

Appellants' and Appellee's Motions for Rehearing Overruled, and Supplemental Opinion on Rehearing issued August 24, 2000.



In The

Fourteenth Court of Appeals

NO. 14-97-00162-CV

SUSAN CAMILLE LEE, INDIVIDUALLY, AND AS TRUSTEE OF THE ARTICLE V TRUST FOR THE BENEFIT OF SUSAN C. GIBSON, AND DERIVATIVELY ON BEHALF OF THE ARTICLE IV TRUST AND THE ESTATE OF KATHERINE PILLOT LEE BARNHART, AND SUSAN C. GIBSON, INDIVIDUALLY, AND DERIVATIVELY ON BEHALF OF THE ARTICLE IV TRUST AND THE ESTATE OF KATHERINE PILLOT LEE BARNHART , Appellants

V.

RONALD E. LEE, JR., INDIVIDUALLY, AS TRUSTEE OF THE ARTICLE IV TRUST, AND THE ARTICLE V TRUST FOR THE BENEFIT OF KATHERINE LEE, AND AS EXECUTOR OF THE ESTATE OF KATHERINE PILLOT LEE BARNHART, Appellee

**On Appeal from the Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 137,506-402**

OPINION ON REHEARING

On rehearing, appellants claim that prejudgment and postjudgment interest should be awarded on the \$1.5 million in executor fees required to be reimbursed by appellee. Although

appellants do not contest the imposition of prejudgment interest, they claim that it should be awarded pursuant to *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998). The parties disagree on the date from which prejudgment interest should accrue.

“Prejudgment interest is ‘compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment’.” *Id.* at 528 (quoting *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985)). The two legal sources for an award of prejudgment interest are general principles of equity, and an enabling statute. *See Kenneco*, 962 S.W.2d at 528. Statutory provisions for prejudgment interest apply only to cases involving claims of wrongful death, personal injury, property damage, and condemnation. *See* TEX. FIN. CODE ANN. §§ 304.102, 304.201 (Vernon Supp. 2000). Because the claims in this case do not fall within the statutory provisions, we hold that an award of prejudgment interest is governed by the common law. *See Kenneco*, 962 S.W.2d at 530.

Appellants argue that prejudgment interest accrued from the dates Ronald Lee paid himself executor fees. Because Lee paid himself fees in a number of payments over a two-year period, appellants have provided a chart depicting the various payments and the amount of interest on each, with a total amount due of \$2,051,311.79. Appellee disagrees with appellants’ calculation and contends that appellants’ argument is based on the approach described in the *Cavnar* case, in contravention to the more recent *Kenneco* case.

In *Kenneco*, the court held that, “under the common law, prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed.” *See id.* at 531. A “‘claim’ is ‘a demand for compensation or an assertion of a right to be paid’.” *See id.* Appellee contends the first date he received notice of a claim with regard to executor fees paid, was the date suit was filed. We have not located in the record an earlier date of notice of a claim with respect to the executor fees.

Accordingly, we hold that the date of accrual of prejudgment interest is July 28, 1993, the date of filing of Plaintiffs' First Amended Petition.

The *Kenneco* court further held that prejudgment interest accrues at the rate for postjudgment interest and it is to be computed as simple interest. *See id.* at 532. The rate of interest is 10%. *See* TEX. FIN. CODE ANN. § 304.003 (Vernon Supp. 2000).

Accordingly, we hold that appellants are entitled to prejudgment interest on the excessive executor fees required to be reimbursed, at the rate of 10% per annum, computed as simple interest from the date of notice of the claim, July 28, 1993, to the day preceding entry of judgment, October 24, 1996. Appellants are entitled to postjudgment interest on this award calculated from the date of judgment, October 25, 1996. Other than imposing prejudgment and postjudgment interest, we overrule appellants' and appellee's motions for rehearing.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed August 24, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Publish — TEX. R. APP. P. 47.3(b).