IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00777 COA

P. HALE AUST

APPELLANT

v.

THE ESTATE OF WILLIAM RAYMOND PARKER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: CIRCUIT COURT OF PRENTISS COUNTY

ATTORNEY FOR APPELLANT:

DUNCAN LOTT

ATTORNEY FOR APPELLEE:

GREG BEARD

NATURE OF THE CASE: DEBT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR PLAINTIFF FOR $8,194.98 PLUS 8% INTEREST UNTIL PAID

BEFORE FRAISER, C.J., McMILLIN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

This is an appeal from a summary judgment on an action for debt owed by P. Hale Aust to the deceased, William Raymond Parker, for unpaid insurance premiums. Although finding error in the charging of thirteen percent interest on the debt absent a written agreement to the higher rate, we affirm the summary judgment but remand with instruction to the court to recalculate the prejudgment interest at a rate of eight percent.

FACTS

During his lifetime, William Raymond Parker was an insurance agent in Booneville from whom Aust purchased insurance for his recycling business. Prior to Parker's death, Aust was billed for insurance premiums for coverage for various periods from 1988 to 1990. A $1500 payment was made in 1990, and a second payment of $100 was made in 1991. Subsequently Parker died and this suit to collect the premium debt was filed by the estate upon authorization of the Chancery Court of Prentiss County where Parker's will was being probated. Aust defended the suit claiming that he was not sure that the insurance was actually issued at Parker's request, that he objected to Parker adding thirteen percent interest to his past due account, and that his nonpayment of the premiums had served as a cancellation of the insurance, if any, negating any obligation to pay the remaining premiums.

After extensive pre-trial discovery, the trial judge granted a summary judgment to the Parker estate in the amount of $8,194.98 plus legal interest until paid and costs. It is from that judgment which Aust appeals.

STANDARD OF REVIEW

In summary judgment appeals, this Court employs a *de novo* review. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993); *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992). A trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c). A fact is material if it "tends to resolve any of the issues, properly raised by the parties." *Webb v. Jackson*, 583 So. 2d 946, 949 (Miss. 1991) (citing *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So. 2d 431, 433 (Miss. 1988)). The evidence must be viewed in the light most favorable to the nonmoving party. *Morgan v. City of Ruleville*, 627 So. 2d 275, 277 (Miss. 1993) (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983)). If, in this view, the moving party is entitled to a judgment as a matter of law, then summary judgment should be granted in that party's favor. *Id.*

DISCUSSION

We will first address the matter of the addition of interest to the past due account at the rate of thirteen percent. The correspondence shown in the record indicates that Parker had added interest at thirteen percent "because that is what I am paying." There is no citation of authority showing that an amount in excess of the statutory maximum of eight percent could be charged. Therefore, we reverse and remand only on the matter of interest available to the estate of the creditor.

Next, we come to the claim that, under the contract of insurance, failure to pay the premiums operates to cancel the insurance. The wording of the contract in question is:

> It is further agreed that condition eleven of this policy is hereby amended to provide that

> failure on the part of the assured to make monthly payment on or before the due dates above set forth will constitute request on his part for cancellation and cancellation will be effected on the customary short rate basis by the mailing of cancellation notices.

It is obvious that the cancellation clause is not self-executing. There is no merit in this claim. The letters of the Appellant filed as exhibits show a contrary intent. Aust's letter of May 20, 1991, states, "I didn't make the debt with any intentions of not paying it. I will pay the balance, but you will have to let me retire the debt on a monthly installment." Nowhere is there any indication of a challenge of, or refusal to pay the premiums until after Mr. Parker's death and the filing of this lawsuit. In a motion for summary judgment after the movant has shown a right to recover as a matter of law, the burden is on the non-movant to respond in a way that contradicts the movant's right to summary judgment. *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 795-96 (Miss. 1995). Aust must show that there are factual issues material to recovery. The record shows that the only claim Aust has in response is that the agent cannot produce the insurance policy which was sent to him as an insured. Aust did not establish cancellation in his response to the motion for summary judgment.

The last issue that Aust brings forward in his brief is that there is no proof that the insurance for which he was billed was ever secured by Parker, the insurance agent for the insuring company. Such a claim is definitely an affirmative defense which must be specially pled or it is waived. M.R.C.P. 8(c) ; *Goode v. Village of Woodgreen Homeowners Ass'n.*, 662 So. 2d 1064, 1076-77 (Miss. 1995) (citing *Wholey v. Cal-Maine Foods, Inc.*, 530 So. 2d 136, 138 (Miss. 1988)). The record is silent as to any pleading questioning the issuance of the policies for which the premiums are sought. Without such a pleading there is no genuine issue before the court to adjudicate. The judgment of the lower court is affirmed in so far as it sets out the debt. As mentioned above, it is reversed and remanded for correct calculation of prejudgment interest.

THE JUDGMENT OF THE CIRCUIT COURT OF PRENTISS COUNTY IS AFFIRMED EXCEPT THAT WE REMAND WITH INSTRUCTION TO THE COURT TO RECALCULATE THE PREJUDGMENT INTEREST AT A RATE OF 8%. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.