

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-979

DELLIA SMITH ET AL.

APPELLANTS

V.

BEVERLY SIMS AND DRUE H. SIMS

APPELLEES

Opinion Delivered September 7, 2011

APPEAL FROM THE DESHA
COUNTY CIRCUIT COURT
[NO. CV-2008-70-3]

HONORABLE ROBERT BYNUM
GIBSON, JR., JUDGE

REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

This is an appeal from a directed verdict entered against the plaintiffs-appellants in an action to collect on a promissory note. Appellants argue that the trial court erred in directing a verdict against them because the question of payment was an affirmative defense. We agree, and we reverse and remand.

The promissory note secured a real estate transaction between Mrs. W.W. Sizemore and one of her daughters and her husband, appellees Beverly and Drue Sims. The note was introduced at trial by appellants, and reads as follows:

PROMISSORY NOTE

\$24,000.000

McGEHEE, ARKANSAS, MAY 30, 1979

On or before the date hereinafter set forth We promise to pay to the order of MRS. W.W. SIZEMORE, for value received the sum of \$24,000.00 (TWENTY-FOUR THOUSAND AND NO/100 DOLLARS) with interest from the date of maturity at the rate of 6% per annum and thereafter until paid at the rate of 10% per annum, payable at McGehee, Arkansas.

This note is payable ON DEMAND.

This note is given as evidence of indebtedness for a real estate loan on the following property lying in DESHA COUNTY, ARKANSAS:

Lot Two (2), Replat of Rose Garden Addition to McGehee, Arkansas, same being a part of the E½ NW¼ of Section One (1), Township Thirteen (13) South, Range Three (3) West.

Also described in Mortgage with Power of Sale of even date herewith and is secured by said mortgage, with the agreement that if default be made at any time in payment of said installment for a period of 60 days, all of the remaining note then due shall, at the option of the holder, at once become due and payable for the purpose of foreclosure.

If this obligation, after default, is placed in the hands of an attorney for collection, the undersigned will be obligated to pay the holder hereof an additional sum as attorney's fee, not exceeding 10% of the unpaid principal and interest.

The makers and endorsers hereof hereby severally waive protest, demand and notice of protest and non-payment in case this note is not paid at maturity and agree to all extensions and partial payments before or after maturity without prejudice to holder.

(Signed)
Drue H. Sims
Beverly S. Sims

The note was assigned by Mrs. W.W. Sizemore to Orval Sizemore in a writing dated October 7, 1992. Orval Sizemore endorsed the note and assigned it to the appellants in a writing dated June 22, 1995. All of these documents were introduced at trial. Appellants recognized that certain payments had been made by appellees prior to their acquisition of the note, and they testified as to the amount that they believed was still owing to them after crediting those payments. On cross-examination during appellants' case-in-chief, it was disclosed that appellees had in their possession evidence of other payments in addition to those

recognized by appellants. The trial court directed a verdict in favor of appellees on the ground that appellants had failed to establish the amount owing with specificity and that the jury would have to resort to speculation to determine the amount owed to appellants. We hold that the trial court erred.

In determining whether a directed verdict was properly granted, we view the evidence in the light most favorable to the party against whom the verdict was sought, giving it its highest probative value and taking into account all reasonable inferences deducible from it. *Haupt v. Kumar*, 103 Ark. App. 298, 272 S.W.3d 98 (2008). A motion for a directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Id.* Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and a judgment entered on a directed verdict should be reversed. *Id.*

It is true that the burden of proving damages rests on the party claiming them, and the proof must consist of facts, not speculation. *See, e.g., Minerva Enterprises, Inc. v. Howlett*, 308 Ark. 291, 824 S.W.2d 377 (1992). However, this was not an action for damages based on tort or breach of contract but instead was an action for debt based on a promissory note. The note in this case contained an unconditional promise to pay a sum certain in money to order on demand, and was thus a negotiable instrument. *See generally* Ark. Code Ann. § 4-3-104 *et seq.* (Repl. 2001). When signatures on a negotiable instrument are established, production of the instrument entitles a holder to recover unless the defendant establishes a defense. *Skelton v. Farm Service Co-Operative*, 266 Ark. 827, 587 S.W.2d 76 (Ark. App. 1979); *see generally* Ark. Code Ann. §§ 4-3-301, 4-3-302, and 4-3-305 (Repl. 2001). Thus, production of the instrument and establishment of the signatures establishes a prima facie case on a note. In

contrast, payment is an affirmative defense in an action on a note, and the burden of proving payment lies on the party asserting it. *Pulpwood Suppliers, Inc. v. First National Bank*, 21 Ark. App. 147, 729 S.W.2d 425 (1987); Ark. R. Civ. P. 8(c) (2011).

The jury could have ascertained the amount owing on the note. The trial judge appears to have been greatly concerned with the absence of any expert testimony to assist in the computation of interest. However, it is settled law that, unless otherwise provided in the instrument, interest is payable from the date of the instrument. Ark. Code Ann. § 4-3-112(a) (Repl. 2001). Furthermore, the Arkansas Supreme Court has thoroughly discussed approved methods of calculating interest in Arkansas. *Ford Motor Credit Co. v. Hutcherson*, 277 Ark. 102, 640 S.W.2d 96 (1982) (citing *Martin's Mobile Homes v. Moore*, 269 Ark. 375, 601 S.W.2d 838 (1980)).

Reversed and remanded for trial.

GLADWIN and BROWN, JJ., agree.