

SUPREME COURT OF FLORIDA

CLARENDON NATIONAL
INSURANCE COMPANY,

Petitioner,

vs.

IRENE GRABER, individually and as
Personal Representative of the Estate
of MARTIN GRABER,

Respondent.

SURGEON'S PROFESSIONAL
LIABILITY TRUST, and IRISC, INC.,

CASE NO. SC02-1809
L.T. CASE NO. 4D01-1296
Consolidated with
CASE NO. SC02-1810
L.T. CASE NO. 4D01-1296

Petitioner,

vs.

IRENE GRABER, individually and as
Personal Representative of the Estate
of MARTIN GRABER,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PREFACE

These appeals arise out of a declaratory judgment action in which the Fourth District construed ambiguous policy language regarding whether prejudgment interest and taxable costs were covered by two separate insurance policies. Petitioner/appellee, Clarendon National Insurance Co., will be referred to as “Clarendon” and petitioners/appellees Surgeon’s Professional Liability Trust and Irisc, Inc., will be referred to collectively as “SPL.” Respondent, Irene Graber, individually and as Personal Representative of the Estate of Martin Graber, will be referred to as “Graber.” The petitions for discretionary review filed by Clarendon and SPL have been consolidated for all appellate purposes by this Court. All emphasis to quoted material is supplied unless stated otherwise.

STATEMENT OF THE CASE AND FACTS

The facts are as set forth in the Fourth District’s opinion. See Graber v. Clarendon Nat’l Ins. Co., 819 So. 2d 840 (Fla. 4th DCA 2002). For the most part, Graber agrees with the statement of the case and facts of Clarendon and SPL. Both, however, fail to mention that the settlement agreement expressly provided that prejudgment interest would **not** merge into the judgment, but instead provided that “the payment ‘shall be considered as though judgments for the principal sum were obtained’ and the plaintiffs would be entitled to recover prejudgment interest and taxable costs on that amount.” Id. at 842.

SUMMARY OF ARGUMENT

The Fourth District in Graber confronted the issue of whether two specific insurance policies covered taxable costs and prejudgment interest in the context of a medical malpractice action where defendants failed to accept a plaintiff's offer to arbitrate. See Graber, 819 So. 2d at 842-44. Both policies covered "interest" as an additional benefit in amounts above the policy limits and did not exclude prejudgment interest. The Fourth District correctly applied the general rules that insurance policies cover interest and costs in amounts above the policy limits and that ambiguities should be resolved in favor of finding coverage. See id. at 843-44.

There is no conflict with cases stating that prejudgment interest awarded at common law is considered an element of damages rather than a penalty. None of the alleged conflict cases construed an insurance policy, let alone a policy that covered interest above the policy limits. In addition, none involved prejudgment interest awarded under the medical malpractice statute due to a defendant's failure to accept a plaintiff's offer to arbitrate.

Clarendon also argues that conflict exists based on the portion of the Fourth District's opinion declining to consider the issue of whether the SPL policy covered costs in excess of the policy limits. There is no conflict with factually dissimilar cases stating general principles of appellate review. Review should be denied.

ARGUMENT

POINT I

NONE OF THE ALLEGED CONFLICT CASES CONSTRUES AN INSURANCE POLICY THAT PROVIDES COVERAGE FOR INTEREST AND COSTS IN ADDITION TO THE AMOUNT PAID IN DAMAGES.

In order to confer jurisdiction on this court, the conflict between decisions must be express and direct. See Art. V, § 3(b)(3), Fla. Const. The issue before the Fourth District in Graber was whether specific policy language covered prejudgment interest and taxable costs that accrued in a medical malpractice action because the defendants failed to accept Graber's offer to arbitrate under sections 766.207(2), Florida Statutes (Supp. 1994), and 766.209(3), Florida Statutes (1993). Both policies covered interest and costs in amounts above the limits of liability and did not exclude coverage for prejudgment interest.

Clarendon and SPL argue that the Fourth District's opinion conflicts with general statements in opinions explaining that, at common law, prejudgment interest is an element of damages rather than a penalty. The only case SPL case cites is Argonaut Insurance Co. v. May Plumbing Co., 474 So. 2d 212 (Fla. 1985). For the same proposition, Clarendon also cites Herrero v. Pearce, 571 So. 2d 96 (Fla. 1st DCA 1990), Gallo v. Department of Banking and Finance, 749 So. 2d 582 (Fla. 5th DCA 2000), Volkswagon of America, Inc. v. Smith, 690 So. 2d 1328 (Fla. 1st DCA

1997), Bryant v. Bryant, 621 So. 2d 574 (Fla. 2d DCA 1993), Zacco Contractors, Inc. v. Irving Trust Co., 488 So. 2d 616 (Fla. 3d DCA 1986), Elbadramany v. Bryson Crane Rental Services, Inc., 630 So. 2d 214 (Fla. 5th DCA 1993), and A.R.A. Services, Inc. v. Pan American World Airways, Inc., 474 So. 2d 396 (Fla. 3d DCA 1985). All of these cases are factually distinguishable. **None** involves the construction of an insurance policy, let alone construction of policies that, like here, expressly cover interest and costs in addition to the policy limits.

The Clarendon policy provides that **it will pay “in addition to the Limits of Liability in the Declarations”**:

4. **All costs taxed against You and the interest** on that part of any judgment that does not exceed the applicable Limits of Liability.

Our Obligation to make these other payments ends after the applicable Limits of Liability stated in the Declarations have been used up by payment of judgments and settlements.

Graber, 819 So. 2d at 842. The SPL policy is similar:

“ADDITIONAL BENEFITS”

All of the following are in addition to the applicable Limits of Liability of your coverage”:

....

2. The Fund will pay the expenses it incurs and the **costs** taxed against the Insured in suits the Fund defends.

3. The Fund **will pay interest on that part of any judgment that does not exceed the Limits of Liability** applicable to the claim.

Id. at 843-44.

As the Fourth District observed, “[t]he general rule has been that insurance policies provide coverage for interest and costs, which exceed policy limits, unless specifically excluded by the policy.” Id. at 842. Here, both policies cover “interest” and costs in addition to the policy limits, without excluding either. See id. at 843-44. In accord with settled law, the Fourth District resolved this ambiguity in favor of providing coverage and properly concluded that the policies cover prejudgment interest. See id. at 843.

There is no conflict with the cited cases. The Fourth District distinguished Argonaut and general cases stating the **common law** rule, that prejudgment interest is an element of damages rather than a penalty. See Graber, 819 So. 2d at 843. Under the common law, “prejudgment interest is not recoverable on awards for personal injury” because the damages are not liquidated prior to the verdict. Argonaut, 474 So. 2d at 214 n.1. In section 766.209, the Legislature departed from this common law rule and imposed the “statutorily created incentive” of prejudgment interest that is “not tied to the liquidation of damages” on medical malpractice defendants who refuse a

plaintiff's offer to arbitrate. Graber, 819 So. 2d at 843. Thus, prejudgment interest assessed under section 766.209 is not "damages" subject to the limits of liability, but "interest" awarded as an additional benefit under the policy. See Graber, 819 So. 2d at 843-44.

In addition, there is no conflict because none of the cases SPL and Clarendon cites construe section 766.209. Clarendon misleadingly implies that the court in A.R.A. Services, 474 So. 2d at 397, construed this statute. A.R.A. Services was not a medical malpractice action and merely determined whether prejudgment interest begins accruing from the date of **loss** or the date of **verdict**. Id. In a footnote, the court observed that some states have enacted statutes allowing personal injury plaintiffs to recover prejudgment interest if the defendant unreasonably failed to settle. See id. at 396 n.1. Because prejudgment interest would not have been allowed at common law, these statutes encourage settlement. See id. The court expressed **no opinion** on whether prejudgment interest imposed under these out-of-state statutes should be considered an element of damages. See id. Nor does the opinion address whether prejudgment interest imposed under one of these out-of-state statutes would be covered by an insurance policy providing "interest" as an "additional benefit" above the policy limits.

Finally, Clarendon argues that the Fourth District's opinion conflicts with Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So. 2d 929 (Fla. 1996), which held that prejudgment interest on an award of attorney's fees merges with the underlying judgment to create one sum due and owing. As with the other cited cases, Quality Engineered does not expressly and directly conflict because it does not involve the discrete issue of whether prejudgment interest assessed under section 766.209 is covered under a medical malpractice defendant's insurance policy. See Quality Engineered, 670 So. 2d at 930-31.

Further, the parties' settlement agreement here expressly provided that prejudgment interest and costs, if awarded, would **not** merge into the underlying judgment. See Graber, 819 So. 2d at 842. Instead, the parties agreed that the settlement "'shall be considered as though judgments for the principal sum were obtained' and the plaintiffs would be entitled to recover prejudgment interest and taxable costs on that amount." Id. There is no conflict.

POINT II

THERE IS NO CONFLICT WITH CASES STATING GENERALLY THAT AN APPELLATE COURT MAY ONLY RULE ON ISSUES DECIDED BY THE TRIAL COURT AND THE TRIAL COURT WILL BE AFFIRMED BASED ON ANY REASON APPARENT IN THE RECORD.

Clarendon argues that conflict exists based on the portion of the Fourth District's opinion addressing whether the SPL policy covers costs.¹ Clarendon contends the opinion conflicts with cases stating two general appellate principals: (1) the appellate court may only rule on issues presented to and ruled on by the trial court, see Lee County Oil Co. v. Marshall, 98 So. 2d 510 (Fla. 1st DCA 1957); and (2) the appellate court must affirm if there is any basis in the record, see Seaboard Coast L.R.R. v. Brummitt, 390 So. 2d 170 (Fla. 5th DCA 1980). These cases are not remotely factually similar to Graber and, thus, do not conflict.

Further, conflict must be found within the "four corners" of the decisions. See, e.g., Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Clarendon omits an important part of the quotation from Lee County, which states "[i]t is fundamental that an appellate court will review **only those questions timely presented and ruled upon**

¹Only **Clarendon** argues that the opinion conflicts because the Fourth District should have reviewed whether the **SPL** policy covers costs. **SPL** has waived this basis for jurisdiction.

in the trial court. And on appeal, a **claim not made** before the trial court in the proper manner **will be considered as waived.**” 98 So. 2d at 512 (footnotes omitted).

The Fourth District’s opinion merely states that because “the summary judgment for SPL did not address the costs issue, it is not properly before us at this time.” Graber, 819 So. 2d at 844 & 841 n.1. Clarendon suggests conflict exists because SPL presented the issue of costs to the trial court, and, thus, the trial court impliedly ruled on the issue. These facts, however, are not contained within the Fourth District’s opinion. See id. Entirely consistent with Lee County, the court in Graber merely states that it will not consider an issue that the trial court has not ruled on. See id.

In addition, Graber does not conflict with a case stating the “tipsy coachman” rule. See Seaboard, 390 So. 2d at 171. The Fourth District reversed the order granting summary judgment for SPL in Graber because prejudgment interest was covered under the policy. 819 So. 2d at 844. Thus, there is no possible conflict with Seaboard because reversal for an award of prejudgment interest would still have been required.

CONCLUSION

Clarendon and SPL have not demonstrated that the decision in Graber conflicts with the decisions of this or any other court. Their petitions for discretionary review should be denied.

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CERTIFICATE OF SERVICE

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Respondent's Brief on Jurisdiction has been typed using the 14 point Times
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