing the protection of the consuming public and to conform these ***926** laws with existing

consumer protection policies;
(2) To protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state;
(3) To encourage and promote the development of fair consumer practices;
(4) To declare and to provide for civil legal means for maintaining ethical standards of dealing between persons engaged in business and the consuming public to the end that good faith dealings between buyers and sellers at all levels of commerce be had in this state; and
(5) To promote statewide consumer education.

Tenn.Code Ann. § 47-18-102 (1995). Furthermore, the legislature has explicitly required that the Act be liberally construed in order to effectuate these purposes. Id. Section 47-18-115 (1995) further emphasizes the point: "This part, being deemed remedial legislation necessary for the protection of the consumers of the state of Tennessee and elsewhere, shall be construed to effectuate the purposes and intent."

Finally, the most decisive language is found in Tenn.Code Ann. § 47-18-112 (1995):

> The powers and remedies provided in this part shall be cumulative and supplementary to all other powers and remedies otherwise provided by law. The invocation of one power or remedy herein shall not be construed as excluding or prohibiting the use of any other available remedy.

This language is crystal clear. Even when a different code section applies and is invoked to obtain relief, the Consumer Protection Act may also apply, assuming the act or practice in question falls within the scope of its application.

[6][7] Therefore, the mere existence of comprehensive insurance regulations does not prevent the Consumer Protection Act from also applying to the acts or practices of an insurance company. In this context, the legislature has enacted a trilogy of statutes which, on their faces, apply to unfair and deceptive insurance trade acts and practices. We consider the Insurance Trade Practices Act, the bad faith statute, and the Consumer Protection Act as complementary legislation that accomplishes different purposes, and we conclude, accordingly, that the acts and practices of insurance companies are generally subject to the application of all three.

[8][9] The next question is whether the particular act at issue here--the denial of the Myints' claim--violated the Consumer Protection Act. The stated purpose of the Consumer Protection Act is "[t]o protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this State." Tenn.Code Ann. § 47-18-102(2) (1988). The terms "trade," "commerce," and "consumer transaction" are defined by the Act to mean

> the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or intangible, real, personal, or mixed, and other articles, commodities or things of value wherever situated.

Tenn.Code Ann. § 47-18-103(9) (1988).

While the sale of a policy of insurance easily falls under this definition of "trade" and "commerce," we conclude that Allstate's conduct in handling the Myints' insurance policy was neither unfair nor deceptive. The record reveals no evidence of an attempt by Allstate to violate the terms of the policy, deceive the Myints about the terms of the policy, or otherwise act unfairly. It is apparent that the denial of the Myints' claim was Allstate's reaction to circumstances which Allstate believed to be suspicious. Consequently, Allstate's conduct does not fall within the purview of the Tennessee Consumer Protection Act, and the Myints are not entitled to the benefits of treble damages and attorney's fees recoverable under the Act. The trial court's dismissal of the Consumer Protection Act claim and the subsequent approval of that dismissal by the Court of Appeals is therefore affirmed.

III

The final issue is whether the trial court properly awarded prejudgment interest to ***927** the Myints. They requested the prejudgment interest pursuant to Tenn.Code Ann. § 47-14-123 (1988), which provides:

> Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum....

The trial court's award of $13,106 in prejudgment interest was calculated under the simple interest method by applying a 10% annual interest rate to the judgment amount of $44,750 from June 26, 1991, the date the insurance claim was denied, to May 31, 1995, the date the trial court's judgment was entered.

[10][11] An award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion. Spencer v. A-1 Crane Service, Inc., 880 S.W.2d 938, 944 (Tenn.1994); Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 446 (Tenn.1992). This standard of review clearly vests the trial court with considerable deference in the prejudgment interest decision. Generally stated, the abuse of discretion standard does not authorize an appellate court to merely substitute its judgment for that of the trial court. Thus, in cases where the evidence supports the trial court's decision, no abuse of discretion is found. See State v. Grear, 568 S.W.2d 285, 286 (Tenn.1978) (applying abuse of discretion standard to trial court's decision to deny request for suspended sentence), cert. denied, 439 U.S. 1077, 99 S.Ct. 854, 59 L.Ed.2d 45 (1979).

[12][13] Several principles guide trial courts in exercising their discretion to award or deny prejudgment interest. Foremost are the principles of equity. Tenn.Code Ann. § 47-14-123. Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing. Mitchell v. Mitchell, 876 S.W.2d 830, 832 (Tenn.1994); Otis, 850 S.W.2d at 446.

[14][15] In addition to the principles of equity, two other criteria have emerged from Tennessee common law. The first criterion provides that prejudgment interest is allowed when the amount of the obligation is certain, or can be ascertained by a proper accounting, and the amount is not disputed on reasonable grounds. Mitchell, 876 S.W.2d at 832. The second provides that interest is allowed when the existence of the obligation itself is not disputed on reasonable grounds. Id. (citing Textile Workers Union v. Brookside Mills, Inc., 205 Tenn. 394, 402, 326 S.W.2d 671, 675 (1959)).

We note that these criteria, if strictly construed, could prohibit the recovery of prejudgment interest in the vast majority of cases. Indeed, only a liquidated claim, for which prejudgment interest is already recoverable as a matter of right under Tenn.Code Ann. § 47-14-109, [FN6] can truly be considered an obligation of certain and indisputable amount. Further, it is safe to say that, at trial, defendants usually can articulate at least one good reason for disputing the existence of the obligation, for were it otherwise, defendants would rarely survive summary judgment. Finally, the focus on whether the defendant had a reasonable defense ignores the principle that prejudgment interest is not a penalty imposed on the defendant for indefensible conduct.

> FN6. Section 47-14-109(b) (1995) provides: "Liquidated and settled accounts, signed by the debtor, shall bear interest from the time they become due, unless it is expressed that interest is not to accrue until a specific time therein mentioned."

[16] Not surprisingly, an analysis of relevant case law reveals that these criteria have not been used to deny prejudgment interest in every case where the defendant reasonably disputed the existence or amount of an obligation. More typically, courts either use the certainty of a claim as support for an award of prejudgment interest, or they do ***928** not discuss the certainty of the claim at all. See, e.g., Mitchell, 876 S.W.2d at 832 (allowing the award of interest where the existence and amount of the obligation under a settlement agreement were not reasonably disputed); Otis, 850 S.W.2d at 446 (allowing the award of interest to a plaintiff whose right to recover under a fire insurance contract was reasonably disputed on the grounds of arson and misrepresentation); Performance Systems, Inc. v. First American Nat. Bank, 554 S.W.2d 616, 619 (Tenn.1977) (allowing the award of interest, although the existence of the defendant's obligation under the lease was reasonably disputed); Johnson v. Tennessee Farmers Mut. Ins. Co., 556 S.W.2d 750, 752 (Tenn.1977)(allowing the award of interest, although the amount of recovery under the insurance claim was reasonably disputed); Uhlhorn v. Keltner, 723 S.W.2d 131, 138 (Tenn.App.1986) (allowing award of interest in a boundary dispute case, where the existence of any obligation to pay rent and the amount of rent due were both reasonably disputed); Schoen v. J.C. Bradford & Co., 667 S.W.2d 97, 101-02 (Tenn.App.1984)(rejecting argument that prejudgment

interest should not be imposed when defendant appealed in good faith). [FN7]

> FN7. But see Textile Workers Union, 205 Tenn. at 402-03, 326 S.W.2d at 675 (where the employer reasonably and in good faith disputed its contractual obligation to provide vacation pay to certain employees, there was no reasonable basis for allowance of interest); Howard G. Lewis Construction Co. v. Lee, 830 S.W.2d 60, 66 (Tenn.App.1991) (where the plaintiff requests $25,000 in damages but receives only $11,000, there is too substantial a controversy over the amount due, rendering the award of interest an abuse of discretion). To the extent these cases suggest that prejudgment interest can never be awarded when a claim is reasonably disputed, regardless of any equitable considerations, they are hereby overruled.

[17][18] Thus, we find that if the existence or amount of an obligation is certain, this fact will help support an award of prejudgment interest as a matter of equity. After all, the more clear the fact that the plaintiff is entitled to compensatory damages, the more clear the fact that the plaintiff is also entitled to prejudgment interest as part of the compensatory damages. The converse, however, is not necessarily true. The uncertainty of either the existence or amount of an obligation does not mandate a denial of prejudgment interest, and a trial court's grant of such interest is not automatically an abuse of discretion, provided the decision was otherwise equitable. The certainty of the plaintiff's claim is but one of many nondispositive facts to consider when deciding whether prejudgment interest is, as a matter of law, equitable under the circumstances.

[19] Turning to the facts at hand, the Court of Appeals found that the trial court abused its discretion in awarding prejudgment interest because the amount due was not certain and Allstate had a reasonable basis upon which to dispute the Myints' right to recovery. Concededly, Allstate did have a reasonable basis on which to dispute liability in this case, considering the series of events which led to the loss: (1) the Myints were notified by a letter dated October 18, 1991, that their insurance policy would be canceled as of December 2, 1991; (2) this cancellation was due to the deteriorating condition of the house; (3) five days later, on October 23, a small fire was intentionally set in the basement of the house; and (4) on October 26, a second fire was intentionally set, causing more extensive damage. Although no conclusive evidence was adduced to support Allstate's suspicions that the Myints were involved in the arsons, under these circumstances, Allstate's denial of the claim was certainly reasonable.

[20] While the Myints' right of recovery may have been reasonably disputed, we are not convinced that the amount of recovery was uncertain for the purposes of prejudgment interest. The test for determining whether the amount of damages is certain is not whether the parties agree on a fixed amount, for a fixed amount would be a liquidated claim, and the plaintiff would have a right to collect interest under Tenn.Code Ann. § 47-14-109(b). Instead, the test is whether the amount of damages is ascertainable by computation or by any recognized standard of valuation. This is true even if there is a dispute over monetary value or if the parties' experts compute differing estimates of damage. See Unlimited Equip. Lines v. Graphic Arts Centre, Inc., 889 S.W.2d 926, 942-43 (Mo.Ct.App.1994); Community ***929** State Bank v. O'Neill, 553 N.E.2d 174, 177-78 (Ind.Ct.App.1990). Here, the amount of damages was ascertainable by two well-accepted methods of valuation: by estimation of the cost to repair the fire damage, and by calculation of the difference between the market value of the house prior and subsequent to the fire. That these values were contested by the parties does not preclude an award of prejudgment interest.

Additional facts indicate that the trial court's award of prejudgment interest was an equitable decision. First, a jury determined that the Myints did not commit arson and were legally entitled to the insurance proceeds. Yet, they were without the use of those proceeds from the date of the loss, October 1990, to the trial court's judgment in May 1995--a period of approximately four and a half years. During that time, Allstate had full use of the funds, while the Myints possessed only unproductive property. Unquestionably, then, the Myints cannot be fully compensated without the award of interest. Further, the trial court did not allow the interest to begin accruing until the date Allstate denied the claim, June 1991, rather than the date of the loss, as the trial court did in Wilder v. Tennessee Farmers Mutual Ins. Co., 912 S.W.2d 722, 727 (Tenn.App.1995) (award of interest beginning at date of loss was abuse of discretion; two year period was more appropriate under the circumstances).

[21] In conclusion, we find that there is evidence here to support the award of prejudgment interest. Consequently, the trial court's decision was not a "manifest and palpable abuse of discretion," and, as a matter of law, we are constrained to sustain the trial court's judgment, even if we were to disagree with it. [FN8]

FN8. As a final matter, Allstate argues that it had a constitutional right to have the issue of prejudgment interest decided by a jury, under Article I, § 6 of the Tennessee Constitution. Allstate cites one unpublished decision for support, a decision which has already been implicitly overruled by Mitchell, 876 S.W.2d at 832, on the issue of pleading requirements for prejudgment interest.
We find Allstate's argument without merit. As Tenn.Code Ann. § 47-14- 123 indicates, prejudgment interest is awarded as a matter of equity. The right to a jury in an equitable matter is not the common law right guaranteed by the constitution. Rather, the right exists only to the extent provided by Tenn.Code Ann. § 21-1-103. This statute provides a right to have "any material fact in dispute" tried by a jury in chancery, but it does not require that the jury also decide all mixed questions of law and fact. See Wright v. Quillen, 909 S.W.2d 804, 813-14 (Tenn.App.1995); Sasser v. Averitt Express, Inc., 839 S.W.2d 422, 434 (Tenn.App.1992). In this case, the jury found the facts, and the court decided whether an award of prejudgment interest was equitable in light of those facts. We do not find this improper.

IV

In sum, we hold that the Consumer Protection Act, although applicable to the insurance industry as a whole, does not provide a right to recovery to the Myints for the denial of their insurance claim. Further, under the circumstances of this case, we find no error in the award of prejudgment interest. Accordingly, we affirm the Court of Appeals' dismissal of the claim made under the Consumer Protection Act. We reverse the Court of Appeals' decisions that the Consumer Protection Act does not apply to insurance companies and that the prejudgment interest award was an abuse of discretion.

ANDERSON, C.J., DROWOTA and HOLDER, JJ., and REID, Senior Justice, concur.

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

David A. SCHOLZ,
v.
S.B. INTERNATIONAL, INC.

No. M1997-00215-COA-R3-CV.

Aug. 31, 2000.

Appeal from the Chancery Court for Davidson County, No. 96-1785-III; Ellen Hobbs Lyle, Chancellor.

W. Gary Blackburn and William J. Shreffler, Nashville, TN, for appellant, David A. Scholz.

Clark H. Tidwell and Jordan S. Keller, Nashville, TN, for appellee, S.B. International, Inc.

KOCH, J., delivered the opinion of the court, in which TODD, P.J., M.S., and CANTRELL, J., joined.

OPINION

KOCH

*1 This appeal arises from a dispute over the severance benefits in an employment contract. Following his termination, a corporate officer filed suit against his former employer in the Chancery Court for Davidson County seeking his severance benefits. The employer asserted that its former officer was not entitled to the severance benefits. Following a jury trial, the trial court entered a judgment awarding the officer $111,623.33 but denying his requests for prejudgment interest and discretionary costs. On this appeal, the officer asserts that the trial court erred by failing to award him prejudgment interest and discretionary costs. We agree and, therefore, remand the case for further proceedings.

David A. Scholz became S.B. International, Inc.'s ("SBI") vice president and chief financial officer on January 1, 1996. [FN1] His three-year employment contract contained a severance provision entitling him to continuation of his salary for twelve months and an amount equal to his average performance bonus if the company fired him during the term of the contract. The contact also provided that Mr. Scholz would not be entitled to these severance benefits if SBI terminated him for cause.

FN1. We have no transcript or statement of the evidence in this case. The appeal is here on the technical record alone. While ordinarily we do not consider statements of fact alleged in pleadings as the facts of the case, see State v. Bennett, 798 S.W.2d 783, 789 (Tenn.Crim.App.1990), we have no alternative other than to rely on the allegations in Mr. Scholz's compaint that are admitted in SDI's answer to provide the factual framework for this appeal.

Mr. Scholz's tenure at SBI turned out to be brief. The company fired him on May 19, 1996, and informed him that it did not intend to pay him the severance benefits contained in his employment contract. On June 12,1996, Mr. Scholz filed suit in the Chancery Court for Davidson County, alleging that SBI did not have cause to fire him and seeking payment of $115,523.33 in severance benefits [FN2] and prejudgment interest. SBI denied the allegations in the complaint and asserted the affirmative defense of novation. In May 1997, a jury found that the parties had not entered into a new employment agreement and that Mr. Scholz had not voluntarily quit his job. In light of SBI's stipulation that the severance provision, if applicable, would entitle Mr. Scholz to $111,623.33, [FN3] the trial court entered a judgment for Mr. Scholz in the amount of $111,623.33 but reserved the issue of prejudgment interest.

FN2. This amount included twelve months of salary at his current rate of compensation, his performance bonus, and paid vacation time.

FN3. This amount is, to the penny, the amount that Mr. Scholz sued for minus the value of his vacation pay. These damages were clearly calculable to a specific sum.

Following the trial, Mr. Scholz promptly requested the trial court to award him over $11,000 in prejudgment interest and an additional $1,091.80 in discretionary costs. On June 26, 1997, the trial court entered an order denying both requests. The trial court justified its refusal to award Mr. Scholz prejudgment interest on the ground that SBI had "presented a reasonable defense." Likewise, the trial court justified its decision not to award discretionary costs by stating that these costs should be awarded

only when "the conduct of the defendant has somehow contributed to creation of the costs" and by concluding that SBI had not contributed to the creation of the costs. Mr. Scholz then perfected this appeal.

I.
MR. SCHOLZ'S CLAIM FOR PREJUDGMENT INTEREST

Tennessee's courts have always had the power to award **prejudgment interest** as an element of damages. Their authority derived from the common law, Cole v. Sands, 1 Tenn. (1 Overt.) 105, 106 (1805), but during the earliest days of statehood, the General Assembly began enacting statutes defining the circumstances in which a prevailing party would be entitled to **recover prejudgment interest**. [FN4] These statutes did not completely displace the courts' common-law power to award pre-judgment interest, and in 1979, the General Assembly codified this authority. [FN5] Thus, Tenn .Code Ann. § 47-14-123 (1995) now provides, in part:

> FN4. E.g., Act of Feb. 20, 1836, ch. 50, 1835-36 Tenn.Pub.Acts 157.
>
> FN5. Act of April 24, 1979, ch. 203 § 22, 1979 Tenn.Pub.Acts 349, 360.

> *2 Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common law of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum.

The common-law power to award prejudgment interest has consistently been viewed as an equitable matter entrusted to the judge's discretion. Accordingly, Tenn.Code Ann. § 47-14-123 has been construed to preserve the discretionary character of these decisions. Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 944 (Tenn.1994); Brandt v. BIB Enters., Ltd., 986 S.W.2d 586, 595 (Tenn.Ct.App.1998); Wilder v. Tennessee Farmers Mut. Ins. Co., 912 S.W.2d 722, 727 (Tenn.Ct.App.1995). Many of the earlier opinions dealing with prejudgment interest leave a distinct impression of subtle judicial antipathy toward awarding prejudgment interest unless it was statutorily mandated. However, the Tennessee Supreme Court's decision in Myint v. Allstate Ins. Co., 970 S.W.2d 920 (Tenn.1998) heralds a departure from this approach and requires a re-examination of the factual and legal bases used by the courts to determine whether prejudgment interest should be awarded.

Nearly everyone has become familiar with interest because they have paid it. Few, however, have bothered to understand what interest represents. Over one hundred and fifty years ago, John Stuart Mill noted that the possession of capital (money) enabled persons to gain in two ways-either by spending the capital to obtain desired goods or services or by using the capital to produce more capital over time. He also noted that persons having capital could be persuaded to forego both kinds of gain only by offering them compensation. That compensation became known as interest. [FN6] 2 John Stuart Mill, Principles of Political Economy 405-06 (Sir W.J. Ashley, ed., 7th ed., Longmans, Green & Co.1920) (1871). This understanding of interest was echoed by Learned Hand when he observed that "in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value" and that "[t]he present use of my money is itself a thing of value and, if I get no compensation for its loss, my remedy does not altogether right my wrong." Procter & Gamble Distrib. Co. v. Sherman, 2 F.2d 165, 166 (S.D.N.Y.1924).

> FN6. In medieval Latin, the noun "interesse" came to mean a compensatory payment for a loss. W. Lewis Hyde, The Gift: Imagination and the Erotic Life of Property 123 (1983). This meaning was taken up when European political philosophers began talking about paying the owner of wealth for the "loss" when the owner agreed to forego other opportunities to use the wealth in order to let another use his or her money.

Parties who have been wrongfully deprived of money have been damaged in two ways. First, they have been damaged because they have not received the money to which they are entitled. Second, they have been damaged because they have been deprived of the use of that money from the time they should have received it until the date of judgment. Awards of pre-judgment interest are intended to address the second type of damage. They are based on the recognition that a party is damaged by being forced to forego the use of its money over time. General Motors Corp. v. Devex Corp., 461 U.S. 648, 655-56, 103 S.Ct. 2058, 2062-63 (1983); Mitchell v. Mitchell, 876 S.W.2d 830, 832 (Tenn.1994). Thus, our courts have repeatedly recognized that prejudgment interest is

awarded, not to punish the wrong-doer, but to compensate the wronged party for the loss of the use of the money it should have received earlier. Myint v. Allstate Ins. Co., 970 S.W.2d at 927; Mitchell v. Mitchell, 876 S.W.2d at 832; Southwest Progressive Enters. v. Shri-Hari Hospitality, LLC., No. 01A01-9810-CH-00542, 1999 WL 675136, at *2-3 (Tenn.Ct.App. Sept. 1, 1999) (No Tenn.R.App.P. 11 application filed); see also Gore, Inc. v. Glickman, 137 F.3d 863, 868 (5th Cir.1998); Partington v. Broyhill Furniture Indus., Inc., 999 F.2d 269, 274 (7th Cir.1993); Marlen C. Robb & Son Boatyard & Marina, Inc. v. The Vessel Bristo, 893 F.Supp. 526, 540 (E.D.N.C.1994); Childs v. Copper Valley Elec. Ass'n, 860 P.2d 1184, 1191 (Alaska 1993); Hughes v. Burlington N. R.R. Co., 545 N.W.2d 318, 321 (Iowa 1996); Conway v. Electro Switch Corp., 523 N.E.2d 255, 258 (Mass.1988).

*3 Having set out the economic justification for awarding prejudgment interest, we turn now to Mr. Scholz's argument that the trial court erred by failing to award him prejudgment interest after the jury determined that he was entitled to the severance benefits that he contracted for. Both sides have reminded us that these decisions are discretionary. Therefore, we must defer considerably to the trial court's decision. Myint v. Allstate Ins. Co., 970 S .W.2d at 927. However, appellate deference is not synonymous with rubber stamping a trial court's decision. Discretionary decisions remain subject to appellate scrutiny, albeit less strict. Our review is confined to determining whether the trial court has based its decision on applicable legal principles and whether the decision is consistent with the evidence. Myint v. Allstate Ins. Co., 970 S.W.2d at 927; Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 709 (Tenn.Ct.App.1999).

Tennessee's courts have tended to decline to award prejudgment interest if the amount of the underlying obligation is uncertain or if the existence of the underlying obligation is disputed on reasonable grounds. The Tennessee Supreme Court used Myint v. Allstate Ins. Co. to articulate a different, more flexible, standard for considering prejudgment interest claims. Addressing the two most common reasons for denying prejudgment interest, the Court first held that "uncertainty of either the existence or amount of an obligation does not mandate a denial of prejudgment interest." Myint v. Allstate Ins. Co., 970 S.W.2d at 928. Second, the Court overruled all previous cases suggesting that prejudgment interest should not be awarded if the claim is reasonably disputed. Myint v. Allstate Ins. Co., 970 S.W.2d at 928 n. 7. In place of these rigid tests, the Court articulated the following standard:

> Simply stated, the court must decide whether the award of pre-judgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize the defendant for wrongdoing.
>
> Myint v. Allstate Ins. Co., 970 S.W.2d at 927.

As we construe the Myint decision, the Tennessee Supreme Court has shifted the balance to favor awarding prejudgment interest whenever doing so will more fully compensate plaintiffs for the loss of use of their funds. Fairness will, in almost all cases, require that a successful plaintiff be fully compensated by the defendant for all losses caused by the defendant, including the loss of use of money the plaintiff should have received. Levien v. Sinclair Oil Corp., 314 A.2d 216, 221 (Del. Ch.1973); King v. State Roads Comm'n, 467 A.2d 1032, 1035 (Md.1983); Erin Rancho Motels v. United States Fidelity & Guar. Co., 352 N.W.2d 561, 566 (Neb.1984) (Shanahan, J., concurring and dissenting in part). That is not to say that trial courts must grant prejudgment interest in absolutely every case. Prejudgment interest may at times be inappropriate such as (1) when the party seeking prejudgment interest has been so inexcusably dilatory in pursuing a claim that consideration of a claim based on loss of use of the money would have little weight, R.E.M. v. R.C.M., 804 S.W.2d 813, 814 (Mo.Ct.App.1991); (2) when the party seeking prejudgment interest has unreasonably delayed the proceedings after suit was filed, Batchelder v. Tweedie, 294 A.2d 443, 444 (Me.1972); or (3) when the party seeking prejudgment interest has already been otherwise compensated for the lost time value of its money. Braswell v. City of El Dorado, 187 F.3d 954, 957 (8th Cir.1999); Perlman v. Zell, 185 F.3d 850, 857 (7th Cir.1999).

*4 The trial court declined to award Mr. Scholz **prejudgment interest** because SBI had "presented a reasonable defense." We have already pointed out that the Tennessee Supreme Court has devalued this consideration as a reason for denying **prejudgment interest**. Accordingly, we must review the record to determine whether other equitable grounds exist that support the trial court's decision. We find none. To

the contrary, the only conclusion that can fairly be drawn from this record is that it would be inequitable not to award Mr. Scholz **prejudgment interest**. We base this conclusion on six considerations. First, the amount of the disputed severance pay Mr. Scholz was claiming was easily ascertained, and in fact, known and stipulated to by the parties. Second, Mr. Scholz did not delay unreasonably in filing suit to **recover** his severance benefits. Third, the record contains no indication that Mr. Scholz inappropriately delayed the proceedings once suit was filed. Fourth, the jury determined that Mr. Scholz was entitled to his contracted for severance benefits. Fifth, SBI, not Mr. Scholz, had full use of the money during the litigation. Sixth, Mr. Scholz has not otherwise been compensated for the loss of use of these funds from May 1996 through June 1997. Accordingly, we vacate the portion of the judgment denying Mr. Scholz's claim for **prejudgment interest** and remand the case with directions to calculate and award Mr. Scholz the **prejudgment interest** to which he is entitled.

II.
MR. SCHOLZ'S CLAIM FOR DISCRETIONARY COSTS

Mr. Scholz filed a timely and properly supported motion seeking $1,091.80 in discretionary costs under Tenn.R.Civ.P. 54.04(2). The trial court declined to award him discretionary costs based on its belief that "such costs should be awarded only when the conduct of the Defendant has somehow contributed to the creation of those costs ." Mr. Scholz now takes issue with that decision.

Tenn.R.Civ.P. 54.04(2) empowers the trial courts to award the prevailing party certain litigation expenses. These expenses include "reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, and guardian ad litem fees." Decisions to award these costs are discretionary, Sanders v. Gray, 989 S.W .2d 343, 345 (Tenn.Ct.App.1998), and thus, we employ a deferential standard when reviewing decisions either to award or to deny discretionary costs.

A party is not automatically entitled to discretionary costs under Tenn.R.Civ.P. 54.04(2) simply because it prevailed. Benson v. Tennessee Valley Elec. Coop., 868 S.W.2d 630, 644 (Tenn.Ct.App.1993). However, courts generally award discretionary costs if they are reasonable and if the prevailing party has filed a timely, properly supported motion. Turner v. Turner, No. 01A01-9506-CV-00255, 1997 WL 136448, at *17 (Tenn.Ct.App. Mar. 27, 1997) (No Tenn.R.App.P. application filed); Dent v. Holt, No. 01A01-9302-CV-00072, 1994 WL 440916, at *3 (Tenn.Ct.App. Aug. 17, 1994) (No Tenn.R.App.P. 11 application filed). Accordingly, we have affirmed Tenn.R.Civ.P. 54.04(2) awards for court reporter expenses on numerous occasions. E.g., Placencia v. Placencia, 3 S.W.3d 497, 503-04 (Tenn.Ct.App.1999); Reed v. Wally Conard Constr., Inc., No. 03A01-9807-CH-00210, 1999 WL 817528, at *7 (Tenn.Ct.App. Oct. 13, 1999) (No Tenn.R.App.P. 11 application filed); Harmon v. Shell, No. 01A01-9211-CH-00451, 1994 WL 148663, at *7 (Tenn.Ct.App. Apr. 27, 1994) (No Tenn.R.App.P. 11 application filed); Davidson v. Davidson Corp., No. 01A01-9301-CH-00017, 1993 WL 295024, at *5-6 (Tenn.Ct.App. Aug. 4, 1993), perm. app. denied (Tenn. Feb. 7, 1994).

***5** We confess to our inability to understand precisely what the trial court was getting at when it concluded that SBI did not contribute to the creation of the court reporter's expenses in this case. In one sense, SBI was solely responsible for both parties incurring this expense because it was SBI's refusal to pay Mr. Scholz's contracted for separation benefits that forced Mr. Scholz to commence this litigation in the first place. If SBI had honored its contract with Mr. Scholz, neither party would have incurred these court reporter's expenses. If we shift our focus to the litigation itself, it is still apparent that SBI was responsible, at least in part, for these expenses. In litigation, as in ballroom dancing, it takes two to tango. Both parties took depositions as part of the pretrial discovery, and $754.30 of the requested expenses represents the court reporter's expenses for those depositions. There is no indication in this record that SBI did not agree to taking these depositions or that it took any steps to avoid incurring the court reporter's expenses at trial.

We pointed out in Section I of this opinion that trial courts have viewed awarding prejudgment interest as a punitive measure, despite the repeated admonitions that the purpose of prejudgment interest is to make an injured plaintiff whole. The same can be said for discretionary costs under Tenn.R.Civ.P. 54.04(2). Awards of discretionary costs are not intended to punish the defendant either for its conduct that caused the litigation or for its conduct during the litigation. Rather, they represent another step toward making an

injured plaintiff whole. There are, of course, circumstances in which a plaintiff would not be entitled to discretionary costs even if it prevails. Litigants who adopt unreasonable litigation strategies or who unilaterally run up extravagant litigation expenses should not be permitted to pass these sorts of costs on to their adversaries.

We respectfully disagree with the trial court's reasoning that Mr. Scholz is not entitled to discretionary costs under Tenn.R.Civ.P. 54.04(2) because SBI did not "contribute" to these expenses. As far as we can tell from this record, SBI contributed to the court reporter's expenses in precisely the same way that any other litigant in routine civil litigation would. In addition, Mr. Scholz did not engage in the sort of conduct that would warrant depriving him of these costs. He also filed a timely and properly supported motion demonstrating that the court reporter expenses he was seeking to recover were necessary and reasonable. Accordingly, on remand, we direct the trial court to award Mr. Scholz his discretionary costs.

III.

The portions of the judgment denying Mr. Scholz's request for prejudgment interest and his motion for discretionary costs under Tenn.R.Civ.P. 54.04(2) are vacated, and the case is remanded to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal to S.B. International, Inc. for which execution, if necessary, may issue.

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

RAZORBACK MARBLE MANUFACTURING CO., INC., Plaintiff/ Appellee,
v.
D.D. ROBERTS, Roberts Construction Company, Naran P. Patel, Kusum N. Patel, and Heritage Bank, Defendant/Appellant.

No. 01A01-9709-CH-00512.

July 1, 1998.

APPEALED FROM THE CHANCERY COURT OF MONTGOMERY COUNTY AT CLARKSVILLE, TENNESSEE.

Rodger N. Bowman, 601 North Second Street, Suite 4, Clarksville, Tennessee 37041-1404, Attorney for Plaintiff/Appellee.

Larry J. Wallace, 118 Franklin Street, Clarksville, TN 37040, Attorney for Defendants/Appellants.

OPINION

CANTRELL, J.

***1** In this construction contract dispute, the Chancery Court of Montgomery County granted a judgment plus prejudgment interest to Razorback Marble Manufacturing Company, Inc. On appeal, Roberts Construction Company, Inc. and D.D. Roberts, Individually, raise issues pertaining to the Contractor's Licensing statutes and the Notice of Non-Payments statute. Razorback insists that it was due a larger judgment and a greater award of prejudgment interest.

I.

Roberts Construction Company, Inc. received the contract to construct a Fairfield Inn in Clarksville. D.D. Roberts, president of the company, entered into a contract with Razorback Marble Manufacturing Company, Inc., an Arkansas corporation, to install marble products in the motel for a total contract price of $39,850.16. Razorback does not have a contractor's license in Tennessee.

Razorback, however, completed its work and some extra work it claims the general contractor's agents authorized and requested. When it did not receive payment, Razorback sued Roberts Construction and Mr. Roberts. The complaint alleged that pursuant to Tenn.Code Ann. § 66-11-145 Razorback gave notice of non-payment to the defendants on May 22, 1996. The defendants' answer admitted the allegation. The chancellor entered judgment in favor of Razorback in the amount of the original contract plus $3,800.75 of extras, and allowed prejudgment interest on the original contract amount to run from December 8, 1996.

II.

The first three issues raised by the defendants on appeal pertain to Razorback's failure to have a contractor's license in Tennessee. Because of this fact, the defendants allege that Razorback's recovery must be limited to actual documented expenses that can be shown by clear and convincing proof. See Tenn.Code Ann. § 62-6-103(b). Since the record does not contain proof of specific expenses, the appellants argue that the judgment in favor of the plaintiff must be reversed.

We note, however, that the issue of the license was not raised as a defense in the defendants' answer. When the question was first asked at the trial, Razorback's lawyer objected because the defense had not been pled. In the ensuing discussion the court immediately ruled that Razorback did not have to have a license if they were doing work for a contractor. There the issue died in the trial court.

Although the issues in this court relate to the question of whether a contractor in Razorback's position needs to be licensed in Tennessee, we think the defense has been waived by the defendants' failure to plead it in the court below. See Tenn. R. Civ. Proc. 12.08. The defendants rely on the fact that Razorback did not put on any proof of its actual documented expenses in order to recover anything under Tenn.Code Ann. § 62-6-103(b), but since the licensing statute had not been raised as a defense Razorback was not on notice that it needed to do so. Thus, it would not be fair to reject the claim at this stage based on a defense that was not raised below.

***2** We, therefore, pretermit the question of whether Razorback was required to have a Tennessee license. We do note, however, that in the massive overhaul of the licensing statute in 1994, the legislature repealed the statute that specifically exempted sub-contractors from the statute's requirements. And we find no comparable exemption in the present statute, although the sponsor of the 1994 act stated on the House floor that his bill had no effect on the sub- contractors. We defer any judgment on the proper interpretation of the statute until the question is squarely presented to us.

III.

The appellants also rely on Tenn.Code Ann. § 66-11-145(a), which requires a notice of nonpayment to be given to the owner and the contractor contracting with the owner within sixty days of the last day of the month in which work was performed. While we note, parenthetically, that the only consequence of failing to comply with the statute is a loss of lien rights, see Tenn.Code Ann. § 66-11-145(c), the complaint in this case alleged that the notice had been given and the defendants' answer admitted it.

For these reasons we think this issue is without merit.

IV.

The appellants assert that the chancellor erred in admitting evidence of an offer to compromise Razorback's claim. The record reveals that the issue came up in the following way:

Q. [Mr. Bowman] Okay. Mr. Roberts, this FAX contains the total billing for the project as far as Razorback was concerned. And you received this on April 4th, 1996?
A. Yes.
Q. Did you ever call Razorback when you received this and complain to them in any fashion about the work that had been done or the charges that had been made?
A. Yes, I called them, even wrote them a letter.
Q. Could I see the letter that you wrote to them?
A. I don't have the letter. I have their reply to my letter.
Q. Where is the letter that you sent? Do you know?
A. I don't know. We got it lost somewhere.
Q. May I see the reply to the letter?
A. Here's the reply to the letter.
Q. May I see that, please?
(Document passed to Mr. Bowman.)
This was in response to your offer to settle this matter, is that correct?
A. That's right.
MR. WALLACE: Objection, Your Honor.
THE COURT: No, he can use it, whatever the letter says.
MR. BOWMAN: Let's make this Exhibit 5 to your testimony.
MR. WALLACE: For the record again, I'm going to object that settlement offers are not admissible.
THE COURT: Of course, the question comes down, counselor, to whether the work was done or not. And the letter itself may reveal certain things. It has nothing to do with settlement.

The letter made an exhibit at that point was actually a letter from Razorback to Mr. Roberts and it contained the following:
We will settle the account on the Fairfield Inn for a certified check of $40,000.00 for the marble work, also a $1,350.00 certified check for plumbing and wood work around the whirlpools.

***3** The $40,000.00 certified check to be made out to Razorback Marble, and the $1,350.00 certified check to be made out to Tony Weatherford.
Payment should be made in 14 working days of receiving this letter. When the checks are received and deposited, all legal action will be withdrawn.

Tenn. R. Evid. 408 prohibits the introduction of evidence showing an offer or acceptance of a compromise "to prove liability for or invalidity of a civil claim...." We do not read the exchange in court nor the letter as tending to prove the defendants' liability for Razorback's claim. There is a hint that Mr. Roberts had proposed a settlement and the letter contained Razorback's counter- proposal. But the evidence in the record about the contract and the completion of it is so overwhelming that the evidence quoted above is at most harmless. See Tenn. R.App. Proc. 36(b).

V.

Razorback alleges that the chancellor should have allowed a recovery for all of the extras it performed. The claim was for $7,451.75, of which the chancellor allowed $3,800.75. The defendants' defense is that none of it was authorized by Mr. Roberts.

We find that the record preponderates in favor of a finding that all the work was done and that the agents for the defendants, on the site and in charge of the work, authorized it. Although Mr. Roberts may have had a policy of reserving to himself the right to approve any contract extras, he apparently did not communicate that to Razorback or to his agents on the job. Therefore, the judgment should be increased to include the total of $7,451.75 in extras.

VI.

Razorback also asserts that the chancellor erred in not allowing pre-judgment interest from April 4, 1996, the date it billed the defendants for the full amount.

The award of prejudgment interest is governed by Tenn.Code Ann. § 47-14- 123, which says that prejudgment interest may be awarded as an element of, or in the nature of damages, "in accordance with the principles of equity" at a rate of up to 10% per annum. The award is within the sound discretion of the trial judge. Myint v. Allstate, --- S.W.2d ---- (Tenn.1998). The object is to fully compensate plaintiffs for their losses. Id.

We think the trial judge's discretion applies to the time at which the prejudgment interest will begin to run. The chancellor chose December 8, 1996 when the interest began to accrue. He based the date on a finding that some information had been furnished to Mr. Roberts on November 8, 1996 and that thirty days from that date was a reasonable time in which to pay the claim.

We think the December 8, 1996 date should be affirmed. We also think, however, that the interest began to accrue on the whole amount of the claim, $47,301.91.

As modified the judgment of the court below is affirmed and the cause is remanded to the Chancery Court of Montgomery County for the enforcement of the judgment. Tax the costs on appeal to the appellants.

Concur: Henry F. TODD, Presiding Judge, Middle Section, William C. KOCH, Jr., Judge.

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