WIN MYINT and wife, PATTI K. MYINT, Plaintiffs/Appellees/ Cross-Appellants, VS. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, MAYOR PHIL BREDESEN, AND METROPOLITAN CODES DIRECTOR, TERRY COBB, AND ALLSTATE INSURANCE COMPANY, Defendants/Appellant/ Cross-Appellee.	)	Appeal No. 01-A-01-9512-CH-00558 Davidson Chancery No. 92-3159-II

FILED

July 24, 1996

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

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AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
TODD, P.J., M.S.
LEWIS, J.

O P I N I O N

In this action on a fire insurance policy the insurance company asserts that it no longer covered the risk because the property had been condemned by the local government and the owners had increased the hazard by allowing the property to deteriorate. The jury returned a verdict for the homeowner, and the trial judge added prejudgment interest. On appeal the insurance company attacks the amount of the verdict and the prejudgment interest. The homeowners assert that the trial judge erred in dismissing their claim under the Consumer Protection Act. We reverse the part of the judgment attributable to prejudgment interest. Otherwise, we affirm.

I.

Mr. and Mrs. Myint bought a house at 224 Treutland Street in Nashville in 1983 and they insured the house for $61,000 through Allstate Insurance Company. The house contained two apartments. A leak in the upstairs bathroom caused extensive water damage. Despite Mr. Myint's attempts at repairs, the leak continued to damage the house, and another leak in the upstairs kitchen added to the damage.

One of the tenants applied for public assistance, which required an inspection of the premises. The inspection revealed several building code violations. On August 5, 1991 Mr. Myint received notice from the Metropolitan Codes Department that the building was unfit for human habitation. Because of a misunderstanding Mr. Myint failed to attend a hearing set for the purpose of determining whether the building should be demolished. Consequently, the Codes Department entered an order on August 20, 1991 that the building be removed or demolished by September 30, 1991.

Mr. Myint filed a claim with Allstate for the water damage. The adjuster visited the premises on September 27, 1991 to investigate the claim. He denied the claim because the damage was caused by a slow leak rather than by a sudden occurrence. The adjuster also recommended to the insurance company that its

insurance coverage be canceled because of the condition of the premises. On October 18, 1991 Allstate notified Mr. Myint that its coverage would terminate on December 2, 1991.

On October 23, 1991 a small fire in the basement of the house caused some minor smoke damage. Mr. Myint notified Allstate. On October 26, 1991, at approximately 2:00 a.m. another fire caused substantial damage to the house and Mr. Myint promptly notified Allstate. Mr. Myint finally got the proofs of loss filed, but Allstate denied coverage on June 23, 1992 on the grounds that (1) plaintiffs had intentionally set the fire, and (2) the failure to maintain the premises increased the risk and voided the insurance coverage.

Meanwhile, in November of 1991 the Metropolitan Board of Housing appeals granted Mr. Myint a variance, removing the house from the demolition list and giving him until September 1, 1992 to make the necessary repairs. After Allstate refused to pay the claim, Mr. Myint sought an extension for making the repairs. The legal department of the Metropolitan Government responded on July 29, 1992 by rejecting the request for an extension.

On October 23, 1992 the Myints sued Allstate for the insurance coverage and the Metropolitan Government for an injunction to prevent it from taking any steps to demolish the property. The complaint also included a claim against Allstate for violating the Consumer Protection Act, Tenn. Code Ann. § 47-18-101, et seq., and for violating Tenn. Code Ann. § 56-7-105 by denying the claim in bad faith.

The lower court granted the Metropolitan Government's motion to dismiss for the failure to state a claim upon which relief could be granted. The trial court also dismissed the plaintiff's claim for relief under the Consumer Protection Act. The case went to the jury on the claim against Allstate under the insurance policy, and

for the bad faith penalty. The jury returned a verdict for the plaintiffs in the amount of $45,000 on the policy, but held for Allstate on the bad faith claim.

Following the entry of the order on the jury verdict, the court granted the plaintiffs' motion for prejudgment interest and discretionary costs.

II.

Allstate insists on appeal that, as a matter of law, the Myints had no insurable interest in the property on the date the fire occurred. Drawing on the definition of an insurable interest in property taken from *Duncan v. State Farm Fire & Cas. Co.*, 587 S.W.2d 375 (Tenn. 1979), Allstate asserts that the plaintiffs did not suffer a loss because of the fire. Instead, because the house was under a demolition order, Allstate insists that the fire actually made it easier for the plaintiffs to comply with the order.

We think, however, that the plaintiffs did have an insurable interest in the property in October of 1991, despite the demolition order. The order was subject to revision as demonstrated by the fact that Mr. Myint obtained a variance in November of 1991 -- even after the fire -- allowing him until September 1, 1992 to bring the house into codes compliance. The record shows that in September 1991 Allstate estimated that the house had a fair market value of $50,000, and that the necessary repairs could have been made for $10,000 (Mr. Myint's estimate) or $15,000 to $20,000 (the codes inspector's estimate). Therefore, we hold that the Myints had an insurable interest in the property in October of 1991.

III.

Assuming that the plaintiffs had an insurable interest in the property, Allstate argues on appeal that the loss should have been limited to its salvage value. This argument, however, is based on the premise that the house was under an irrevocable demolition order. *See Chicago Title & Trust Co. v. United States Fidelity & Guaranty Co.*, 511 F.2d 241 (7th Cir. 1975). Since the record reveals that the Metropolitan Government lifted the demolition order until September 1, 1992 to allow Mr. Myint to repair the house, this argument is without merit.

IV.

Allstate also asserts that when the lower court dismissed the Metropolitan Government, the conclusion that the government acted properly in condemning the property became the law of the case. *See Perlberg v. Jahn*, 773 S.W.2d 925 (Tenn. App. 1989). Thus, the insurer argues that the Myints can no longer dispute the correctness of the government's action in issuing the demolition order.

We think, however, that the motion to dismiss filed by the government has to be viewed as of the time the complaint was filed asking for an injunction against the demolition order. Holding that the complaint failed to state a claim for an injunction in October of 1992, after the house had been extensively damaged by fire and was yet unrepaired despite the variance granted by the government, is not a holding that the original demolition order was irrevocable or was properly issued. The dismissal only amounts to a holding that the complaint failed to state a cause of action for an injunction in October of 1992.

V.

Allstate also argues that, as a matter of law, the Myints neglect of the property increased the risk of loss so as to void coverage under the insurance policy. The specific policy provision reads as follows:

> We [Allstate] do not cover loss or damage to the property described in the building protection coverage resulting directly or indirectly from . . . [a]n increase in hazard, if increased by any means within the control or knowledge of the insured person.

The lower court submitted this question to the jury, and the jury obviously resolved it against Allstate. Since it would ordinarily be a question of fact as to whether there has been a physical change in the condition of the premises from the time the policy was first issued, *see West v. Green*, 226 So.2d 302 (Alabama 1969), the court would be justified in taking the case from the jury only if the uncontroverted evidence showed that the plaintiffs did increase the hazard. We think the evidence is in conflict on that question. Therefore, the court could not resolve it as a matter of law.

VI.

After the order was entered on the jury verdict, the plaintiffs moved for an award of prejudgment interest.[1] The trial judge granted the motion and Allstate asserts on appeal that the award was an abuse of discretion, that prejudgment

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[1]The statutory basis for awarding prejudgment interest is found in Tenn. Code Ann. § 47-14-123:

> 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; provided, that with respect to contracts subject to § 47-14-103, the maximum effective rates of prejudgment interest so awarded shall be the same as set by that section for the particular category of transaction involved. In addition, contracts may expressly provide for the imposition of the same or a different rate of interest to be paid after breach or default within the limits set by § 47-14-103.

interest cannot be awarded without being specifically set out in the pleadings, and that the question of prejudgment interest should have been submitted to the jury.

As to the question of the pleadings, the Supreme Court held in *Mitchell v. Mitchell*, 876 S.W.2d 830 (Tenn. 1994) that prejudgment interest was not an item of special damages that Rule 9.07, Tenn. R. Civ. Proc. required to be specifically stated. Therefore, the award could be made under a prayer for general relief.

Passing over the question of whether the amount of prejudgment interest should have been submitted to the jury, *see Garrott Bros. Continuous Mix, Inc. v. Porter*, No. 01-A-01-9202-CH-00059 (Filed Nashville, August 28, 1992), we think the trial judge abused her discretion in making the award in this case. While the award is a matter of discretion, prejudgment interest is not a matter of right in unliquidated damage cases. *Uhlhorn v. Keltner*, 723 S.W.2d 131, 138 (Tenn. App. 1987). Prejudgment interest is allowed as a general rule in cases where the amount of the debt is certain and not disputed on reasonable grounds. *Textile Workers Union v. Brookside Mills, Inc.*, 205 Tenn. 394, 326 S.W.2d 671 (1959). It should be allowed in accordance with the principles of equity. *Schoen v. J.C. Bradford & Co.,* 667 S.W.2d 97 (Tenn. App. 1984).

In this case the amount of the loss was not certain and Allstate had a reasonable basis on which to dispute the Myint's right to recovery. The jury found that coverage was not denied in bad faith. Therefore, we find as a matter of law that this is not a proper case for the award of prejudgment interest.

VII.

The Myints assert that the trial court erred in dismissing their claim under the Consumer Protection Act, Tenn. Code Ann. § 47-18-101, et seq. In this

connection, it is important to note that the cause of action alleged arises from Allstate's denial of the claim.

The Consumer Protection Act provides a private right of action for "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn. Code Ann. § 47-18-104(a). Following that general statement, the act lists thirty specific acts or practices that are prohibited. The bad faith refusal to settle an insurance claim is not in the list -- although the act does say that it should be liberally construed to promote the public policy of protecting the public from unfair or deceptive practices. Tenn. Code Ann. § 47-18-102.

The bad faith refusal to settle an insurance claim is specifically dealt with in Tenn. Code Ann. § 56-7-105(a) which says that an insured may recover up to a twenty five percent penalty in all cases when the insurer, in bad faith, refuses to pay the claim within sixty days after demand has been made. In a number of cases the courts have held that this statute provides the exclusive remedy for the bad faith refusal to pay claims arising from insurance policies. *Chandler v. Prudential ins. Co.*, 715 S.W.2d 615, 621 (Tenn. App. 1986); *Persian Galleries, Inc. v. Transcontinental Ins. Co.*, 38 F.3rd 253, 258-9 (6th Cir. 1994); *Berry v. Home Beneficial Life Insurance Co.*, No. 1150, Tenn. Court of Appeals (Knoxville 1988).

While the issue is not free of some doubt, due to the scope of the Consumer Protection Act, we think the courts that have previously decided this issue were correct. Therefore, the trial court did not err in dismissing the Myints claims under the Consumer Protection Act.

The part of the lower court's judgment awarding the plaintiffs prejudgment interest is reversed. Otherwise, the judgment is affirmed and the cause

is remanded to the Chancery Court of Davidson County for any further proceedings that may become necessary. Tax the costs on appeal to Allstate.

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BEN H. CANTRELL, JUDGE

CONCUR:

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HENRY F. TODD, PRESIDING JUDGE
MIDDLE SECTION

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SAMUEL L. LEWIS, JUDGE