Affirmed as Modified and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00347-CV

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant

V.

KATHRYN A. CUNNINGHAM, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 98CV0331

O P I N I O N

This is an appeal from a judgment against State Farm for uninsured/underinsured motorist benefits. State Farm raises one issue, claiming it is not liable for prejudgment interest. Cunningham raises a single cross-point, challenging the trial court's calculation of prejudgment interest. We affirm as modified.

Kathryn Cunningham was involved in a collision with a vehicle driven by Stephanie Thiem. Cunningham advised her insurer, State Farm of the collision. Cunningham subsequently filed suit against Stephanie Thiem, Thiem's husband, and against State Farm for uninsured/underinsured motorists benefits. Cunningham settled with the Thiems for

$25,000 and a judgment was entered dismissing the claims against them. The claims against State Farm were tried to a jury, which awarded Cunningham $33,000 in damages. The trial court entered judgment (1) awarding Cunningham prejudgment interest on the sum of $33,000, beginning 180 days after State Farm acknowledged notice of the claim, and ending on the date of settlement with the Thiems; (2) awarding Cunningham prejudgment interest on the sum of $8,000 (the $33,000 jury damage award minus the $25,000 settlement) begining the date after the Thiems settled with Cunningham and ending on the date of judgment. Calculating this total of prejudgment interest to be $7,180, the court then added the jury verdict award of $33,000, deducted the $25,000 settlement, and awarded Cunningham a total of $15,180. On the day of judgment, State Farm tendered to Cunningham the sum of $8,000 (the $33,000 verdict award less the $25,000 settlement), but tender was refused.

In its sole issue on appeal, State Farm claims the trial court improperly awarded prejudgment interest. The parties disagree about the standard of review applicable to this issue. State Farm cites *Rivas v. City of Houston*, 17 S.W.3d 23 (Tex. App.–Houston [14th Dist.] 2000, pet. denied)(opinion on reh'g) for the proposition that the trial court's ruling on prejudgment interest is a determination of law which is subject to *de novo* review by this court. Cunningham disagrees, and argues that the ruling on prejudgment interest is one within the trial court's discretion, which must be upheld absent a finding of an abuse of discretion. *See Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.–Houston [14th Dist.] 1997, no pet.); *European Crossroads Shopping Ctr. Ltd. v. Criswell*, 910 S.W.2d 45 (Tex. App.–Dallas, writ denied).

In *Rivas*, a panel of this court was addressing a claim that the trial court erred in granting j.n.o.v. because the City of Houston had not established that an employee was performing a discretionary function "as a matter of law" at the time of the accident. 17 S.W.3d at 29. Because no jury issue was submitted on this issue, the court interpreted Rivas' challenge as one to the trial court's legal conclusion about a discretionary function, and therefore, applied a *de novo* review of this legal conclusion. *Id.*

State Farm reasons that the trial court's decision whether to award prejudgment interest is also a question of law and thus, we should apply the *de novo* standard of review. Courts have long held, however, that the trial court's decision to award prejudgment interest is discretionary and that an abuse of discretion standard should be applied. *Purcell Const., Inc. v. Welch*, 17 S.W.3d 398, 402 (Tex. App.–Houston [1st Dist.] 2000, no pet.); *European Crossroads' Shopping Center, Ltd. v. Criswell*, 910 S.W.2d 45, 55 (Tex. App.–Dallas 1995, writ denied); *Southwest Airlines Co. v. Jaeger*, 867 S.W.2d 824, 837 (Tex. App.–El Paso 1993, writ denied); *First City Nat'l Bank v. Haynes*, 614 S.W.2d 605, 610 (Tex. Civ. App.–Texarkana 1981, no writ). Accordingly, we follow this line of authority and apply the abuse of discretion standard.

A trial court abuses its discretion if its decision is "arbitrary, unreasonable, and without reference to guiding principles." *Goode v. Shoukfeh*, 943, S.W.2d 441, 446 (Tex. 1997). For example, a court abuses its discretion if it exercises its discretion by making an erroneous choice as a matter of law in one of the following ways: (1) by making a choice not within the range of choices allowed by law; (2) by reaching its choice in violation of an applicable legal rule or principle; or (3) by making a choice that is "legally unreasonable in the factual-legal context in which it was made." *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 939 (Tex. App.–Austin 1987, no writ).

In support of its claim that prejudgment interest should not have been awarded, State Farm relies on *Henson v. Southern Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652 (Tex. 2000). Cunningham claims that *Henson* is not on point and that, instead, we should follow *Allstate Indemnity Co. v. Collier*, 983 S.W.2d 342 (Tex. App.–Waco 1998, pet. dism'd). No one raised the issue in *Allstate*, however, about entitlement to an award of prejudgment interest. Rather, the insurance company merely argued the trial court employed the wrong method of calculation of prejudgment interest. *Id.* at 342-343. Although the appellate court did include general language about the entitlement to prejudgment interest, this was not necessary to their decision. Thus, we find *Allstate* inapplicable here.

On the other hand, we find the facts in *Henson* analogous to those in this case. Henson was injured in a vehicle driven by Millican when the vehicle collided with a truck driven by Consuelo Contreras. *Id.* at 652. Henson submitted a claim to his insurance carrier and to Millican's insurer for uninsured/underinsured motorist's benefits. *Id.* Henson then sued Millican and Contreras for negligence, and sued both insurance companies for benefits. *Id.* at 652-53. With the insurers' permission, Henson settled with Contreras for her policy limits of $20,000. *Id.* at 653. The claims against the insurers were severed and the insurers agreed to be bound by the judgment rendered in the suit against Millican. *Id.* The jury attributed 100% of the negligence to Contreras and awarded damages of $133,842.13. *Id.* The court entered a take nothing judgment against Millican. *Id.* The insurers tendered policy limits of $45,000, but Henson refused the tender, demanding prejudgment interest. *Id.* The trial court refused to award prejudgment interest and Henson appealed. *Id.*

The court of appeals affirmed. *Henson v. Tex. Farm Bureau Mut. Ins. Co.*, 989 S.W.2d 837, 840 (Tex. App.–Amarillo 1999), *aff'd*, 17 S.W.3d 652 (Tex. 2000). The supreme court also affirmed and explained when an insurance company owes prejudgment interest. *Henson*, 17 S.W.3d at 653-54. The supreme court observed that, because Henson was seeking prejudgment interest on the insurance companies' obligations rather than on the tortfeasor's obligations, the parties's respective duties were established by contract. *Id*. at 653. Under the policies, the companies were obligated to pay uninsured/underinsured motorist's benefits to the extent of policy limits, which was a total of $45,000. *Id.* Furthermore, the court noted that insurers owe prejudgment interest in addition to policy benefits only if they withheld those benefits in breach of the insurance contracts. *Id*. at 654. The policies provided that the insurers would pay benefits "which a covered person is legally entitled to recover . . . ." *Id.* The supreme court found that Henson did not become legally entitled to recover benefits until the jury established Contreras' liability. *Id.* Thus, Henson was not entitled to compensation for the lost use of the funds and was not entitled to prejudgment interest on top of the policy benefits. *Id.*

Similarly, in this case, Cunningham sued the driver of the other vehicle for negligence and State Farm for uninsured/underinsured motorists benefits. Cunningham then settled with the driver for her policy limits and proceeded against State Farm. As in *Henson*, Cunningham sought to recover prejudgment interest, based not on the tortfeasor's obligation, but on State Farm's obligation. The relationship between Cunningham and State Farm is that of contracting parties and their respective duties are established by contract. Under the policy here, as in *Henson*, the insurance company is obligated to pay the uninsured/underinsured motorist's shortfall to the extent of the policy limits. Furthermore, the policy stated that State Farm would pay damages that a covered person was legally entitled to recover.

Because prejudgment interest is awarded not as punishment of the defendant, but to fully compensate the injured party, an insurer only owes prejudgment interest on top of policy benefits if they withheld those benefits in breach of the contract. *Id*. at 654. Here, as in *Henson*, Cunningham failed to demonstrate that State Farm was obligated to pay the policy benefit at any time earlier than they did. The settlement with the Thiem's did not establish that Cunningham was entitled to recover from State Farm because State Farm did not become obligated under the policy to pay uninsured/underinsured motorist benefits unless Cunningham's damages exceeded the Thiem's policy limits. The jury could have found that Cunningham's damages did not exceed the Thiem's policy limits, in which case State Farm would not have been obligated to pay benefits to Cunningham.

Indeed, Cunningham did not become legally entitled to the uninsured/underinsured motorist policy benefits until the jury found that Cunningham's damages exceeded the Thiem's policy limits. Thus, no obligation to pay the claim existed until the jury awarded damages to Cunningham above the Thiem's policy limits and the trial court entered judgment on that verdict. On the day of judgment, when State Farm became obligated to pay policy benefits, it in fact tendered the amount of the policy benefits less the $25,000 settlement amount from the Thiems. These facts indicate that Cunningham is not entitled to prejudgment interest as compensation for the lost use of funds wrongfully withheld.

Accordingly, the trial court abused its discretion in awarding prejudgment interest to Cunningham.

Because we find the trial court abused its discretion in awarding prejudgment interest to Cunningham, we need not address Cunningham's cross-point challenging the method of calculating prejudgment interest. We modify the trial court's judgment to delete the award of prejudgment interest. As so modified, we affirm.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed July 12, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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